FILED JULY 31, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **FRANK MARTIN ENNIX III,** **Member No. 40459,** A Member of the State Bar.	)	Case Nos.: **06-O-12235** (06-O-14292) **DECISION**

I. INTRODUCTION.

In this contested, original disciplinary proceeding, the Office of Chief Trial Counsel of the State Bar of California (hereafter State Bar) charges respondent **FRANK MARTIN ENNIX III** with a total of seven counts of professional misconduct involving three separate client matters. The court finds, by clear and convincing evidence, that respondent is culpable on only three of the seven counts: one count of failure to perform, one count of improperly limiting liability to client, and one count of failure to communicate.

For the reasons stated *post*, the court recommends that respondent be placed on five years' stayed suspension and five years' probation on conditions, which include an eighteen-month suspension that will continue until respondent establishes his rehabilitation, fitness to

practice, and learning in the law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.[1]

II. PERTINENT PROCEDURAL HISTORY.

The State Bar filed the notice of disciplinary charges (hereafter NDC) in this matter on October 5, 2007. Thereafter, respondent filed his response to the NDC on November 14, 2007.

On August 8, 2008, the parties filed a stipulation regarding letters authored by Daniel Dean. And, on November 17, 2008, the parties filed a stipulation regarding the testimony of respondent's two character witnesses.

The trial was held over nine days on August 5, 6, 7, and 8, 2008; October 2 and 3, 2008; November 17, 2008; January 12, 2009; and February 23, 2009. After both parties filed posttrial briefs, the court took the matter under submission for decision on May 4, 2009.

The State Bar was represented by Deputy Trial Counsel Tammy M. Albertsen-Murray. Respondent was represented by Attorney Joseph S. Picchi.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Credibility Determinations

Many of the court's findings of fact are based in large part on credibility determinations. Except for respondent, all of the witness were generally credible. After carefully observing respondent testify before it and after carefully considering, inter alia, respondent's demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome in this proceeding; 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

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

parts of respondent's testimony lack credibility. (See, generally, Evid. Code, § 780; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737.)

Even though the court finds that Jacqueline Hutton's testimony was generally credible, the court does not regard her testimony concerning dates and sequences of events reliable. (*In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 274 [trial judge may find a witness's testimony to be credible on some points, but not others].)

B. Jurisdiction.

Respondent was admitted to the practice of law in the State of California on June 13, 1967, and has been a member of the State Bar of California since that time.

C. The Williams Client Matter

On December 4, 2002, Michael Williams retained respondent to pursue a civil action against the City of Oakland, California (hereafter Oakland) and some of its police officers for alleged use of excessive force and police brutality. Respondent and Williams executed a contingency fee agreement under which respondent was to receive 33 1/3 percent of any recovery.

In September 2003, respondent filed, in the Alameda County Superior Court, a complaint against Oakland and some of its police officers for Williams. In February 2004, Oakland removed Williams's case to the United States District Court for the Northern District of California (hereafter federal court).

On December 8, 2004, the federal court issued a case management and pretrial order requiring the parties to prepare, file, and serve numerous pretrial documents no less than 20 days before the date of the final pretrial conference. The pretrial documents were to include, inter alia, a joint proposed final pretrial order, a joint exhibit list, a witness list, proposed findings of fact and conclusion of law, trial briefs, and motions in limine. On that same day, the federal

court clerk mailed a copy of the order to respondent's office at 3300 Telegraph Avenue, Berkeley, California 94609. Respondent's office, however, was actually at 3300 Telegraph Avenue, *Oakland*, California 94609. Nonetheless, respondent actually received that copy of the order and was aware of its contents.[2]

On September 2, 2005, the federal court issued a further case management statement and pretrial order setting the case for a final pretrial conference on October 28, 2005. Under the federal court's December 8, 2004, and September 2, 2005, orders, Williams's pretrial documents would have ordinarily been due no later than October 8, 2005 (i.e., 20 days before the final pretrial conference on October 28, 2005). But October 8, 2005, was a Saturday, and the following Monday, October 10, 2005, was a court holiday. Accordingly, Williams's pretrial documents were to have been filed no later than Tuesday, October 11, 2005.

On Friday, October 7, 2005, respondent and Williams participated in a mandatory settlement conference. The matter did not settle.

On October 11, 2005, respondent became ill and underwent emergency surgery. Respondent's doctor anticipated that respondent would be incapacitated for two weeks.

Respondent admits that he failed to file and serve any of Williams's pretrial documents before or on October 11, 2005, as ordered. What is more, respondent admits that he never even prepared any of the required documents because of the October 7 mandatory settlement conference. Apparently, it is respondent's practice not to prepare paperwork that may prove unnecessary. According to respondent, "It would not be unusual for an attorney not to prepare paperwork when it is anticipated that there may be a pending settlement in the case."

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[2] Respondent's claim that he cannot be sure whether he received all of the mail addressed to him in Berkeley is not credible. The record clearly establishes that respondent received all of his mail regardless of whether it was addressed to him in Berkeley or Oakland.

What is more, respondent claims that he was "physically unable to prepare," file, and serve the required documents after the case failed to settle on Friday, October 7 because he became ill and had to have emergency surgery on Tuesday, October 11.

On October 14, 2005, the federal court filed an order to show cause (hereafter OSC) directing respondent to show cause why Williams's lawsuit should not be dismissed for failure to prosecute and failure to comply with the court's pretrial orders. A hearing on the OSC was set for October 28, 2005. Also, on October 14, 2005, the federal court clerk served a copy of the OSC on respondent by mail. Respondent received that copy of the OSC and was aware of its contents.

On October 26, 2005, respondent filed an updated case management conference statement and a response to the OSC. Respondent did not appear at the OSC hearing on October 28. Instead, respondent sent Attorney Al McCloskey in his place. Attorney McCloskey, however, did not appear until after the conclusion of the hearing. At the OSC hearing, the federal court continued the trial until March 13, 2006.

On November 1, 2005, the federal court issued a further case management conference and pretrial order continuing the final pretrial conference to March 3, 2006; ordering that all pretrial filings be calculated from the new March 13, 2006, trial date; and expunging the October 14, 2005, OSC. The court clerk served a copy of the federal court's November 1, 2005, order on respondent.

On February 14, 2006, the defense filed a trial brief, exhibit list, witness list, and proposed final pretrial order, proposed findings of fact and conclusions of law, and two motions in limine. Respondent, however, again failed to file any of Williams's pretrial documents. Accordingly, on February 14, 2006, the federal court issued another OSC (hereafter second OSC) directing respondent to show cause why Williams's lawsuit should not be dismissed for

failure to comply with the court's pretrial orders. A hearing on this second OSC was set for March 3, 2006. On February 14, 2006, the court clerk served a copy of the second OSC on respondent. Then, on February 16, 2006, the defense notified the federal court that respondent had moved his law office from Telegraph Avenue to 10th Street in Oakland. And, later that same day, the court clerk mailed another copy of the second OSC to respondent at his new office address on 10th Street.

Also, on February 16, 2006, the federal court clerk issued two clerk's notices. The first notice, which is clearly titled "CLERK'S NOTICE," notified the parties that both the March 3, 2006, pretrial conference and the March 13, 2006, trial setting had been taken off calendar. The first notice also notified the parties that the hearing on the second OSC remained on calendar for March 3, 2006.

The second notice, which is clearly titled "**SECOND** [¶] CLERK'S NOTICE," notified the parties that both the March 3, 2006, pretrial conference and the March 13, 2006, trial setting had been restored to the federal court's calendar. (Bolding original.) The second notice again notified the parties that the hearing on the second OSC still remained on calendar for March 3, 2006.

The federal court clerk mailed copies of both the first and second February 16, 2006, clerk's notices to respondent at his old office address on Telegraph Avenue and at his new office address on 10th Street. Respondent actually received those copies of the two notices. Respondent, however, testified that he did not realize that there was a difference between the first and the second clerk's notices and that he just assumed that he has been sent multiple copies of the first clerk's notice. Thus, according to respondent, he did not know that the federal court had restored the pretrial conference and trial setting to the court's calendar. The court, however, rejects respondent's testimony because it is incredible.

Even though Williams appeared, respondent failed to appear for the March 3, 2006, pretrial conference and OSC hearing. Respondent again sent Attorney McCloskey in his place. When respondent failed to appear, the federal court continued the OSC hearing to March 10, 2006, and ordered respondent to personally appear. In addition, the federal court also took the March 13, 2006, trial setting off calendar.

On March 7, 2006, the federal court clerk mailed copies of minutes of the March 3, 2006, proceedings to respondent both at his old office address on Telegraph Avenue and at his new office address on 10th Street. Respondent received those copies and was aware of their contents.

Meanwhile, in February and March 2006, respondent offered Williams $5,000 plus payment of Williams's medical bills if Williams would agree to dismiss his case. On March 10, 2006, before attending the continued OSC hearing, respondent presented Williams with a written agreement stating that respondent would pay Williams $5,000 in exchange for Williams agreeing to have his case dismissed. Williams signed that agreement the same day. Respondent did not inform Williams in writing that he may seek the advice of an independent attorney of his choice regarding the written agreement of March 10, 2006. Nor did respondent give Williams a reasonable opportunity to seek such advice. Williams felt coerced by the circumstances. He was aware that respondent failed to appear at the OSC hearing on March 3, 2006, and he was concerned about respondent's preparedness (or lack thereof) on the case.

Respondent made the following payments to Williams pursuant to the March 10, 2006, written agreement:

On March 27, 2006, respondent paid $2,000;

on April 28, 2006, respondent paid $1,500;

on May 10, 2006, respondent paid $1,000; and

> on May 30, 2007, after the State Bar intervened, respondent paid the remaining unpaid balance of $500.

Subsequent to the written agreement of March 10, 2006, Williams advised respondent that he had outstanding medical bills related to his claims against Oakland and the police. Williams asked respondent to pay the bills, pursuant to the discussions he had with respondent in March 2006, in which respondent had also offered to cover the medical bills in addition to paying $5,000 in exchange for Williams's agreement to dismiss his case. Respondent advised Williams he would "take care of" his doctors, physical therapy, and mental assistance bills related to the personal injury claim.

On June 30, 2006, respondent offered to pay Dr. Aubrey Swartz for Williams's medical bill with Dr. Swartz. Respondent agreed to pay Dr. Swartz a total of $750 in three equal payments of $250 with the balance to be paid in full by September 1, 2006.

Count 1 - Failure to Perform with Competence (Rule 3-110(A))

In count 1, the State Bar charges that respondent wilfully violated rule 3-110(A) of the State Bar Rules of Professional Conduct,[3] which provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Specifically, the State Bar charges:

> By failing to abide by the court orders of December 8, 2004, September 7, 2005, and November 1, 2005, by failing to file the appropriate pre-trial pleadings, such as trial brief, witness list, exhibit list, proposed Facts and Conclusions of Law, by failing to update the Court with his new address; and by failing to appear at the OSC and pre-trial conference on March 3, 2005, and by providing his client with a written agreement to dismiss the case on the morning of the OSC why the case should be dismissed [sic], respondent failed to perform, in wilful violation of Rules of Professional Conduct, rule 3-110(A).

[3] Unless otherwise noted, all further references to rules are to these State Bar Rules of Professional Conduct.

The record clearly establishes that respondent willfully violated rule 3-110(A) because he recklessly failed (1) to prepare, file, and serve the pretrial documents in accordance with the December 8, 2004; September 7, 2005; and November 1, 2005; federal court orders; (2) to notify the federal court of his new office address on 10th Street; and (3) to appear at the pretrial conference and OSC hearing on March 3, 2005.

Count 2 - Payment of Personal Expenses for a Client (Rule 4-210(A))

In count 2, the State Bar charges that respondent wilfully violated rule 4-210(A), which provides: "A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: [¶] (1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or [¶] (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or [¶] (3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expense in preparation for litigation or in providing any legal services to the client." Specifically, the State Bar charges:

> By agreeing to pay Williams [sic] doctor's bills, physical therapy bills, and mental assistance bills, and by agreeing to give Dr. Swartz $750.00 in resolution of William's [sic] outstanding medical bill with Dr. Swartz, respondent directly paid or agreed to pay the personal expenses of an existing client, in wilful violation of Rules of Professional Conduct, rule 4-210(A).

Without question, the record clearly establishes that respondent agreed to pay and paid at least a portion of Williams's medical bills related to his claims against Oakland and its police.

However, the court finds that, when respondent agreed to pay and paid those medical bills and when respondent agreed to pay and paid Williams $5,000 under the March 10, 2006, written agreement, respondent effectively settled a *potential* claim for his liability to Williams for professional malpractice. The State Bar has not cited any authority, and the court is unaware of any, holding that an attorney's payment of a client's medical bills related to the representation and in furtherance of settlement of a potential professional negligence claim violates rule 4-210(A). Accordingly, the court declines to find that respondent willfully violated rule 4-210(A) (cf. rules 4-210(A)(1), 3-400(B)) and dismisses count 2 with prejudice.

Count 3 - Avoiding Interests Adverse to a Client (Rule 3-300)

In count 3, the State Bar charges that respondent willfully violated rule 3-300, which provides: "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless each of the following requirements has been satisfied: [¶] (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition."

Specifically, the State Bar charges that by agreeing to pay Williams $5,000 plus the cost of medical bills in exchange for his dismissal of his case, respondent entered into an improper business transaction with a client in willful violation of rule 3-300. The court cannot agree. As the court found *ante* under count 2, when respondent paid Williams $5,000 and paid some portion of Williams's medical bills, respondent effectively settled a *potential* claim for his

liability to Williams for professional malpractice. The State Bar has not cited any authority, and the court is unaware of any, holding that such a settlement falls within the purview of rule 3-300. In fact, to conclude that it does would effectively render rule 3-400(B) meaningless. In short, count 3 is dismissed with prejudice.

Count 4 - Limiting Liability to a Client (Rule 3-400(B))

In count 4, the State Bar charges that respondent willfully violated rule 3-400(B), which provides that a member shall not "Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice."

Specifically, the State Bar charges: "Respondent did not inform Williams in writing that Williams may seek the advice of an independent lawyer of the William's [sic] choice regarding the settlement and he did not give Williams a reasonable opportunity to seek that advice, in willful violation of Rules of Professional Conduct, rule 3-400." The record clearly establishes this charged willful violation of rule 3-400(B).

Again, the court found *ante* under count 2, when respondent paid Williams $5,000 and paid some portion of Williams's medical bills, respondent effectively settled a *potential* claim for his liability to Williams for professional malpractice. Respondent effectively settled a potential malpractice claim, but willfully never informed Williams in writing that he may seek the advice of another attorney and then gave him a reasonable opportunity to seek that advice.

D. The Hutton Client Matter

On June 17, 2004, Jacqueline Hutton retained respondent to bring a personal injury claim on her behalf for a slip and fall accident that occurred on June 15, 2004, at Children's Hospital. The parties executed a contingency fee agreement.

On August 5, 2004, respondent's office wrote to Children's Hospital and advised it that respondent had been retained by Hutton. Respondent also wrote to Summit Medical Center and requested copies of Hutton's medical records.

On October 18, 2004, respondent sent a demand letter to Claremont Liability Insurance Company, which was Children's Hospital's insurance carrier. On December 2, 2004, Attorney Geoffrey Beaty, who represented both Children's Hospital and its insurer, Claremont Liability Insurance, wrote to respondent and denied liability for the claim. Respondent received that letter and was aware of its contents.

Thereafter, respondent took no action on the case. He did not file suit. And he had no further communications with Attorney Beaty.[4]

Respondent explained to Hutton that a suit did not need to be filed until closer to the statute of limitations date of June 15, 2006.

On March 3, 6, 16, and 20, 2006, Hutton called respondent's law office and left messages with various staff members, Kathy, Pam, and the message center.

On March 6, 2006, respondent wrote to Hutton and informed her he was unable to prove liability in the slip and fall matter and was, therefore, terminating his representation in the matter. In that same letter, respondent advised Hutton that, if she wished to continue pursuing her claim, the statute of limitations of June 15, 2006, was fast approaching.

On March 29, 2006, Hutton mailed a letter to respondent advising him of her telephone calls and messages to him and of his lack of response to them. She requested that respondent

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[4] Respondent testified that he also went to Children's Hospital and inspected the floor where Hutton fell, interviewed witnesses, and took pictures. In addition, respondent testified that he or his law office periodically telephoned Attorney Beaty to determine if his clients had changed their mind and wanted to settle. The court, however, does not find this testimony credible.

respond to the letter. Hutton questioned respondent regarding the statute of limitations. Even though respondent received Hutton's March 29, 2006, letter and was aware of its contents, he failed to respond to it.

On April 10, 2006, Hutton again wrote to respondent. And she again requested that respondent respond to the letter. Hutton questioned respondent regarding the approaching two year statute of limitations. In addition, she asked respondent if he was going to file suit and inquired as to the status of the claim with Claremont Insurance Company. Even though respondent received Hutton's April 10, 2006, letter, he did not respond to it.

Count 5 - Failure to Perform with Competence (Rule 3-110(A))

In count 5, the State Bar charges that respondent wilfully violated rule 3-110(A). Specifically, the State Bar charges that "By failing to take action on Hutton's claim between December, 2004, and May 12, 2006, respondent failed to perform, in wilful violation of Rules of Professional Conduct, rule 3-110(A)." The record does not establish this charged violation of rule 3-110(A) by clear and convincing evidence. Resolving all reasonable doubts in respondent's favor, the court must find that, at least until about March 2006, Hutton agreed with respondent's strategy of putting her slip and fall claim on hold until shortly before the statute of limitations date of June 15, 2006. When respondent and Hutton began having differences around the first part of 2006, respondent withdrew his representation of Hutton on her slip and fall claim in his March 6, 2006, letter to her.

Count 6 - Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m) [5]

In count 6, the State Bar charges that respondent wilfully violated section 6068, subdivision (m), which provides that it is the duty of an attorney "To respond promptly to

[5] Unless otherwise stated, all further references to sections are to the Business and Professions Code.

reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

Specifically, the State Bar charges that "By failing to respond to the Huttons [sic] telephone calls of March 3, 2006; March 6, 2006, March 16, 2006, and March 20, 2006, and her letters of March 29, 2006, and April 10, 2006, respondent failed to respond promptly to the reasonable status inquiries of a client in a matter in which he agreed to provide legal services, in wilful violation of Business and Professions Code, section 6068(m)."

The record clearly establishes that respondent willfully violated section 6068, subdivision (m) when he failed to respond to Hutton's March 29, 2006, and April 10, 2006, letters. Even though respondent notified Hutton of his withdrawal from representation in his March 6, 2006, letter, he still owed her a duty to respond to these two letters to at least iterate that he had withdrawn from employment and no longer represented her on her slip and fall case against Children's Hospital and that she needed to be aware of the upcoming statute of limitations date of June 15, 2006. (Cf. *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 179 ["An attorney's duty to the client can extend beyond the closing of the file."]; see also *In the Matter of Feldsott* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754, 757.)

E. The Lloyd Client Matter

In addition to her personal injury suit for the slip and fall at the hospital, Hutton also retained respondent to substitute in and pursue a personal injury lawsuit that she filed in propria persona for her daughter, Akeia Lloyd, in the Alameda County Superior Court. Hutton filed the lawsuit against the Berkeley Unified School District for damages her daughter suffered to her teeth when a fellow student tripped her daughter in school.

Even though respondent agreed to take the case on a contingency fee basis on October 7, 2004, he did not file a substitution of attorney in the case until December 1, 2004.

Also on December 1, 2004, respondent filed a case management statement in which he indicated that he would complete discovery by way of form interrogatories and demand for production of documents by January 15, 2005.

On February 2, 2005, respondent filed another case management statement. In this second statement, respondent indicated that he would complete production of documents, form interrogatories, and depositions by March 15, 2005. Respondent, however, did not complete production of documents, form interrogatories, or depositions by March 15, 2005, or at anytime thereafter. In fact, respondent conducted no formal discovery in the case. Respondent did not designate a medical expert regarding Akeia Lloyd's dental condition. According to respondent, he did not need to designate a medical expert because Lloyd's treating dentist was going to testify. Respondent did not investigate or interview any children or teachers regarding Akeia's injury at school. Nor did respondent investigate or interview the school safety officer, James Williams. Nor did he interview the child that tripped Lloyd. Respondent did not even attend Lloyd's deposition. Respondent sent Attorney McCloskey in his place. Respondent did, however, engage in some informal discovery.

On February 23, 2005, the Berkeley Unified School District filed a motion to compel responses to interrogatories, request for statement of damages, and request for documents. The school district's motion also sought an award of monetary sanctions against respondent. In its motion, the school district noted (1) that Lloyd's discovery responses were all due between November 1 and 16, 2005, and (2) that its attorney telephoned respondent on February 4, 2005, to request that he respond to the discovery requests and left a message for respondent, but that respondent never returned the call.

On June 2, 2005, the superior court set Lloyd's case for trial for January 27, 2006. On January 27, 2006, when all the parties appeared for trial, they were sent to settlement

negotiations. The matter did not settle, and the trial was continued until January 30, 2006. Then, on January 30, 2006, the trial was continued again.

On February 2, 2006, the trial was continued until April 7, 2006. Then, on February 23, 2006, based upon a stipulation of the parties, the trial was continued until May 5, 2006.

In early 2006, the school district made a Code of Civil Procedure section 998 settlement offer of $5,001. In response to that offer, respondent spoke with the school district's attorney and told him that Hutton would probably accept the offer if she could see the discipline record of the child who tripped Lloyd and verified that the child did not have discipline record at the time he tripped Lloyd. The district's attorney told respondent that he could not release the child's school records without authorization. Instead, the district's attorney sent respondent a letter in which he stated: "I, as an officer of the court, have represented to you that the teacher, safety officer and vice-principal we intend to call as witnesses at trial will all testify that the District was not aware of any discipline problems involving [the child who tripped Lloyd] prior to this incident and that, in fact, [the child] did not have any discipline problems prior to this incident."

In light of his informal discovery, respondent advised Hutton to accept the district's settlement offer on February 17, 2006. When Hutton declined to do so, respondent advised Hutton that he would withdraw from the case. Hutton initially agreed to allow respondent to withdraw, but later changed her mind. Thus, on April 20, 2006, respondent filed a motion to withdraw as counsel, which the superior court granted on April 27, 2006.

Count 7 - Failure to Perform with Competence (Rule 3-110(A))

In count 7, the State Bar charges that respondent wilfully violated rule 3-110(A). Specifically, the State Bar charges that "By failing to conduct discovery on the case, by failing to designate a medical expert, and by generally failing to prepare for trial between December, 2005 date [sic] and April, 2006, respondent failed to perform, in wilful violation of Rules of

Professional Conduct, rule 3-110(A). The record does not establish this charged violation of rule 3-110(A) by clear and convincing evidence. That is there is no clear and convincing evidence that respondent intentionally, recklessly, or repeatedly failed to perform legal services for Hutton and Lloyd competently. Even though respondent's representation of Hutton and Lloyd was not stellar and might even have been negligent, it is clear "that negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3 110(A) violation. [Citation.]" (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149.) Accordingly, count 7 is dismissed with prejudice.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES.

A. Mitigation.

Respondent presented two character witnesses by declaration. One of them was an attorney and the other one is a licensed chiropractor. Both declared that respondent has good character. Although not extremely familiar with the facts, they each had a basic grasp of the charges against respondent in this matter. Nevertheless, the court is unable to assign substantial mitigation to respondent's good character evidence because it came from only two witnesses and not from a "wide range of references in the legal and general communities" as required under standard 1.2(e)(vi).

B. Aggravation

As noted *ante*, respondent was admitted to practice in California in 1967. He has two prior records of discipline. These two prior records of discipline are aggravating circumstances. (Std. 1.2(b)(i).)

Respondent's first prior record of discipline is the Supreme Court's order issued on April 18, 1979, in which the Supreme Court placed respondent on 18 months' stayed suspension and 18 months' probation on conditions including a 60-days suspension. (Supreme Court case

number BM 4095; State Bar Court case number 76-6-101.)[6] That discipline was imposed on respondent because, in a single client matter, respondent (1) commingled his client's funds with his own, (2) failed to maintain complete records of his client's fund, and (3) failed to properly disburse his client's funds when so directed by his client.

Respondent's second prior record of discipline is the Supreme Court's order issued on May 16, 1991, in which the Supreme Court placed respondent on five years' stayed suspension and five years' probation on conditions including a three-year suspension that continued until respondent established his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii). (Supreme Court case number S019460; State Bar Court case numbers 88-O-13283; 89-O-11049.) That discipline was imposed on respondent because he (1) misappropriated funds from 10 medical liens totaling $6,875 over an 18-month period, (2) practiced law while he was not an active member of the State Bar, (3) failed to perform legal services with competence, (4) failed to deposit client funds in a client trust account, (5) failed to respond to his clients' reasonable status inquires, (6) failed to maintain records of all held client funds, (7) failed to promptly pay his clients' medical liens, and (8) failed to cooperate and participate in disciplinary investigations.

Finally, respondent fails to accept responsibility for and to acknowledge his misconduct. This is an aggravating circumstance because respondent's "demonstrated lack of insight into the seriousness of his misconduct . . . suggests that it might reoccur. [Citation.]" (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.)

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[6] The court takes judicial notice of respondent's prior record of discipline. (Evid. Code, § 452, subd. (h).).

V. DISCUSSION

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090.) As the review department noted more than 18 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310, 1311.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent 's misconduct is found in standard 2.6, which applies to respondent's violation of section 6068, subdivision (m) in the Hutton client matter.

Standard 2.6 provides, inter alia, that a violation of section 6068 is to "result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3." And standard 1.3 provides:

> The primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed upon a finding or acknowledgment of a member's professional misconduct 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. Rehabilitation of a member is a permissible object of a sanction imposed upon the member but only if the imposition of rehabilitative sanctions is consistent with the above-stated primary purposes of sanctions for professional misconduct.

The generalized language of standard 2.6 provides little guidance to the court. (*In re Morse* (1995) 11 Cal.4th 184, 206.) Moreover, the court must consider standard 1.7(b), which provides:

> If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of two prior impositions of discipline as defined by Standard 1.2(f), the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate.

Relying only on the standards (i.e., standard 1.7(b)) without any legal analysis, the State Bar asserts that the appropriate discipline in this proceeding is disbarment.[7] Notwithstanding the State Bar's statements to the contrary, it has been settled for almost 20 years that disbarment is not mandated under standard 1.7(b) even in the absence of compelling mitigating circumstances. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507; *Arm v. State Bar* (1990) 50 Cal.3d 763, 778-779, 781.)

In applying standard 1.7, this court is not required to blindly "treat all priors as having equal weight, but [is] to consider the facts underlying the various proceedings in arriving at the appropriate discipline." (*Conroy v. State Bar, supra*, 53 Cal.3d at p. 507.) Clearly, respondent's second prior record of discipline is significantly more egregious than his first prior record and much more egregious than the misconduct found in the present proceeding. The present misconduct does not warrant respondent's disbarment even under standard 1.7(b). Nor does respondent's present misconduct warrant the same level of discipline that was imposed in respondent's second prior record of discipline. Nonetheless, the court concludes that very

[7] According to the State Bar, respondent "has indeed had a long career, but it is time for it to come to an end."

significant discipline is warranted in light of standard 1.7(a)[8] and (b). (Cf. *In re Silverton* (2005) 36 Cal.4th 81, 92.)

On balance, the court concludes that the appropriate level of discipline is five years' stayed suspension and five years' probation on conditions including eighteen months' suspension continuing until respondent establishes his rehabilitation, fitness to practice, and learning in the law.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent **FRANK MARTIN ENNIX III** be suspended from the practice of law for five years; that execution of the five-year suspension be stayed; and that he be placed on probation for five years on the following conditions:

1. Ennix is suspended from the practice of law for the first 18 months of probation and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

2. Ennix must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.

3. Ennix must maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation, his current office address and telephone number or, if no office is maintained, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Ennix must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Ennix's home address and telephone number will not be made available to the general public unless it is also his official State Bar membership records address. (Bus. &

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[8] Standard 1.7(a) provides: "If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline as defined by standard 1.2(f), the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust."

Prof. Code, § 6002.1, subd. (d).) Ennix must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Ennix must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10, and October 10 of each year or part thereof in which he is on probation (reporting dates). However, if his probation begins less than 30 days before a reporting date, Ennix may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Ennix must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

   (a) in the first report, whether he has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

   (b) in each subsequent report, whether he has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

   During the last 20 days of this probation, Ennix must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Ennix must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, Ennix must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.

6. Within one year after the effective date of the Supreme Court order in this matter, Ennix must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation. This condition of probation is separate and apart from Ennix's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Ennix's probation will commence on the effective date of the Supreme Court order in this matter. At the expiration of the period of probation, if Ennix has complied with all conditions of probation, the five-year period of stayed suspension will be satisfied and that suspension will be terminated.

VII. MPRE, RULE 9.20 & COSTS

The court also recommends that **FRANK MARTIN ENNIX III** be ordered to take and pass the Multistate Professional Responsibility Examination (hereafter MPRE) administered by the National Conference of Bar Examiners (MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, telephone number (319) 337-1287) within the period of his actual suspension and to provide satisfactory proof of his passage to the State Bar's Office of Probation within that same time period. If respondent fails to take and pass the MPRE within the specified time period, he will be placed on actual suspension without a hearing and will remain on actual suspension until he passes the examination. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; see also Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rules 320, 321(a)&(c).)

The court further recommends that **FRANK MARTIN ENNIX III** be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[9]

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that they be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: August _____, 2009

LUCY ARMENDARIZ
Judge of the State Bar Court

[9] Ennix is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) At least in the absence of compelling mitigating circumstances, an attorney's failure to comply with rule 9.20 almost always results in disbarment. (E.g., *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)