

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case No.: 04-O-11504-LMA
	)	
<b>F. RICHARD LOSEY</b>	)	<b>DECISION AND ORDER OF</b>
	)	<b>INVOLUNTARY INACTIVE</b>
<b>Member No. 49078</b>	)	<b>ENROLLMENT</b>
	)	
<u>A Member of the State Bar.</u>	)	

**I. INTRODUCTION**

In this contested, original disciplinary proceeding, respondent **F. Richard Losey** is alleged to have engaged in a conspiracy to defraud investors in an up-start charter airline. Respondent argues that his actions were appropriate considering the complexity of this securities matter. The court disagrees; and instead recognizes this case for what it is: a simple matter of concealing the truth from investors. Consequently, the court finds, by clear and convincing evidence, that respondent is culpable of committing moral turpitude by participating in a conspiracy to defraud.

For the reasons stated *post*, the court recommends that respondent be disbarred.

**II. SIGNIFICANT PROCEDURAL HISTORY**

The Office of Chief Trial Counsel of the State Bar of California (“State Bar”) initiated this proceeding by filing a notice of disciplinary charges (“NDC”) on October 18, 2006. Respondent filed his response to the NDC on November 20, 2006.

The State Bar was represented by Wonder J. Liang. Respondent was represented by Gerhard O. Winkler.

Trial was held on June 24-27, 2008, September 16-17, 2008 and April 1-3, 2009. The court took the matter under submission for decision on June 22, 2009, following post-trial briefs.<sup>1</sup>

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The findings of fact are based on the record and the evidence adduced at trial. Many of the court's findings of fact are based, in large part, on credibility determinations. After carefully observing and considering respondent's testimony, including, among other things, his demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome of this proceeding; and his capacity to perceive, recollect, and communicate the matters on which he testified; and after carefully reflecting on the record as a whole, the court finds that respondent's testimony was, at times, inconsistent and implausible, and generally lacked credibility. (See, generally, Evid. Code, § 780; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737; see also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 498, fn. 7 [trial court is not bound to accept as true the sworn testimony of a witness even in the absence of evidence contradicting it].)

In contrast to respondent's testimony, the court found the testimony of Leland Evans to be very credible.

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in the State of California on February 11, 1971, and has been a member of the State Bar of California since that time.

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<sup>1</sup> In its closing brief, the State Bar moved to dismiss count two of the NDC. This motion is granted; and count two is hereby dismissed with prejudice.

## **B. Findings of Fact**

In early 1995, respondent, Lita Nadine Quetnick (“Quetnick”), Bruce Hall (“Hall”) and Weldon Smith (“Smith”) decided to start an airline that would operate on a single route between Long Beach, California and Chicago, Illinois. To fund the airline, they decided to solicit funds from members of the public pursuant to a private placement memorandum (“PPM”) by selling units in a limited partnership known as Sterling One.

Serebrodin, Inc., was the managing general partner of Sterling One. Respondent was counsel to Sterling One and Serebrodin, Inc. Respondent’s office prepared the PPM. The PPM stated that Sterling One was seeking to raise a minimum of \$1,700,010.

On June 2, 1995, Sterling One and Serebrodin, Inc., entered into an escrow agreement with Golden Gate Bank to hold the investors’ funds. Both the escrow agreement and the PPM provided that if Sterling One and Serebrodin, Inc., failed to raise \$1,700,010 by September 15, 1995, then the offering would be terminated and all funds would be returned to the investors.

In August 1995, Quetnick and Hall met with Leland Evans (“Evans”) and Ken Tran (“Tran”). The purpose of this meeting was to solicit Evans and Tran to invest in Sterling One. Evans and Tran, however, declined to invest in Sterling One on the terms contained in the PPM.

Following this meeting, Quetnick continued to communicate with Evans and Tran. Evans informed her that the terms contained in the PPM were unacceptable because there was no security mechanism in place to protect his investment. Quetnick informed Evans that they may be able to structure a deal that included the security that Evans and Tran desired.

As of mid-August 1995, Sterling One had raised well below the \$1,700,010 needed to clear escrow by September 15, 1995. Consequently, Sterling One was in a position where it was unlikely to clear escrow without a considerable investment from Evans and Tran. Therefore,

Evans and Tran were invited to attend a Serebrodin, Inc., board meeting scheduled for August 23, 1995. The purpose of this invitation was to procure a \$600,000 investment in Sterling One from Evans and Tran.

On August 23, 1995, Evans and Tran attended the Serebrodin, Inc., board of directors meeting. Respondent, Quetnick, Hall, Smith, Evans, and Tran were all in attendance at this meeting. During the meeting, respondent discussed how an investment deal could be structured to provide Evans and Tran the financial security they desired.

Respondent and Quetnick explained that in order to get Sterling One off the ground, two separate deposits must be made to the Department of Transportation. The first was a \$200,000 qualifying deposit to be held by the Department of Transportation. The second was a \$300,000 deposit for the protection of passengers with pre-purchased tickets. The Department of Transportation required that this second deposit be held at Bank of America.

Respondent and Quetnick went on to explain how these two deposits were not subject to operational risk, and that a deal could be structured where \$500,000 of Evans' and Tran's \$600,000 investment could be secured by these two deposits. Respondent informed Evans and Tran that such an arrangement was lawful and could be properly documented and structured. In actuality, however, respondent knew that Evans' and Tran's investment would not be protected against loss because respondent, Quetnick, Hall, and Smith had no intention of giving Evans and Tran a security interest in the two deposits.

Based upon the representations of respondent, Quetnick, Hall, and Smith, Evans and Tran agreed to invest in Sterling One. Respondent stated that he would take care of the security agreements and any necessary amendments to the PPM.

Shortly thereafter, respondent's office prepared a document identified as a "stop loss agreement." The stop loss agreement specified, among other things, that Evans and Tran would

contribute \$600,000 to the capital of Sterling One subject to the provisions of the PPM, except that:

- (a) \$500,000 of Evans' and Tran's capital contribution may be released from escrow prior to the close of escrow;
- (b) As consideration for their agreement to permit the early release of \$500,000 from escrow, Serebrodin, Inc., would grant Evans and Tran security interests in (i) the \$200,000 asset to be utilized to secure the Department of Transportation deposit; and (ii) the \$300,000 Department of Transportation deposit to be held by the Bank of America; and
- (c) Serebrodin, Inc., would prepare any further documentation necessary to evidence and perfect those security interests.

Evans and Tran entered into the stop loss agreement and promptly invested \$600,000 in Sterling One. Sterling One deposited these funds into the escrow account at Golden Gate Bank.

Thereafter, respondent failed to take any action to perfect Evans' and Tran's security interest, and failed to disclose the transaction to the other investors or Golden Gate Bank.

On August 25, 1995, Quetnick and respondent authorized the release of \$500,000 from the escrow account. These funds were the funds against which respondent promised Evans and Tran he would perfect their security interests. At the time respondent authorized the release of these funds, he knew that he was releasing the funds that should have been used to perfect Evans' and Tran's security interest.

Between August 23, 1995 and mid November 1995, Evans and Tran requested, on multiple occasions, that respondent prepare their security agreements. Respondent repeatedly gave assurances that he would prepare and effectuate the security agreements. Respondent also promised he would prepare all the necessary documentation to amend the PPM and properly disclose the transaction to other investors. In actuality, however, respondent had no intention of preparing the necessary documentation to perfect Evans' and Tran's security interest and had no intention of preparing the necessary documentation to properly disclose the transaction to other investors.

Evans and Tran also requested they be appointed members of the board of directors of Serebrodin, Inc. On September 15, 1995, Evans and Tran were elected to the board of directors of Serebrodin, Inc.

Because respondent failed to take any action to perfect Evans' and Tran's security interests and failed to disclose their security interest to Golden Gate Bank, Golden Gate Bank released the escrow funds to Sterling One on or about mid-October 1995.

Quetnick, Hall, and Smith did not use Evans' and Tran's funds pursuant to the terms set forth in the stop loss agreement. They did not secure the \$200,000 Department of Transportation deposit or the \$300,000 deposit with Bank of America. Instead, Quetnick, Hall, and Smith ultimately deposited the money in unsecured accounts at Golden Gate Bank and Imperial Bank.

Prior to November 1995, Evans and Tran learned that the money they invested in Sterling One was not being used for the Department of Transportation deposits and requested immediate security for the \$500,000 portion of their investment that was to be secured by the Department of Transportation deposits.

On November 20, 1995, Hall requested that Evans consent to allowing Sterling One to use the \$500,000 for purposes other than that set forth in the stop loss agreement, which would expose the funds to operational risk. From November 20, 1995 through on or about December 11, 1995, Evans and Tran refused to allow the \$500,000 to be utilized for any purpose other than that set forth in the stop loss agreement.

On November 30, 1995, Sterling One conducted a board meeting at respondent's office. Immediately prior to that meeting, Quetnick and Hall obtained a line of credit. The line of credit was secured by \$200,000 of the funds Evans and Tran had provided for the Department of Transportation deposits.

At the November 30, 1995 Board meeting, Hall presented a written report to the Board which stated that the Department of Transportation bonds had been cancelled and they had obtained a letter of credit against which they would issue five letters of credit to five entities to secure payment for landing fees and ground services. The written report stated that since this was a departure from the agreement with Evans and Tran, it required their concurrence. Evans and Tran refused to concur. Nonetheless, Quetnick and Hall expended the \$200,000 line of credit by issuing letters of credit to third party creditors between November 30 and December 7, 1995.

Respondent knew that Evans and Tran refused to consent to the issuance of letters of credit to third party creditors. Respondent also knew that, despite Evans' and Tran's refusal, Quetnick and Hall expended the entire \$200,000 line of credit.

In early December 1995, Sterling One commenced negotiations with Evans and Tran to amend the stop loss agreement. Sterling One, however, failed to first disclose to Evans and Tran that Sterling One had issued letters of credit at least equal to \$200,000 against the funds that Sterling One should have been holding for Evans and Tran.

On December 11, 1995, as a result of negotiations between Evans, Tran, and Hall, the parties entered into an amended stop loss agreement. However, unbeknownst to Evans and Tran, Quetnick and Hall had already exhausted all of the funds designated in the amended stop loss agreement to secure Evans' and Tran's funds.

Respondent's office reviewed and modified the amended stop loss agreement. The amended stop loss agreement stated that the \$200,000 Department of Transportation deposit had become unnecessary and therefore Evans' and Tran's \$200,000 remained in a certificate of deposit at Golden Gate Bank. However, at the time Sterling One negotiated and entered into the amended stop loss agreement, the \$200,000 did not remain in a certificate of deposit. Instead, it

was used to issue multiple letters of credit to third party creditors and was not available to provide as security to Evans and Tran since it was already promised as security to the multiple third party creditors.

Respondent knew that at the time his office reviewed and amended the amended stop loss agreement that the agreement contained false statements of fact. Respondent also knew that Evans and Tran would not have entered into the amended stop loss agreement if they had known the true facts.

Paragraph I of the amended stop loss agreement stated that Sterling One agreed to provide Evans and Tran immediate security rights in the \$200,000 certificate of deposit at Golden Gate Bank and failure to do so provided grounds for immediate equitable injunctive relief. The agreement further provided that the remaining \$300,000 would be used for a specified deposit and that Sterling One would maintain a liquid cash reserve of \$250,000 to provide further security for the \$300,000 deposit.

On December 15, 1995, Tran contacted Golden Gate Bank to obtain copies of the documentation regarding the security required by the amended stop loss agreement. At that time, Golden Gate Bank informed Tran that Evans' and Tran's \$200,000 was not available to be secured due to the letters of credit Quetnick and Hall had issued to various third party creditors.

On December 15, 1995, Quetnick, Hall, and Smith also failed to make the \$300,000 deposit required by the amended stop loss agreement and failed to maintain the \$250,000 liquid cash reserve. Instead, they used the \$300,000 for other purposes. Respondent knew that they had failed to make the \$300,000 deposit required by the amended stop loss agreement and failed to maintain the \$250,000 liquid cash reserve. Respondent also knew that they instead intended to use the \$300,000 for other purposes.

On January 30, 1996, Quetnick, Hall, and Smith filed a complaint for breach of contract against Tran and Evans. On March 27, 1996, Evans and Tran filed separate cross-complaints against respondent, Quetnick, Hall, and Smith in the matter *Evans v. Sterling One, et al*, San Francisco Superior Court, Case No. 975723.

Prior to trial, Quetnick, Hall, and Smith reached a settlement with Evans and Tran. Quetnick, Hall, and Smith paid Evans and Tran a combined total of \$350,000, with Evans and Tran both receiving \$175,000.

In March 2001, *Evans v. Sterling One* proceeded to trial. On April 3, 2001, the jury returned a verdict in favor of Tran and Evans and found that respondent engaged in a conspiracy to defraud Evans and Tran. The jury awarded damages totaling \$600,000 to Evans and Tran combined.

On July 3, 2001, the court entered judgment in favor of Evans and Tran. Both received judgment for \$289,999.94, which consisted of restitution in the amount of \$300,000, plus pre-judgment interest, less the \$175,000 each previously received from Quetnick, Hall, and Smith.

On September 9, 2001, respondent filed an appeal in this matter entitled *Losey, et al. v. Evans, et al*, Court of Appeal, First Appellate Dist., Division Four, Case No. A096552.

On December 16, 2002, respondent filed for Chapter 7 bankruptcy and requested that Evans' and Tran's judgments be discharged. On July 9, 2003, Evans and Tran filed a complaint to determine the non-dischargeability of debt and initiated an adversarial proceeding in respondent's bankruptcy proceeding.

On July 15, 2003, the court of appeal affirmed the trial court judgment.

On November 26, 2003, the bankruptcy court issued a judgment of non-dischargeability and granted judgment in favor of Evans and Tran on their complaint and ordered that the judgment entered on July 3, 2001 was non-dischargeable.

To date, respondent has not paid Evans or Tran any money toward the civil judgment.

### **C. Conclusions of Law**

#### ***1. Count 1 – Moral Turpitude—Conspiracy to Defraud***

Business and Professions Code section 6106<sup>2</sup> makes it a cause for disbarment or suspension for an attorney to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his or her relations as an attorney or otherwise. Moral turpitude as found in section 6106 has long been defined as an act “of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” (*In re Craig* (1938) 12 Cal.2d 93, 97.) “It has been described as any crime or misconduct without excuse [citation] or any dishonest or immoral act. The meaning and the test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all.” (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.)

“Although the term ‘moral turpitude’ . . . has been defined very broadly by the Court [citation], the Supreme Court has always required a certain level of intent, guilty knowledge or wilfulness before placing the serious label of moral turpitude on the attorney's conduct.

[Citations.] At the very least, gross negligence has been required. [Citations.]” (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241.)

By knowingly and intentionally participating in a fraudulent scheme to induce and retain Evans’ and Tran’s \$600,000 investment in Sterling One, respondent committed an act involving moral turpitude, dishonesty and corruption in willful violation of section 6106.

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<sup>2</sup> All further references to section(s) are to the Business and Professions Code, unless otherwise stated

## IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

### A. Mitigation

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,<sup>3</sup> std. 1.2(e).) Here, respondent failed to prove any mitigating circumstances. While some reference was made to the ill-effects of respondent's 1994 car accident, respondent did not establish, by clear and convincing evidence, that the injuries suffered in this accident were responsible for the present misconduct. (Std. 1.2(e)(iv).)

### B. Aggravation

It is the State Bar's burden to establish aggravating circumstances by clear and convincing evidence. (Std 1.2(b).) The court finds multiple factors in aggravation.

#### *1. Prior Record of Discipline*

Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).) Effective December 7, 2000, respondent was publicly reprovved with conditions in State Bar Court Case No. 98-O-02718 for issuing checks from his client trust account for personal and non-client related business expenses. In mitigation, respondent had no prior record of discipline, his misconduct did not cause harm to his clients or others, he was candid and cooperative with the State Bar, he demonstrated remorse and recognition of wrongdoing, and he was undergoing extreme physical disabilities at the time of the misconduct. No aggravating factors were involved.

#### *2. Harm*

The court also finds in aggravation that respondent's misconduct caused extensive financial harm to Evans and Tran. (Std. 1.2(b)(iv).) The harm caused by respondent's

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<sup>3</sup>All further references to standard(s) or std. are to this source.

misconduct was further magnified by the fact that Evans and Tran had to expend additional resources going through trial, appeal, and bankruptcy court to obtain and preserve a civil judgment against respondent.

### ***3. Indifference Toward Rectification***

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Respondent exhibits no remorse and, despite the civil judgment, has failed to show even the slightest interest in making Evans and Tran whole.

## **V. DISCUSSION**

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline.

In this case, the standards provide for the imposition of sanctions ranging from suspension to disbarment. (Std. 2.3.) The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Honesty is the fundamental rule of ethics, “without which the profession is worse than valueless in the place it holds in the administration of justice’ [Citations.]” (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60.) The Supreme Court has regularly and consistently condemned attorney dishonesty. (*Sevin v. State Bar* (1973) 8 Cal.3d 641, 645-646 [misappropriation and fabricated loan agreement]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [misappropriation with fraudulent and contrived misrepresentations to the State Bar]; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 263 [insufficiently funded checks].)

In the present matter, the State Bar recommends that respondent be disbarred. Respondent, on the other hand, requests that he be “completely exonerated.” While there is not a plethora of case law on point, the court finds some guidance in *In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70.

In *Wyshak*, the attorney committed moral turpitude by patently deceiving two separate home sellers.<sup>4</sup> In two additional matters, the attorney was found culpable of making false allegations, communicating directly with a represented party, failing to timely report a judicial sanction, representing conflicting interests without written consent, and failing to obey a discovery order. In mitigation, the attorney presented favorable character testimony and had no prior record of discipline in over 40 years of practice. In aggravation, the attorney committed multiple acts of misconduct; his testimony lacked candor; and his misconduct was surrounded by bad faith, dishonesty, and concealment. In addition, the attorney’s complete lack of insight, recognition, or remorse for any of his wrongdoing was found to be a “significant factor” in aggravation. (*In the Matter of Wyshak, supra*, 4 Cal. State Bar Ct. Rptr. at p. 83.) Accordingly, the Review Department recommended that the attorney be disbarred.

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<sup>4</sup> The attorney did not have an attorney-client relationship with either of these sellers.

The present matter shares many qualities with *Wyshak*. Although *Wyshak* involves more extensive misconduct, this factor is counterbalanced by respondent's prior record of discipline and lack of mitigation. Of particular significance to the court is the lack of insight, recognition, or remorse reflected in the present matter. Considering that respondent played a critical role in fraudulently inducing Evans and Tran to invest and maintain \$600,000 in Sterling One, his lack of remorse and accountability is astonishing. Just like in *Wyshak*, respondent's unwillingness or inability to understand the wrongfulness of his actions leads the court to conclude that he is not an appropriate candidate for suspension. Consequently, the court recommends that respondent be disbarred.

#### **VI. RECOMMENDED DISCIPLINE**

The court recommends that respondent F. Richard Losey be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with rule 9.20, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his or her compliance with said order.

#### **VII. COSTS**

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

**VIII. ORDER REGARDING INACTIVE ENROLLMENT**

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: September \_\_\_\_\_, 2009

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LUCY M. ARMENDARIZ  
Judge of the State Bar Court