

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case Nos.: <b>07-O-12888-PEM</b> (08-O-10576;
	)	08-O-13266); <b>08-C-13517-PEM</b> ;
<b>VAN OLIVER KINNEY,</b>	)	<b>08-C-13719-PEM</b> ; <b>09-C-11245-PEM</b>
	)	<b>(Consolidated.)</b>
<b>Member No. 79623,</b>	)	
	)	<b>DECISION</b>
A Member of the State Bar.	)	
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**I. Introduction**

This consolidated disciplinary proceeding involves three conviction referral proceedings and one original disciplinary proceeding. The three conviction referral proceedings involve respondent **VAN OLIVER KINNEY’S** misdemeanor convictions for driving while intoxicated, reckless driving (alcohol related), and driving with a suspended license. In the original disciplinary proceeding, respondent is charged failing to refund unearned fees in two client matters, improperly using his client trust account for personal purposes, and engaging in acts involving moral turpitude by issuing three insufficiently funded checks on his client trust account. This Court finds, by clear and convincing evidence, that respondent is culpable of all the charged misconduct but the moral turpitude charge. In light of the serious nature and extent of culpability, as well as the applicable mitigating and aggravating circumstances, the Court

recommends that respondent be placed on two years' stayed suspension and two years' probation on conditions, including a 90-day suspension.

## **II. Pertinent Procedural History**

On April 24, 2009, in case number 08-C-13719-PEM, the Review Department of the State Bar Court filed an order referring respondent's final misdemeanor conviction for violating Vehicle Code section 23152, subdivision (b) (driving under the influence with a blood-alcohol level of 0.08 percent or more) to the hearing department for a hearing and decision recommending the discipline to be imposed if the hearing department finds that the facts and circumstances surrounding respondent's conviction involved moral turpitude (Bus. & Prof. Code, §§ 6101, 6102)<sup>1</sup> or other misconduct warranting discipline (e.g., *In re Kelley* (1990) 52 Cal.3d 487, 494). (Cal. Rules of Court, rule 9.10(a); Rules Proc. of State Bar, rule 320(a); *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 491-492.) Thereafter, on May 6, 2009, the hearing department filed and served on respondent a notice of hearing on conviction (notice of hearing) in case number 08-C-13719-PEM.

On June 3, 2009, in case number 08-C-13517-PEM, the review department filed an order referring respondent's final misdemeanor conviction for violating Vehicle Code section 23103.5 (reckless driving – alcohol related) to the hearing department for a hearing and decision recommending the discipline to be imposed if the hearing department finds that the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline.

Also, on June 3, 2009, the review department filed an identical referral order in case number 09-C-11245-PEM with respect to respondent's final misdemeanor conviction for violating Vehicle Code section 14601.5, subdivision (a) (driving with knowledge that license is

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<sup>1</sup> Except where otherwise indicated, all further statutory references are to the Business and Professions Code.

suspended). And, on June 10, 2010, the hearing department filed and served on respondent a notice of hearing on conviction in each of these two cases (i.e., case numbers 08-C-13517-PEM and 09-C-11245-PEM).

At a status conference on June 22, 2009, the court consolidated case numbers 08-C-13719-PEM; 08-C-13517-PEM; and 09-C-11245-PEM for all purposes. (See Status Conference Order filed June 23, 2009.)

On August 21, 2009, the State Bar filed the notice of disciplinary charges (NDC) in case number 07-O-12888-PEM.<sup>2</sup> And, on October 8, 2009, respondent filed his response to the NDC. At a status conference on October 13, 2009, the court consolidated case number 07-O-12888-PEM with case numbers 08-C-13719-PEM; 08-C-13517-PEM; and 09-C-11245-PEM for all purposes.

A five-day trial was held on August 25, 26, 27, and 31 and September 23, 2010. The State Bar was represented by Deputy Trial Counsel (DTC) Tammy Albertsen-Murray. Respondent was represented by Attorney Jonathan I. Arons. On August 27, 2010, the parties filed a (partial) stipulation as to facts and as to the admission of State Bar exhibit 20 into evidence. Then, on September 23, 2010, following closing arguments, the court took this matter under submission for decision.

### **III. Findings of Fact and Conclusions of Law**

The following findings of fact are based on the evidence, the parties' stipulation, and testimony introduced at this proceeding.

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in California on May 15, 1978, and has been a member of the State Bar of California since that time.

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<sup>2</sup> Cases numbers 08-O-10576; and 08-O-13266 are correlated with case number 07-O-12888-PEM.

## **B. Conviction Referral Proceedings**

### **1. Case Number 08-C-13719-PEM -- DUI**

On March 17, 2003, respondent was charged in a criminal complaint of driving under the influence of alcohol or drugs in violation of section 23152, subdivision (a) of the Vehicle Code, a misdemeanor and of speed exhibition in violation of section 23109 of the Vehicle Code, a misdemeanor, on February 1, 2003. The criminal complaint also contained a special allegation alleging that, on February 1, 2003, respondent had a blood-alcohol content of 0.20 percent or higher within the meaning of Vehicle Code section 23578.

On April 11, 2003, on the motion of the district attorney, the complaint was amended to allege a violation of Vehicle Code section 23152, subdivision (b) (driving under the influence of alcohol with a blood-alcohol content of 0.08 percent or more) in place of Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol or drugs). Also, on April 11, 2003, respondent pleaded nolo contendere to and was convicted on the new charge of violating Vehicle Code section 23152, subdivision (b). The charged speed exhibition and special allegations were then dismissed.

### **2. Case Number 08-C-13517-PEM – Reckless Driving (Alcohol Related)**

On July 31, 2008, respondent was charged in a criminal misdemeanor complaint of driving under the influence alcohol or drugs, in violation of Vehicle Code section 23152, subdivision (a) and of Vehicle Code section 23152, subdivision (b). There were also two special allegations—Vehicle Code sections 23540 (prior DUI) and 23578 (0.15 percent or higher blood-alcohol content). On March 10, 2009 respondent pleaded nolo contendere to violating Vehicle Code section 23103.5 (reckless driving – alcohol related), and the other charges were dismissed. [See exhibit 43.]

On July 8, 2008, respondent had a party with his son and his son's friends at his home. Around that same time, respondent bought a new Trik (a three-wheel vehicle). He was showing off on his new Trik—driving up and down his neighborhood's streets really fast. A neighbor called the police. Before the police arrived, respondent started drinking. He had five vodka tonics. He maintains that he had the vodka tonics after he got off the Trik. When the police arrived respondent told the police that he did not own a Trik. In questioning respondent, the police observed that respondent had slurred speech, was unable to complete the field sobriety tests, had bloodshot eyes, and a strong odor of alcohol on his breath. Respondent was obviously very intoxicated. Respondent was arrested and tested for the content of alcohol in his blood. The test results revealed a blood-alcohol content 0.24 percent (three times the legal driving limit). [See exhibit 41.]

The State Bar contends that respondent's reckless driving conviction involves moral turpitude and that respondent violated section 6106 when because respondent lied to the police about owning the Trik. The court cannot agree. In light of respondent's high level of intoxication, the court is unable to find, by clear and convincing evidence, that respondent had the requisite intent for a section 6106 violation or that his conviction involved moral turpitude.

### **3. Case Number 09-C-11245-PEM -- Driving with a Suspended License**

On December 4, 2008, respondent was charged in a misdemeanor criminal complaint with driving a motor vehicle on November 7, 2008, when his privilege was suspended and revoked pursuant to Vehicle Code sections 13353, 13353.1, and 13353.2 with knowledge of said suspension and revocation. And on March 10, 2009, respondent entered a plea of nolo contendere to a violation of Vehicle Code section 14601.5, subdivision (a). This was not the only instance in which respondent drove while his license was suspended. A police officer

credibly testified that he saw respondent driving on at least one other occasion. In addition, the Redding Police Department viewed respondent as a habitual offender. [See exhibit 45, page 6.]

#### **4. Conclusions of Law in Conviction Referral Proceedings**

The record does not establish, by clear and convincing evidence, that the facts and circumstances surrounding respondent's convictions for DUI, reckless driving, and driving with a suspended license, *ante*, involved moral turpitude. However, the facts and circumstances surrounding those three convictions clearly involved other misconduct warranting discipline. (*In re Kelley, supra*, 52 Cal.3d at p. 494.)

#### **C. Case Number 07-O-12888-PEM -- The Burton Client Matter**

On May 10, 2006, respondent was hired by Roberta Burton to represent her in a marriage dissolution matter. That same day, respondent and Burton signed a retainer agreement; and in accordance with that agreement, Burton paid respondent \$5,000 as an "advance retainer." According to the retainer agreement, one-half of the \$5,000 "advance retainer" was non-refundable, and one-half of the \$5,000 was to be credited towards anticipated attorney's fees and costs (i.e., advanced fees and costs). The agreement provided further that, when the retainer was depleted through the charging of fees and costs, Burton would be billed on a monthly basis and the bill would be due and payable upon receipt.

On November 15, 2006, Burton terminated respondent's services. As of November 15, 2006, respondent had earned \$3,800, which leaves an unearned fee paid in advance of \$1,200 (\$5,000 less \$3,800). On November 15, 2006, Burton sent a letter to respondent requesting a detailed accounting of respondent's services so that she could better understand how her money was spent. She asked respondent to forward the detailed accounting report along with any unused portion of her retainer. Even though respondent received Burton's November 15, 2006 letter, he failed to provide a detailed accounting report or a refund. [Exhibit 7].

On January 2, 2007, Burton sent another letter to respondent requesting a full refund of the \$5,000 retainer. [Exhibit 7] Again, even though respondent received Burton's January 2, 2007 letter, he failed to provide a refund. On January 6, 2007, Burton sent another letter to respondent requesting a refund of unearned fees. Respondent received Burton's January 6, 2007 letter, but failed to provide a refund. On February 12, 2007, Burton sent yet another letter to respondent requesting a refund for the balance of her retainer agreement (stating she wanted a minimum of \$2,500 refunded). [Exhibit 7, page 6.] Respondent received Burton's February 12, 2007 letter, but failed to provide a refund.

On June 8, 2007, Burton filed a complaint against respondent with the State Bar (Burton's complaint). And on June 25, 2007, a State Bar investigator sent a letter to respondent requesting him to respond in writing to the allegations in Burton's complaint, including the allegation that he failed to refund unearned fees. After receiving the investigator's letter, respondent replied in a July 2, 2007 letter that he did not think that Burton was entitled to any refund pursuant to his retainer agreement. [Exhibit 10.] On January 7, 2008, another State Bar investigator sent respondent a letter telling him that the accounting he provided in his July 2, 2007 letter indicates a credit on Burton's account of \$1,200. In February 2008, respondent sent the State Bar a letter stating that, while he disagreed with the State Bar's analysis of his retainer agreement, he was of the opinion that it is more difficult to challenge Burton's claim than to just write a check. [Exhibit 12.]

On February 2, 2008, more than one year after Burton first requested a refund, respondent refunded \$1,200 in unearned fees to Burton.

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***Count One: Failure to Refund Unearned Fees (Rules of Prof. Conduct, rule 3-700(D)(2))***<sup>3</sup>

In count one, the State Bar charges that respondent willfully violated rule 3-700(D)(2), which provides, in part, that, upon termination of employment, an attorney must “Promptly refund any part of a fee paid in advance that has not been earned.”

Without question, the provision in respondent’s retainer agreement which provides that one-half of the \$5,000 “advance retainer” is nonrefundable is not determinative. (*In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923.) It is well-settled in California that, except for a “true retainer fee,” *all* fees paid to an attorney in advance are *fully* refundable unless and until they have actually been earned by the attorney. (Rules Prof. Conduct, rule 3-700(D)(2).) A true retainer is money a client pays to secure an attorney's availability, for a stated period of time in the future, to work on any legal issue with which the client desires the attorney’s representation and without regard to whether the attorney actually performs any service for the client during the stated period. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4.) True retainers are relatively rare and are almost always paid by businesses or very wealthy individuals who routinely have a need to have an attorney “on call” to handle unforeseen legal issues when they arise.

The foregoing definition does not apply to any portion of the \$5,000 advance retainer that Burton paid to respondent. Respondent’s retainer agreement with Burton does not specify a period of time for which he was to be available to Burton for any new legal matters (other than her divorce) for which she might need to call on respondent. And there is no evidence that respondent set aside a particular period of time to devote to Burton on any other new matter. In

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<sup>3</sup> References to the rules are to the Rules of Professional Conduct, unless otherwise stated.



short, no portion of the \$5,000 was a true retainer fee. (*In the Matter of Lais, supra*, 3 Cal. State Bar Ct. Rptr. at p. 923.) Accordingly, it was refundable unless and until it was earned.

As noted *ante*, as of November 15, 2006, when Burton terminated respondent's services, respondent had earned \$3,800. Thus, he was required to promptly refund \$1,200 (\$5,000 less \$3,800), but failed to do so. By not refunding the \$1,200 to Burton until February 2008, more than one year after the refund was first requested and only after the State Bar became involved in the matter, respondent clearly failed to promptly refund \$1,200 in unearned fees in willful violation of rule 3-700(D)(2).

#### **D. Case Number 08-O-10576-PEM -- Trust Account Violations**

At all relevant times herein, respondent maintained a client trust account at Tri Counties Bank (hereafter trust account or respondent's trust account).

Respondent improperly used his trust account when he issued the following checks drawn on his trust account for his personal, non-client purposes:

<u><b>Dated</b></u>	<u><b>Check Number</b></u>	<u><b>Amount</b></u>	<u><b>Payee</b></u>
08/30/07	4764	\$22.94	April Ruth
09/06/07	4772	\$24.52	Carrell's Office Machine
09/04/07	4765	\$749.88	AT&T
09/06/07	4768	\$76.00	Illegible
09/06/07	4770	\$78.58	Farmers Ins.
09/06/07	4771	\$75.66	Farmers Ins.
09/13/07	4782	\$629.42	Amanda Greenwood
09/14/07	4773	\$125.00	Ralph Andrews
09/11/07	4775	\$774.54	Kim Portarola
09/13/07	4781	\$125.00	David Ranson
09/13/07	4783	\$100.92	April Ruth
09/13/07	4778	\$616.66	Tri-Counties
09/13/07	4779	\$3,650.00	United States Treasury
09/13/07	4780	\$39.80	EDD
09/17/07	4784	\$1,262.18	A & P Investments
09/18/07	(Phone Payment)	\$850.00	Capital One
09/18/07	4777	\$675.00	FTB
09/21/07	(Phone Payment)	\$132.58	Capital One
09/20/07	4800	\$514.73	Capital One (Collections)

09/20/07	4801	\$1,697.79	Capital One (Collections)
10/04/07	4790	\$652.68	Amanda Greenwood
10/04/07	4791	\$94.04	April Ruth
10/01/07	4792	\$125.00	David Ranson
10/04/07	4796	\$192.78	Nor Cal Storage
10/05/07	4794	\$100.00	Pacheco Cheerleaders
10/15/07	4799	\$16.80	Tri-Counties Bank
10/05/07	4797	\$224.19	Illegible
10/14/07	4800	\$148.00	Office Depot
10/11/07	4805	\$38.86	AT&T
10/11/07	4808	\$45.00	Barry Bright
10/11/07	4810	\$1,259.13	A & P Investments
10/11/07	4814	\$1,185.00	Sun Country Prop
10/15/07	4816	\$704.94	Amanda Greenwood
10/11/07	4804	\$179.99	Century Executone
10/16/07	4811	\$37.50	Business Ware
10/11/07	4813	\$4,219.88	Business Ware
10/15/07	4822	\$172.18	Tri-Counties Bank
10/11/07	4802	\$15.96	Carrell's Office Machines
10/11/07	4806	\$72.00	Idesign Tech
10/11/07	4809	\$14.82	Carrell's Office Machines
10/15/07	4803	\$690.00	Ralph Andrews
10/15/07	4818	\$675.00	FTB
10/15/07	4820	\$504.00	FTB
10/15/07	4821	\$9.62	EDD
10/11/07	4807	\$80.00	Illegible (Description: PR)
10/15/07	4819	\$3,650.00	IRS
10/15/09	4817	\$91.75	April Ruth
11/01/07	4826	\$791.35	Amanda Greenwood
10/24/07	4824	\$990.37	Members 1
11/07/07	4832	\$516.68	AT&T
11/01/07	4828	\$276.00	U.S. Post Office
11/6/07	4827	\$125.00	David Ransom
11/02/07	4829	\$2,061.30	Cap 1
11/07/07	4833	\$509.39	Carrell's Office Machines
1/07/07	4836	\$534.11	Carrell's Office Machines
11/07/07	4835	\$100.00	AT&T
11/07/07	4837	\$44.94	Express
11/15/07	4838	\$4,219.88	Option One
11/07/07	4834	\$68.34	Prsmatic Services
11/15/07	4840	\$734.77	Amanda Greenwood
11/13/07	4842	\$572.60	Tri-Counties

11/15/07	4843	\$1,200.00	FTB
11/15/07	4841	\$37.01	EDD
11/21/07	4844	\$1,238.17	A & P Investments
11/21/07	4853	\$800.00	Illegible (Description: Office)
11/21/07	4846	\$275.83	Essential Forms
11/21/07	4847	\$15.90	Mt Shasta Spring Water
11/21/07	4848	\$418.97	AT&T
11/21/07	4849	\$60.00	CPA Ralph Andrews
11/21/07	4850	\$16.40	Carrell's
11/21/07	4851	\$74.00	Illegible (Description: PR)
11/21/07	4852	\$69.82	Prsmatic Services
11/21/07	4854	\$100.00	AT&T
11/21/07	4856	\$1,200.00	Kim Portarola
12/03/07	4858	\$642.13	Amanda Greenwood
12/07/07	4861	\$500.00	Lowe's
12/14/07	4871	\$1,110.43	Amanda Greenwood
12/17/07	4869	\$127.50	Business Ware
12/12/07	4867	\$96.00	City Clerk
12/18/07	4868	\$1,276.86	A&P Investments
12/18/07	4872	\$339.34	Tri-Counties
12/10/07	4863	\$1,148.81	Lori Scott
12/12/07	4870	\$9.00	Express
12/13/07	4874	\$1,200.00	FTB
12/14/07	4873	\$16.93	EDD
12/20/07	4871	\$300.00	DEA Arrow Smith
12/19/07	4876	\$125.00	David Ransom
12/26/07	4881	\$2,500.00	Capital One
12/21/07	4882	\$515.00	Ralph Andrews CPA
12/20/07	4884	\$360.39	AT&T
12/20/07	4885	\$300.00	Cap 1
12/20/07	4883	\$100.00	AT&T
12/21/07	4886	\$413.32	Cap 1
01/24/08	4903	\$990.37	Members 1st
01/25/08	4908	\$69.82	Prsmatic Services
01/28/08	4910	\$22.22	Canal Office
01/25/08	4911	\$62.82	AT&T
01/28/08	4902	\$164.42	Office Depot
01/25/08	4905	\$95.00	Barry Bright
01/25/08	4907	\$725.00	Ralph Andrews
01/25/08	4904	\$394.56	AT&T
01/25/08	4912	\$37.00	Illegible (Description: Office)
01/16/08	4892	\$49.41	Express

01/15/08	4894	\$125.00	David Ransom
Undated	4901	\$851.59	Asher Hospital
01/15/08	4897	\$1,200.00	FTB
01/15/08	4899	\$1,321.58	A & P Investments
01/15/08	4896	\$8.29	EDD
01/15/08	4895	\$210.98	Tri-Counties
01/15/08	4893	\$710.33	Amanda Greenwood
01/15/08	4898	\$77.86	Tri-Counties
01/02/08	4888	\$164.00	U. S. Post Office
01/02/08	4887	\$699.49	Amanda Greenwood
01/07/08	4880	\$90.00	Illegible (Description: PR)
02/14/08	4921	\$192.72	EDD
02/28/08	4935	\$588.22	Amanda Greenwood
02/21/08	4927	\$388.22	AT&T
02/21/08	4928	\$21.70	Carrell's Office
02/21/08	4930	\$315.00	Ralph Andrews
Undated	4922	\$1,200.00	FTB
02/21/08	4931	\$7.95	Shasta Spring Water
02/22/08	4932	\$25.00	Cap 1
02/14/08	4919	\$183.10	Cyndal Bailey
02/14/08	4923	\$541.76	Tri-Counties
02/14/08	4924	\$125.00	David Ransom
02/14/08	4918	\$1,364.46	A & P Investments
02/14/08	4916	\$82.00	U.S. Post Office
01/28/08	4909	\$70.63	Matthew Bender
02/01/08	4815	\$2,919.38	Miller Auto Center
01/18/08	4908	\$164.00	Illegible (Description: PR)
01/31/08	4914	\$761.61	Amanda Greenwood
03/13/08	4948	\$322.90	Tri-Counties
03/13/08	4946	\$183.10	Cyndal Bailey
03/13/08	4947	\$124.32	EDD
03/13/08	4945	\$588.21	Amanda Greenwood
02/21/08	4829	\$35.00	Illegible (Description: PR)
03/05/08	4940	\$60.00	David Ransom
02/28/08	4936	\$183.10	Cyndal Bailey
03/05/08	4939	\$19.44	Shasta Spring Water
03/03/08	4934	\$187.54	Office Depot

The foregoing checks were paid with funds that respondent earned and left in his trust account or with funds that respondent improperly deposited into his trust account for his personal

use. In December 2007, respondent issued the following three, insufficiently funded checks for his personal purposes:

<u>Check No.</u>	<u>Payee</u>	<u>Amount of Check</u>	<u>Date Check Presented for Payment</u>	<u>Balance on Date Check Presented for Payment</u>	<u>Bank Action</u>
4886	Capital One	\$413.32	12/27/07	\$41.98	Paid
4883	AT&T	\$100.00	12/27/07	\$41.98	Paid
4882	R. Andrews	\$515.00	12/31/07	\$-496.34	Returned

On about January 2, 2008, respondent deposited \$1,500 of his own funds into his trust account. After that \$1,500 deposit, the balance in respondent's trust account was \$1,003.66 (\$1,500 less \$496.34).

***Count Two(A): Trust Account Violations (Rule 4-100(A))***

In count two(A), the State Bar charges respondent with willfully violating rule 4-100(A). Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith. “An attorney violates [rule 4-100] when he or she fails to deposit and manage funds in the manner delineated by the rule, even if this failure does not harm the client. [Citation.]” (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.) Moreover, under rule 4-100(A), commingling occurs whenever an attorney uses his or her client trust account for personal purposes even if no client funds are in the account at the time. (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 876.)

The record clearly establishes that respondent willfully violated rule 4-100(A) by repeatedly using his trust account for personal purposes from August 2007 through March 2008 and by commingling as charged in count two(A).

***Count Two(B): Moral Turpitude (§ 6106)***

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty, or corruption. In count two(B), the State Bar charges that respondent committed acts involving moral turpitude “By issuing checks drawn on his trust account when respondent knew or should have known that there were insufficient funds in his trust account.” The record, however, fails to establish the charged violations of section 6106.

“It is settled that the ‘*continued* practice of issuing [*numerous*] checks which [the attorney *knows* will] not be honored violates’ ” section 6106. (*Bowles v. State Bar* (1989) 48 Cal.3d 100, 109, italics added, quoting *Alkow v. State Bar* (1952) 38 Cal.2d 257, 264.) The record fails to establish, by clear and convincing evidence, that respondent engaged in a *continued* practice of issuing insufficiently funded checks (NSF checks). Moreover, respondent did not issue *numerous* NSF checks; he issued three. There is no clear and convincing evidence that respondent knew (or that he should have known) that the three checks were insufficiently funded when he issued them or that respondent was grossly negligent in issuing the three NSF checks.

Respondent wrote one of the three NSF checks on December 20, 2007, and the other two NSF checks the next day (i.e., December 21, 2007). Moreover, the record establishes respondent promptly deposited \$1,500 into his trust account on January 2, 2008, which more than covered the \$1,028.32 total of the three NSF checks (\$413.32 plus \$100 plus \$515). Respondent credibly testified that he was the only person that kept the records of his trust account, that he had a caseload of at least 60 clients, that there were a lot of checks going through his trust account, and that he did not know the checks were insufficiently funded when he issued them. Respondent issued the three NSF checks by mistake.

At worst, respondent was negligent in issuing the three NSF checks. And it is well settled that mere negligence is insufficient to support a violation of section 6106. Accordingly, count two(B) is dismissed with prejudice.

**E. Case Number 08-O-13266-PEM -- The Leach Client Matter**

On November 13, 2007, respondent was hired by Darlene and James Leach to represent them in an adoption matter. That same day, respondent and the Leaches signed a retainer agreement; and in accordance with that agreement, the Leaches paid respondent \$2,500 as an “advance retainer.” According to that retainer agreement, one-half of the \$2,500 “advance retainer” was non-refundable and the other one-half was to be credited towards anticipated attorney’s fees and costs (i.e., advanced fees and costs). And when the retainer was depleted through the charging of fees and costs, the Leaches would be billed on a monthly basis, and the bill would be due and payable upon receipt.

In June 2008, the Leaches terminated respondent's services. Prior to June 17, 2008, Darlene Leach sent a letter to respondent requesting a refund of unearned fees. Soon thereafter, respondent received Darlene Leaches’ letter. As of June 17, 2008, respondent had earned and charged the Leaches fees in the amount of \$780, leaving a credit in unearned fees of \$1,720 (\$2,500 less \$780). On June 17, 2008, respondent sent a letter to Darlene Leach enclosing a check in the amount of \$470 as a refund of unearned fees. As of June 17, 2008, after refunding \$470 to the Leaches, respondent still owed the Leaches an additional \$1,250 (\$1,720 less \$470) in unearned fees.

On June 26, 2008, the Leaches filed a complaint against respondent with the State Bar (Leach complaint). On July 25, 2008, State Bar Deputy Trial Counsel, Larry DeSha (DTC DeSha), sent a letter to respondent requesting him to respond in writing to the allegations in the Leach complaint, including the allegation that he failed to refund unearned fees. Soon thereafter,

respondent received DTC DeSha's July 25, 2008 letter. On July 28, 2008 respondent replied to DTC DeSha's letter. [Exhibit 26.]

In October 2008, respondent received a letter from a State Bar investigator as the case had been transferred to the Bar's San Francisco office. In October 2008, respondent replied to the investigator's letter stating that he did not know that the Leach case was still in dispute. On October 17, 2008, respondent deposited \$1,250 back into his trust account under the Leaches' ledger. [Exhibit 29.] And on June 12, 2009, approximately one year after the Leaches first requested a refund, respondent finally refunded the \$1,250 in unearned fees to the Leaches.

***Count 3: Failure to Refund Unearned Fees (Rule 3-700(D)(2))***

For the same reasons set forth *ante*, in the Burton client matter, no portion of the Leaches \$2,500 payment to respondent was for a true retainer fee. Thus, by not refunding the \$1,250 to the Leaches until on or about June 12, 2009, approximately one year after the refund was first requested, and only after the State Bar became involved in the matter, respondent failed to promptly refund unearned fees in willful violation of rule 3-700(D)(2).

**IV. Mitigating and Aggravating Circumstances**

**A. Mitigation**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Professional Misconduct, standard 1.2(e).)<sup>4</sup>

**1. No prior discipline**

Respondent has no prior record of discipline in 32 years of practice, which is very strong mitigation standing alone. (Std. 1.2(e)(i).)

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<sup>4</sup> All further references to standards are to this source.



## **2. No Client Harm**

With respect to the three conviction referral proceedings, there clearly was no client harm. (Std. 1.2(e)(iii).)

## **3. Good Character evidence**

Respondent presented compelling good character evidence from the following *very* credible witnesses. (Std. 1.2(e)(vi).) Notably, almost all of respondent's character witnesses are respected individuals from Redding, California and the surrounding area (where respondent lives and practices law) who personally observe respondent's daily conduct and mode of living. Positive testimony from such witnesses is highly relevant to respondent's character. (Cf. *In re Andreani* (1939) 14 Cal.2d 736, 749-750.)

### **a. Paul Kjos**

Paul Kjos is a Deputy Ad Commissioner for Shasta County and has known respondent for 19 to 20 years. They are in the Shasta Exchange Club (like the Rotary Club), which meets every Thursday. He and respondent are regulars.

Last May, Kjos's son was involved in a hit-and-run accident. Respondent went to court with him and walked him through it. Kjos trusts respondent with his family. Knowing the disciplinary charges against respondent does not change Kjos's high opinion of respondent's good character.

### **b. Diana Brown**

Diana Brown has been a licensed marriage counselor since 2004. She knows respondent as friend and colleague and has referred cases to respondent. Brown has lived in Redding for 40 years, and views respondent as a pillar of the community. He is in the Exchange Club and volunteers for the air show. She talks to respondent a few times a month.

She understands the charges against respondent and still opines that he is honest and very compassionate.

**c. Greg Donnell**

Greg Donnell has been an insurance agent for 14 years and has known respondent for about 11 years. They see each other every Thursday for lunch with the Exchange Club. Donnell thinks very highly of respondent even though Donnell is familiar with the charges against respondent.

**d. Brent Walton**

Brent Walton was a Deputy Sheriff from about 1967 to 1979 who later became a contractor. He knows respondent through the Asphalt Cowboys, which puts on the Rodeo for the community. Respondent is an active member and works hard. They have regular meetings, and he sees respondent every week. Walton opines that respondent is a nice guy, straightforward, trustworthy, and reliable. Walton learned of the charges against respondent about one month ago, and the charges do not change his opinion of respondent's good character.

**e. Wayne Webber**

Wayne Webber is a retired food wholesaler and has lived in Redding since 1965. He met respondent when respondent was representing someone who was suing Webber. He sees respondent twice a week. They are both in the Asphalt Cowboys; Webber has been a member for 40 years and sponsored respondent for membership. The Cowboys raise money for disaster relief and search and rescue work.

Webber is familiar with the charges and would trust respondent with anything. Respondent has a great reputation in the community, and Webber just referred his daughter to respondent.

**f. Fred Hogan**

Fred Hogan is retired from the milk distribution business and has lived in Redding for 16 years. He sees respondent mostly at community meetings. Hogan opines that respondent is a very professional person. Hogan's knowledge of the charges against respondent do not alter his opinion of respondent.

**g. Brian Walton**

Brian Walton is an engineer with a manufacturing company. He was born in Redding. Respondent previously represented Walton in a divorce. Walton is also a member of Asphalt Cowboys, and he met respondent in spring 2002. Their relationship is now social and they attend many of the same lunches and brunches. He also did some driving for respondent when respondent's driver's license was suspended. Walton opines that respondent's character is outstanding, and the charges do not alter his opinion of respondent.

**h. Sean Vinson**

Sean Vinson is a self-employed contractor who did some work for respondent. Vinson is also in the Asphalt Cowboys and has known respondent for five years. Respondent previously represented Vinson with respect to a restraining order. Respondent billed Vinson for his legal services. Respondent sponsored Vinson for membership in the Asphalt Cowboy. He sees respondent about once a week, and they socialize once in a while. Vinson describes respondent as a wonderful, genuine guy who will give you the "shirt off his back." Vinson is aware of the charges against respondent.

**i. Dea Arrowsmith**

Dea Arrowsmith is respondent's daughter and she was his secretary from 1999 to 2009. Arrowsmith is fully aware of the charges against her father and does not believe that the picture the State Bar paints of him is inaccurate. Arrowsmith confirms that respondent knows that he

used the trust account inappropriately; that respondent has remedied the improper use of his trust account; that respondent has expressed so much remorse for the DUI; and that respondent is quite honest.

**j. Joe Franzoia**

Joe Franzoia was a homicide and political/crimes inspector with the San Mateo County District Attorney's Office. He was in law enforcement for 30 years. Franzoia is a member of the Asphalt Cowboys. He has known respondent since 2006. They were involved with a mission to help the homeless people in the Redding area. When the homeless shelter needed a computer, respondent wrote a check for a computer. Franzoia believes that respondent is extremely trustworthy, always helpful, and very honorable. Franzoia trusts respondent with his life and family. He believes that respondent is harder on himself than respondent is with others. Franzoia learned of the charges against respondent about one month ago. They do not change his opinion of respondent.

**k. Fred Carelli**

Fred Carelli is currently retired. He was a chief investigator in the Shasta County District Attorney's Office for 12 years. Before that he was a homicide detective for Shasta County. Carelli has know respondent for 25 years. Carelli does not see respondent much outside of the Asphalt Cowboy, but Carelli has never heard anything bad about respondent. Respondent has a great reputation, and Carelli referred his son to respondent. The NDC and respondent's misdemeanor convictions have no impact on Carelli's opinion of respondent's good character.

**l. Thomas Spade**

Thomas Spade is a vice-president of Pepsi Bottling Company. Spade met respondent through his community involvement. Spade is involved in the Asphalt Cowboys and the Exchange Club. Respondent spoke with him about six weeks ago about the charges. They do

not change his opinion of respondent's good character. Spade has known respondent for 23 years, but became close friends with respondent in 2001, when respondent came into the Asphalt Cowboys.

**m. Jennifer Duval**

Jennifer Duval has been a legal secretary for eight years and respondent's secretary for the last year and a half. Duval believes respondent is honest, kind, and selfless. Knowing the charges against him, Duval still has a great opinion of respondent.

**4. Community Work**

Respondent undertakes extensive community work. (Std. 1.2(e)(vi).) He performs about 1,000 hours a year in volunteer work. He has been a member of the Asphalt Cowboys since 2002. The Redding Asphalt Cowboys is a private organization and an official affiliate of the Redding Rodeo Association volunteering year round along with three other affiliate groups: (1) the Redding Women's Rodeo Association; (2) the Redding Rodeo Auxiliary Association; and (3) the Redding Junior Rodeo Association. The Redding Rodeo is one of the best rodeos in California and in the nation. In addition, members of the Asphalt Cowboys are an arm of the sheriff's department and assist in search and rescue and other emergency operations. They do fundraising for the community.

Respondent is a member of the Exchange Club, which raises money for local agencies. They honor local police officers, firefighters, and athletes. They help with scholarships for students.

**5. Good Faith**

Respondent did not understand what a true retainer is. (Std. 1.2(e)(ii).)

**6. Objective Steps**

Respondent modified his fee agreement. (Std. 1.2(e)(vii).) Respondent's trust accounting

practices have changed—he no longer uses his trust account as his personal account. He apologized to the arresting police officers in his DUI and driving on a suspended license case.

## **7. Stipulation**

Respondent entered into a partial stipulation of facts with the State Bar regarding his trust account bank records. (Std. 1.2(e)(v).)

## **B. Aggravation**

The State Bar did not establish any aggravating circumstances by clear and convincing evidence.

## **V. Discussion**

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve 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.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

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 2.2(b), which applies to respondent's violations of rule 4-100. Standard 2.2(b) provides:

Culpability of a member of commingling of entrusted funds or property with personal property or the commission of another violation of rule 4-100, Rules of

Professional Conduct, none of which offenses result in the wilful misappropriation of entrusted funds or property shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances.

Clearly, respondent's mitigation is compelling. Respondent's 32 years of discipline-free practice alone is very significant. There is no evidence of any venal intent. Moreover, respondent was candid and cooperative during the disciplinary process. Nonetheless, "our Supreme Court has [frequently] described the important function of rule [4-100] in serving to protect client's funds and property from the more severe consequences which could accidentally or intentionally result if trust property is attached, lost or misappropriated. [Citation.]" (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Accordingly, it is clear that significant discipline is appropriate.

The court is aware that, notwithstanding its language to the contrary, the minimum three-month suspension in standard 2.2(b) is not mandatory. (*Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1100.) Nonetheless, the found misconduct in this proceeding is serious and involves more than just a single violation of rule 4-100(A). Respondent rule 4-100(A) violations alone spanned more than six months (from August 2007 to March 2008). Thus, on balance the court concludes that the appropriate level of discipline to recommend is two year's stayed suspension and two years' probation on conditions, including a three-month (or 90-day) suspension in accordance with standard 2.2(b).

## **VI. Recommended Discipline**

This court recommends that respondent **VAN OLIVER KINNEY**, State Bar Number 79623, be suspended from the practice of law in the State of California for two years, that execution of the two-year suspension be stayed, and that he be placed on probation for a period of two years subject to the following conditions:

1. Kinney is suspended from the practice of law for the first 90 days of probation.

2. Kinney is to comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all of the conditions of this probation.
3. Within 30 days after the effective date of the Supreme Court order in this proceeding, Kinney must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with Kinney's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Kinney must meet with the probation deputy either in-person or by telephone. Thereafter, Kinney must promptly meet with the probation deputy as directed and upon request of the Office of Probation.
4. Kinney is to maintain, with the State Bar's Membership Records Office and 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)(1)). In addition, Kinney is to maintain, with the State Bar's Office of Probation, his current home address and telephone number (Bus. & Prof. Code, § 6002.1, subd. (a)(5)). Kinney's home address and telephone number are not to be made available to the general public unless his home address is also his official address on the State Bar's Membership Records. (Bus. & Prof. Code, § 6002.1, subd. (d).) Kinney must notify the Membership Records Office and the Office of Probation of any change in this information no later than 10 days after the change.
5. Kinney is to submit written quarterly reports to the State Bar's Office of Probation no later than January 10, April 10, July 10, and October 10 of each year. Under penalty of perjury under the laws of the State of California, Kinney must state in each report whether he has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar, and all conditions of this probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to the quarterly reports, Kinney is to submit a final report containing the same information during the last 20 days of his probation.

6. Subject to the assertion of any applicable privilege, Kinney is to fully, promptly, and truthfully answer all 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.
7. Within the first year of his probation, Kinney is to attend and satisfactorily complete the State Bar's Ethics School; and to provide satisfactory proof of his successful completion of that program to the State Bar's Office of Probation. The program is offered periodically at either 180 Howard Street, San Francisco, California 94105-1639 or at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the program must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Kinney's Minimum Continuing Legal Education ("MCLE") requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this program. (Accord, Rules Proc. of State Bar, rule 3201.)



8. Within the first year of his probation, Kinney is to attend and satisfactorily complete the State Bar's Ethics School -- Client Trust Accounting School; and to provide satisfactory proof of completion of that program to the State Bar's Office of Probation. The school is offered periodically both at 180 Howard Street, San Francisco, California 94105-1639 and at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the school must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Kinney's MCLE requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this school. (Accord, Rules Proc. of State Bar, rule 3201.)
9. This probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of this probation, if Kinney has complied with all the terms of probation, the order of the Supreme Court suspending him from the practice of law for two years will be satisfied and that suspension will be terminated.

#### **VII. Professional Responsibility Examination**

The court further recommends that respondent **VAN OLIVER KINNEY** be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and to provide proof of passage to the Office of Probation within one year after the effective date of the Supreme Court's disciplinary order in this matter. Failure to pass the MPRE within the specified time results, without further hearing, in actual suspension until passage. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; but see Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rule 321(a)(1)&(3).)

#### **VIII. California Rules of Court, Rule 9.20 & Costs**

The court further recommends that **VAN OLIVER KINNEY** 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.<sup>5</sup>

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

Dated: December 22, 2010.

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**PAT McELROY**  
Judge of the State Bar Court

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<sup>5</sup> Kinney is required to file a rule 9.20(c) compliance affidavit even if he has no clients to notify *on the date the Supreme Court files its order in this proceeding*. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)