FILED JULY 1, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	**Case No.: 07-O-14334-DFM**
	)	
JOSEPH BERNARD McHUGH, JR.,	)	
	)	
Member No. 128665,	)	**DECISION**
	)	
A Member of the State Bar.	)	

INTRODUCTION

Respondent **Joseph Bernard McHugh, Jr.** (Respondent) was originally charged here with eighteen counts of misconduct, involving a single client matter. During the trial, the State Bar asked that five of the counts be dismissed. Ten of the remaining counts include various allegations and theories of moral turpitude of willful violation of Business and Professions Code section 6106.[1] The remaining three counts are allegations that Respondent willfully violated (1) rule 4-200(A) of the Rules of Professional Conduct[2] (unconscionable fee); (2) rule 4-100(B)(3) (failure to render accounts of client funds) and (3) section 6068, subdivision (a) (failure to comply with laws – breach of fiduciary duty). As is discussed at length below, this court finds that the evidence does not provide proof of any culpability of Respondent for any of the remaining counts. Accordingly, this case is dismissed with prejudice in its entirety.

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[1] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

[2] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on July 6, 2012. It is 28 pages in length and includes 178 paragraphs of charging allegations. On August 7, 2012, Respondent filed his response to the NDC.

On August 28, 2012, the initial status conference was held in the case. At that time the case was scheduled to commence trial on October 16, 2012.

On September 13, 2012, Respondent filed a motion to continue the trial due to the Respondent's inability to obtain documents from his attorney in the civil matter involving the same issues. The State Bar filed a statement of non-opposition to that request. This court then continued the case until December 5, 2012.

In late November, 2012, the parties requested another status conference with the court, at which they indicated that another continuance was needed. During the course of that conference, this court identified a number of legal issues raised by the allegations of the NDC and requested the parties to provide briefing on those issues at or before the time of trial. This court then continued the case until March 2013.

Trial commenced on March 5, 2013, and was completed on March 18, 2013, followed by a period of post-trial briefing. The State Bar was represented at trial by Deputy Trial Counsel Ashod Mooradian and Elizabeth Gonzalez. Respondent was represented at trial by Edward Lear of Century Law Group.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC, the stipulation of undisputed facts previously filed by the parties, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 17, 1987, and has been a member of the State Bar at all relevant times.

Case No. 07-O-14334

Helen M. Sprinkle (Helen) was born in 1917. She eventually married Carl C. Sprinkle, and they had one child, Donna Sprinkle (Donna).

Helen was one of the heirs of the founder of the Farmers and Merchants Bank. On May 28, 1984, Carl and Helen created the Revocable Trust Agreement of Carl C. Sprinkle and Helen M. Sprinkle (1984 Trust). This was an estate plan to provide for the surviving spouse after the first spouse passed away. The 1984 Trust provided that, upon the death of the first spouse, the trust would be divided into two subtrusts, the first called the "A" Trust (also known as the Survivor's Trust) and the second called the "B" Trust, which consisted of enough of Carl's assets to take full advantage of his individual exemption credit that he had against estate taxes. The "B" Trust of the 1984 Trust was irrevocable. That is, the surviving spouse could enjoy all of the income generated from the assets, but could not deplete the principal assets of "B" Trust without first depleting the assets in the "A" Trust.

In 1991, Carl died and, thus, Helen became the surviving spouse and income beneficiary of the 1984 Trust. Among the assets held in the "A" and "B" Trusts were a number of shares of Farmers and Merchants Bank stock.

In 1997, Helen and her daughter, Donna, created the Helen Sprinkle Charitable Remainder Trust, dated November 19, 1997 (1997 CRT). The 1997 CRT was created with the assumption that Helen would die before Donna. Donna was named as both the trustee and the beneficiary of the trust during her life-time but, on the death of Donna, what assets remained in the trust would be distributed to designated charities. At the time that the trust was created in

1997, the charities designated to receive the benefit of the trust after Donna's death were the American Diabetes Association, the Guide Dog Foundation for the Blind, Inc., and the Friends of the Sea Otters.

Respondent had no contact with either Helen or Donna Sprinkle prior to 2002.

At some unspecified time in 2002, Respondent met an individual named Naomi Campbell (Naomi) at the office of Robert Hall, an accountant and mutual acquaintance. Naomi had a background in estate planning and financial investment, and her husband was a licensed securities broker.

Near the end of 2002, Naomi introduced Respondent to Helen and Donna. Naomi had already been working with Helen and Donna in managing their financial arrangements. Donna was a senior vice-president of Farmers and Merchants Bank. Naomi referred Helen and Donna to Respondent because he was an attorney qualified to assist them in creating trusts and other estate planning instruments. Respondent was then retained in 2002 by Helen and Donna to prepare an irrevocable insurance trust (2002 IRT). Respondent then created the 2002 IRT and, as requested, named Donna as the beneficiary.

In March 2003, Respondent was retained to draft what became "The Helen M. Sprinkle Charitable Trust" (2003 CRT). Naomi continued at that time to be a financial advisor for Helen and Donna. Donna was both the trustee of the trust and the co-beneficiary of the 2003 CRT for so long as Donna lived. Helen was also a beneficiary of the trust. On the death of both Donna and Helen, the proceeds would then go to certain designated charities.

There is no evidence of any contact between Respondent and either Helen or Donna after his creation of the 2003 CRT in 2003 until October 2005.

In 2005, Donna was diagnosed with a serious illness. She died on October 5, 2005, at the age of 55. Helen was 88-years-old at the time of Donna's passing and was in generally good health. At the time of the trial of this matter in March 2013, Helen was still alive.

On October 8, 2005, three days after Donna's death, Helen and Naomi met with Respondent to discuss legal services and other administrative services that Respondent could provide Helen regarding both Donna's estate and Helen's other estate planning issues. Pursuant to an Attorney Fee Agreement, signed by Helen and Respondent and dated October 8, 2005, Respondent was to provide: "Legal consultation and Trustee Services for the Carl C. Sprinkle and Helen M. Sprinkle [Trust] dated May 23, 1984, Survivor's Share Trust "A" Only, dated May 23, 1984; trust administration and termination services for the Estate of Donna Sprinkle; the creation of the Helen and Donna Sprinkle Foundation, and other legal consultation." Respondent's Attorney Fee Agreement set forth billing rates of $300 per hour as Respondent's normal billable rate; $190 per hour as a paralegal's rate; $125 per hour as a paralegal assistant's billable rate; and $80 per hour as a clerical rate. For purposes of dealing with Donna's personal property, including Donna's extensive collection of dolls and other collectibles, Helen directed that the "paralegal" referred to in Respondent's Attorney Fee Agreement was to be Naomi, and that the "paralegal assistant" was to be Naomi's husband, Ron Campbell (Ron). Pursuant to this Attorney Fee Agreement, Helen agreed to pay a $125,000 up-front retainer to Respondent, which she subsequently did.

On October 19, 2005, Respondent obtained Helen's signature on a "Uniform Statutory Form Power of Attorney" (Power of Attorney). In the same month, he drafted a Restatement of the "A" Trust to the 1984 Trust, which Helen subsequently executed.

After being retained in October, Respondent worked on a number of different legal issues and administrative matter related to Donna's estate and Helen's need for revised estate planning.

At the same time, Naomi was dealing with the personal property in Donna's estate. The details of these matters are discussed more fully below.

On May 18, 2006, Respondent drafted a new irrevocable charitable remainder trust on behalf of Helen (2006 CRT). Helen was the designated trustee of this trust. Respondent was designated as Successor Trustee in the event that Helen died or became incapacitated. He never served in the capacity as trustee. The "Church of God of the Twin Cities, Inc." (Church of God) was named as one of three charitable remainder beneficiaries.

After the 2006 CRT was created, Helen started to move assets from the trusts that had been created before Donna's death and place them in the new 2006 CRT trust. She also began to convert her old bank shares, which paid a very small annual dividend, into annuities based on her own life. These annuities provided a significantly larger cash flow to her. As will also be discussed in greater detail below, Respondent generally had no involvement in Helen's selections of financial investments to make, except on one occasion when he advised Helen that she was not allowed by the existing trust agreement to remove certain assets from that trust. Despite Respondent's advice, Helen went ahead and removed the assets from that trust and then placed them in her new trust. Shortly thereafter, Respondent learned that he had been replaced as Helen's attorney.

Count 1 – Section 6106 [Moral Turpitude – Scheme to Defraud]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. "Moral turpitude" has been defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Fahey* (1973) 8 Cal. 3d 842, 849, citing *In re Craig* (1938) 12 Cal.2d 93, 97; *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 73; *In re Boyd* (1957) 48 Cal.2d 69, 70.) The

paramount purpose of the moral turpitude standard is not to punish practitioners but to protect the public, the courts and the profession against unsuitable practitioners. “To hold that an act of a practitioner constitutes moral turpitude is to characterize him as unsuitable to practice law." (*In re Higbie* (1972) 6 Cal.3d 562, 570.)

In this count, the State Bar alleges:

> By obtaining Helen’s signature on his Attorney Fee Agreement three days after the death of her daughter Donna, by not disclosing that he had a personal, legal, financial, and/or business relationship with Naomi at that time, by not disclosing to Helen that Naomi was a convicted felon or that Naomi had multiple fraud judgments entered against her, by demanding a $125,000.00 retainer from Helen that was grossly disproportionate to the number of hours reasonably necessary to complete all of the tasks specified in the Attorney Fee Agreement scope of services, by creating a materially different version of the Attorney Fee Agreement that provided for a $5,000.00 retainer and a scope of services limited to Donna’s estate, by allowing Naomi to show and provide a copy of the materially different retainer to Tom and Ellyn, by charging Helen for the “paralegal” and “paralegal assistant” services of Naomi and Ron, neither of whom were qualified to be paralegals nor provided any paralegal or legal services of value to Helen, by charging for “clerk” fees for an unidentified person that Respondent had never met, by collecting $240,850 for “paralegal” and “clerical” services that were of no value, and by diverting an additional $110,348.25 to himself for “supervision” of the “paralegal,” “paralegal assistant” and “clerk”, services that Respondent never performed, Respondent participated in a scheme to defraud and overbill Helen, thereby committing an act or acts involving moral turpitude, dishonesty or corruption.”

The evidence offered by the State Bar in support of this count fails to prove any act of moral turpitude by Respondent. In many instances, the factual allegations are not supported by any evidence at trial whatsoever.

It is true that Helen, accompanied by Naomi, came to Respondent three days after the death of Donna to seek legal assistance as a result of Donna’s death. There is nothing unusual or suspicious about the timing of their appointment, and certainly nothing about it to suggest that it reflects any dishonesty on the part of Respondent. Nor was Naomi’s presence at the meeting any source of suspicion. She was known by Respondent to have been a financial advisor and close friend of Helen’s since before Respondent first met Helen in 2002. She continued to be Helen’s

financial advisor and close friend in 2003, when Respondent prepared the 2003 Charitable Remainder Trust for Helen. Respondent had no "personal, legal, financial, and/or business relationship" with Naomi that was required to be disclosed under the circumstances or at all.

At various times, the State Bar has alleged that Respondent had a duty to notify Helen of the fact that Naomi had a criminal record, including when Naomi first referred Helen to him as a prospective client and when Respondent hired Naomi to provide paralegal services on a contract basis for his office. The testimony of attorney Marshall Waller at trial was that he had been told by Naomi in mid-2005 that she had a prior conviction of grand theft and that he had shared that information with Respondent in mid-2005. Respondent testified credibly that he did not recall that conversation.

Even assuming that the conversation took place, and the parties have so stipulated, Respondent's failure to tell Helen what he had heard did not reflect dishonesty or any act of moral turpitude. At the conclusion of the trial, the court directed the parties to address a list of legal issues presented by the State Bar's allegations, including the following:

> What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of an attorney to disclose to an actual or prospective client the prior criminal record of a paralegal either
> a. Employed as an employee by that attorney; or
> b. Hired as an independent contractor by that attorney?
>
> What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of an attorney to investigate to determine the prior criminal record of a paralegal either
> a. Employed as an employee by that attorney; or
> b. Hired as an independent contractor by that attorney?

In its response, the State Bar stated that it had found no case stating that an attorney has any such duties. While the State Bar argues that this court should find that there are such duties, this court need only decide whether Respondent's failure to take such steps represents or reflects acts of moral turpitude. The court concludes that it does not.

Continuing with the string of accusations quoted above, there was no proof at trial that "multiple fraud judgments" had been entered against Naomi or that Respondent had information to that effect during the time that he was dealing with Helen.

With regard to the $125,000 retainer, as will be disclosed in greater detail below, this court finds that this retainer was refundable and was neither unconscionable nor "grossly disproportionate to the number of hours reasonably necessary to complete all of the tasks specified in the Attorney Fee Agreement scope of services." (See Count 2, below.)

Nor does this court find that the prior preparation by Respondent of a draft retainer agreement, showing a smaller scope of services and a lower required retainer fee, reflects any dishonesty on his part. The agreement was never signed by the parties; the final fee agreement provided a different scope of services and reflected Respondent's awareness of the magnitude of the work to be done; both documents showed the same billing rates for Respondent and the personnel of his office; and the draft agreement was never known by Respondent, or authorized by him, to be shown to anyone other than Helen and Naomi. Given that neither Naomi nor Tom Turk testified in this matter, there is also no clear and convincing evidence that this draft agreement actually ever was shown to anyone other than Helen and Naomi.

The suggestion that Naomi and Ron were not qualified to do the work they were directed and paid by Helen to do as paralegals is unsupported by any evidence and is not true. The state Bar's allegation that this work had no value is also unsupported by any evidence whatsoever and is not true. The same conclusion applies to the State Bar's accusation that work was done by a clerk that Respondent "never met."

Contained within the factual allegations of this count is the fact that Helen executed a Uniform Statutory Power of Attorney, granting Respondent the power to act as an agent on

Helen's behalf.[3] During the trial, the State Bar argued that Respondent, as the holder of this power, had both the power and the duty to set aside transactions effected by Helen as his principal.

At the conclusion of the trial, the court directed the parties to address a list of legal issues presented by the State Bar's allegations, including the following:

> What authority (statute and case law) exists that supports or is contrary to the State Bar's contention that a person holding a durable power of attorney (attorney-in-fact), executed by a still-competent principal, has:
>
> a. Any duty to set aside or negate a financial transaction effected by the principal based on concerns of the attorney-in-fact regarding the appropriateness of the transaction, in the absence of any specific direction by the principal to the attorney-in-fact to take such steps;
> b. Any power under the durable power of attorney to set aside or negate a financial transaction effected by the principal based on concerns of the attorney-in-fact regarding the appropriateness of the transaction, where such steps by the attorney-in-fact would be contrary to the wishes and/or instructions of the principal?

In its response to the inquiry, the State Bar cited no case supporting either of the above two propositions. While the State Bar argues that this court should find that there are such powers and duties, this court need only decide whether Respondent's failure to take steps, pursuant to the Uniform Statutory Power of Attorney, to challenge and set aside the actions of his principal, Helen, represents or reflects any act of dishonesty or moral turpitude on his part. The court concludes that it does not.

In sum, this court does not conclude that Respondent sought to overbill Helen or to defraud her in any way with regard to the billings of his office. Instead, it finds that Respondent was dealing with a wealthy, independent, and demanding client, who was insistent on having

[3] This power of attorney also named Cheryl Templeton as an alternative holder of the power. The NDC then inaccurately describes Ms. Templeton as Respondent's "employee and friend." There was no factual basis for this accusation. Ms. Templeton testified at trial that: She has never been an employee of Respondent's office. Instead, she is a state-licensed fiduciary and has been for at least 15 years. She is an active participant in the State Bar's section on trusts and estates; is a "national guardian"; and is frequently designated by attorneys as an alternative trustee for individuals having no obvious other candidates for such appointment.

certain personal matters handled in precisely the manner that she wanted – and at a cost that she was expressly willing to pay. Respondent then took extraordinary steps to make certain that his client, Helen, was aware at all times of what was happening, that she was given the option of more cost-efficient approaches, and that he documented the fact that his actions were at her direction and with her consent.

At the time that Helen sought to retain Respondent in 2005 to deal with the issues raised by Donna's death; Helen had control over a substantial amount of money; she had no close relatives; and she was concerned that her money would eventually be going to a niece and nephew on the east coast, with whom she was not particularly close and who were already the beneficiaries of their own parents' substantial estates. Worse, under the "B" Trust, Helen was unhappy that a portion of her money would be going to the distant relatives of her deceased husband, relatives that she affirmatively disliked. It was to avoid those unhappy outcomes that she began to change the manner in which her estate would eventually be distributed.

In contrast to her relationship with her distant relatives, Helen by 2005 had developed a special relationship over the past several years with Naomi. During the trial of this matter, Helen was described by more than one witness, including the attorney who replaced Respondent, as regarding and treating Naomi as though Naomi was Helen's own daughter.[4] Both before, during, and after Respondent's representation of Helen, it is clear that Helen was seeking to distribute small portions of her wealth to Naomi and her husband, undoubtedly to have the pleasure of seeing them receive it while Helen was still alive. During the course of this trial, there was passing evidence regarding other individuals in Helen's life for whom she was doing the same.

In addressing how Helen wanted the personal effects and assets of her deceased only child, Donna, to be handled, Helen was explicit in stating that she wanted that work to be done

[4] Like Respondent, this attorney also concluded that Naomi was not exercising undue influence over Helen.

by Naomi and her husband Ron. She asked that this work be paid for through Respondent's office. It was agreed that Respondent would charge $190 per hour for Naomi's work, that Naomi would receive $150 per hour from Respondent's office, and that Respondent would retain the other $40. All evidence at trial was that $190 was a reasonable hourly rate to be charged for a paralegal performing such work. A comparable payment and mark-up agreement was reached between Respondent and Helen with regard to Ron (who was the "paralegal assistant") and any other individuals who might be needed to perform the work required by Donna's estate.

Respondent was told that the value of Donna's estate was in the range of $3-5 million. He also was aware that there were trust agreements and other estate planning instruments in place that would need revision or handling. For his own time, he agreed to work at $300 per hour, a rate that was reasonable and possibly even on the low side.[5] In determining what would be a reasonable retainer, he felt that $150,000 would be sufficient and reasonable to match the expected services.

After Helen had agreed to the arrangement, Naomi went to work dealing with Donna's many belongings, including her massive doll collection. This collection was described at trial as including "thousands of dolls." The charges for the many hours being spent by Naomi seeking to organize, preserve, and dispose of the dolls quickly exceeded the $175,000 retainer.

Naomi and Ron were required to provide a log of their daily charges and efforts. When Respondent saw how much time was being spent, he complained first to Naomi, who told him that he needed to address his concerns directly with Helen. When he did just that, he suggested that it would be significantly more cost effective for Helen simply to authorize him to have the dolls sold on consignment. Rather than agree to this suggestion, Helen rebelled at it. Her message: "It's my money and I want the dolls to go to a good home." She also remained

[5] A deputy county counsel from the County of Los Angeles, who acts as a public guardian, testified that the county routinely charges $400 per hour for administering an estate.

insistent that Naomi continue to do the work, even though Respondent indicated that he felt that the expense was unreasonable and avoidable. Her response-- and continuing instruction -- was that she wanted Naomi's work to continue and that she was willing to pay for it up to a total of $400,000.

Respondent was clearly uncomfortable with the situation, but recognized that this was a decision that Helen was free to make. Nevertheless, as recounted by various witnesses during the trial, he continued to express his concerns about the situation with both Naomi and Helen, without any change in the conduct or instructions of either.

Respondent also took extraordinary steps to document the fact that this work was being done with the knowledge and approval of his client, Helen, and that she was neither incompetent nor acting under undue influence. At about the time that Helen authorized the work to continue up to the $400,000 level, Respondent had Helen agree to be evaluated by Dr. Jean Beltran, a licensed clinical psychologist experienced in such issues. Dr. Beltran examined and tested Helen on December 10, 2005, and issued a written report attesting to her competency.

Respondent also insisted that Helen sit down and review with him each page of the bills being submitted by his office for the work that had been done by Naomi on Donna's and Helen's affairs during the last billing cycle. He would approve the bill, and submit it to Helen for payment, if Helen first signed off on the bills. He even had Helen signify her approval of the bills by signing each page of them.

Naomi continued to work on Helen's matters even past the time that the cumulative bills exceeded $400,000. Respondent absorbed the cost of this excess time by paying for it out of that his portion of the funds remaining from the $400,000 after Naomi had been paid for her time and all other expenses related to Helen's matters had been paid. More significantly, Respondent continued to do legal work for Helen after that point, but stopped charging for it. He viewed his

time as having already been paid by the mark-up for Naomi's time that he had previously received.

For all of the above reasons, Respondent's actions, as alleged in this count, were not acts of dishonesty or moral turpitude and did not represent any scheme by him to defraud Helen or anyone else. This count is dismissed with prejudice.

Count 2 – Rule 4-200(A) [Unconscionable Fee]

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

In this count the State Bar alleges:

> By charging and collecting the $125,000 retainer fee from Helen that Respondent knew or was grossly negligent in not knowing was grossly disproportionate to the number of hours necessary to complete the tasks specified in the Attorney Fee Agreement scope of services, Respondent entered into an agreement for, charged, and collected an unconscionable fee.

At the time that Respondent met with Helen to discuss the proposed retention, Helen made it clear that she wanted Respondent to oversee the handling of Donna's estate; restructure the existing estate plan documents for Helen; create a Helen and Donna Sprinkles Foundation; and provide such other administrative and legal assistance as Donna might request. Donna's estate was thought to be worth approximately $3-5 million and included a significant quantity of personal (and potentially valuable) effects. Helen told Respondent that she wanted Respondent to hire Naomi and her husband to be responsible for going through, organizing, preserving, and disposing of Donna's personal effects, including Donna's substantial collection of dolls. Respondent agreed to this arrangement, and it was agreed that Respondent would bill his own

time at $300 per hour;[6] paralegals (including Naomi) at $190 per hour; and paralegal assistants at $125 per hour. This agreement was then committed to writing and executed by Helen.

As part of this agreement, Respondent required that Helen provide a significant retainer to cover the cost of the work that was going to immediately be required on the many issues, including the cost of paying for the work to be done by Naomi and Ron in dealing with Donna's physical properties. After discussing this with Helen, it was agreed that the initial retainer would be $125,000. That figure was included in the fee agreement; the money was refundable in the event that the ultimate fees did not reach that level; and Helen paid the retainer by wire transfer to Respondent's account on November 17, 2005.

As noted, the State Bar alleges that the amount of this retainer constituted an unconscionable fee. In support of that contention, the State Bar argued at trial that, because the fee agreement was silent on the issue of whether the retainer was refundable, it was presumed to be non-refundable.[7]

At the conclusion of the trial, the court directed the parties to address a list of legal issues presented by the State Bar's allegations, including the following:

> What authority (statute and case law) exists that supports or is contrary to the State Bar's contention that a retainer fee, required by a fee agreement, is <u>non-refundable</u> in the absence of language in the fee agreement specifically stating that the fee is <u>refundable</u>? In the absence of clear authority on the issue, is it the State Bar's position in this case that this court should enunciate such a legal conclusion?

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[6] In the NDC, the State Bar alleged that Respondent lacked the legal expertise to handle the issues addressed in the fee agreement. This court finds to the contrary.

[7] The agreement was not completely silent on the issue of whether the retainer was non-refundable or not. The form agreement had a box for "Non-refundable Retainer Payment" which was unchecked and for which no figure was entered. Instead, the $125,000 retainer was designated as a "Client Trust Retainer." To the extent that this agreement is even arguably ambiguous as to whether the fee is refundable, any ambiguity would normally be resolved against the drafter, here the attorney.

> What authority (statute and case law) exists that supports or is contrary to the State Bar's contention that a refundable retainer fee may be an unconscionable fee for purposes of culpability under rule 4-200 of the Rules of Professional Conduct?

In its response to the above directive and issues, the State Bar was unable to identify any statute or case law to support either contention. Instead, with regard to its contention that a retainer is non-refundable in the absence of contrary language, it cited and quoted from cases holding that, unless an advance fee "is actually a 'true' retainer, any unearned portion thereof must be returned to the client upon termination of the attorney's services." (Closing Brief, p. 4.) In this court's view, that rule of law defeats the State Bar's contention, rather than supports it.

This court declines to find that a retainer is presumed to be non-refundable to the client in the absence of language in the fee agreement making it expressly refundable. Such a presumption would be contrary to normal rules governing the interpretation of agreements; would conflict with the rules requiring attorneys to refund fees that are unearned; and, in this court's view, would be contrary to public policy.

Moreover, this court does not find under the circumstances that the amount of the $125,000 retainer was unconscionable. Helen was aware of the retainer, and she intelligently and knowing consented to it. She was aware that there was a substantial amount of work to be done under the terms of that agreement, both in dealing with her own needs and with the logistical needs and problems caused by Donna's death. Further, it was her wish and directive that the extensive work required to be done in organizing, preserving, and disposing of Donna's personal property and effects, including of the extensive doll collection, was to be done by Naomi and Ron, at billable hourly rates and markups that Helen specifically agreed to. In addition, Respondent was expected to provide extensive legal work in reviewing, revising and providing estate plan documents for Helen and handling the legal effects and transitions required by Donna's death.

All of the services provided under this agreement were billed on an hourly basis. There is no credible evidence that the services charged were not actually performed. The fact that the cost of the work subsequently performed under the agreement quickly exceeded the amount of the retainer is a further indication of the reasonableness of that retainer. This is reinforced by the fact that Helen directed that the work (and resulting expense) of organizing Donna's property continue, even after Respondent had expressed his own concern about that cost. Finally, Helen subsequently reviewed, approved, and paid, without protest, bills well in excess of this initial retainer.

This count is dismissed with prejudice.

Count 3 – Rule 4-200(A) [Illegal Fee]

In this count the State Bar alleged that the $118,348 fee charged by Respondent was illegal. During the latter portion of the trial, the State Bar asked that this count be dismissed. To formalize this court's oral order at that time, this count is dismissed with prejudice.

Count 4 – Rule 1-320(A) [Sharing Legal Fees with a Non-Lawyer]

In this count the State Bar alleged that Respondent had violated rule 1-320(A) by using money received by him pursuant to a legal fee agreement to pay for the work done by Naomi as paralegal services. During the latter portion of the trial, the State Bar asked that this count be dismissed. To formalize the court's oral order at that time, this count is dismissed with prejudice.

Count 5 – Section 6106 [Moral Turpitude]

In this count the State Bar alleges:

> By billing and collecting $400,000.00 from Helen and then characterizing $389,000.00 as expenses for which Helen paid as attorney's fees, when Respondent knew or was grossly negligent in not knowing that the $389,000.00 did not qualify as a legal and allowable deduction, all in order to misrepresent the true use of that money, for purposes of defrauding the Internal Revenue Service,

> Respondent committed an act or acts involving moral character, dishonesty or corruption.

This court declines to find that Respondent participated in any dishonest act or act of moral turpitude with regard to Helen's tax returns. Her returns were prepared by an independent accountant, and Respondent had no involvement in that process. Nor has the State Bar presented clear and convincing evidence that the tax returns prepared on Helen's behalf were not appropriate or that the expenses paid by her in administering Donna's estate were not properly deducted. On the estate tax return filed by the accountant for Donna's estate, the costs incurred and charged by Respondent and his office are listed under the heading, "Funeral and Administrative Expenses." (See Exh. 19, p. 2.) Testimony at trial indicated that every estate tax return is audited by the IRS, and there is no evidence of any complaint or challenge to the appropriateness of the reported deduction.

At the conclusion of the trial, the court directed the parties to address a list of legal issues presented by the State Bar's allegations, including the following:

> What authority (statute and case law) exists that supports or is contrary to the State Bar's contention that an attorney, who bills and collects fees for legal services, has any duty to see that those fees are not improperly deducted in a tax returned filed by the client, where that tax return was prepared by an enrolled agent and not by the attorney? (See NDC, Count 4.)

In its response, the State Bar stated that its research had not revealed any case supporting this contention. (Closing Brief, p. 12-12.) However, it then went on to state: *"The State Bar contends that this Court should determine that an attorney is not free to idly sit back and await the results of the accountant's work, but is in fact duty-bound to understand the work completed on behalf of his client for no other reason than to explain it to the client correctly."*

This court declines to adopt any such blanket obligation for attorneys in this state, especially when (like here) the attorney has neither been asked nor assumed any duty to participate in the filing of the client's tax returns. A client's tax returns are confidential,

privileged, and not automatically accessible to all attorneys representing the client. Moreover, not all attorneys, and perhaps few of them, possess the expertise in tax law sufficient to be able to assess the appropriateness of various deductions or "to explain it to the client correctly."

For all of the above reasons, this court does not conclude that Respondent's failure to interject himself into the business of Helen's tax returns constituted an act of dishonesty or moral turpitude. This count is dismissed with prejudice.

Count 6 – Section 6106 [Moral Turpitude]

In 2006, Helen asked Respondent to draft a revision to the "A" Trust so that he could be designated as a successor trustee of the trust. Respondent indicated that any such document should to be handled by another attorney. Arrangements were then made for the revision to the trust to be handled by Marshall Waller to represent Helen with regard to the proposed revision. Waller is an independent attorney and is knowledgeable about estate planning and trust issues. Respondent provided a draft of the proposed revision to Waller, who then finalized the agreement and presented it to Helen. Waller, who was called as a witness at trial by the State Bar, testified that he met personally with Helen for about two hours, went through the agreement line-by-line, and concluded that she was mentally competent. He also concluded that Helen understood the legal significance of the revision and that she wanted to go forward with it. Helen then subsequently executed the revision.

In this count the State Bar alleges that Respondent was guilty of acts of moral turpitude:

> By inducing Helen to execute the Restatement without disclosing to Helen material facts regarding 1) who actually drafted the Restatement or 2) explaining the purpose of the Restatement; by inducing Helen to sell 265 shares of her Farmers and Merchants Bank stock from the "A" Trust of the 1984 Trust and using the proceeds to purchase a Sun Life annuity that was held in the 2006 CRT and for which Ron was paid a significant commission by Sun Life due to Helen's purchase of the annuity, Respondent committed an act or acts involving moral turpitude, dishonesty or corruption.

The evidence fails to support those allegations.

With regard to the revision of the "A" Trust, as noted above, Respondent did not handle that matter. Instead, Helen was represented in the matter by attorney Waller. He met with Helen, explained the agreement, satisfied himself that she was competent, and concluded that she both understood the revision and wanted to go forward with it. Although the State Bar alleges that Respondent somehow had a duty to tell Helen that he had drafted the revision, there is no basis for concluding that any failure by Respondent to do so would be an act of moral turpitude. There was also no evidence that there was anything unusual or deceptive about the revision. It was finalized, reviewed, approved, presented, and explained to Helen by an independent attorney. That attorney also testified that he probably told Helen that the document had been drafted by Respondent.

Turning to the sale of the shares of bank stock in the "A" trust, this court finds that Respondent had no involvement whatsoever in that transaction. Helen continued to control the assets of the "A" Trust. There was no prohibition against her depleting the assets in the trust by transferring them to another trust. She did this by having the bank shares transferred in 2006 to the Helen Sprinkle Charitable Trust (2006 CRT) that she had created after Donna's death. She made arrangements to sell the shares to the bank and then used the funds to purchase an annuity from Sun Life.

While Helen did not testify in person in this matter, portions of her videotaped deposition testimony in the prior civil action were made part of the record in this proceeding. During her deposition testimony, she repeatedly stated that she did not look to Respondent to be involved in her financial decisions and that her decisions, to transfer the bank shares from the "A" trust, sell them, and then use the proceeds to purchase an annuity, were decisions that were was hers, and not Respondent's. In fact, she testified that she never talked with him about such financial matters. Respondent's testimony was to the same effect. There was no contrary evidence.

The decision to sell the bank shares was also not an unreasonable decision, whether judged at the time or in retrospect. This is true even though the sale resulted in a capital gain tax. In her deposition, Helen stated that she was aware that the sale of the stock would result in a capital gain. She had previously sold shares of this same stock held in the trust. At the time of the sale, there was little or no diversification of the assets held in the trust. The bulk of the trust corpus consisted of shares of Farmers and Merchant Bank stock. When Helen sold the stock, she received $5,800 per share. When the economy sagged, according to a bank representative who helped coordinate the sale, the value of each share went to as low as $3,000. At the time of the trial, even with the resurgence of the stock market, the value of the bank stock had only climbed back to $4,900.

The decision to then use the proceeds of the sale of the stock to purchase an annuity also was a wise decision. With the value of the bank shares sold from the trust, Helen was able to purchase an annuity paying the trust approximately $400,000 each year. In contrast, the annual total of the dividends from all of the bank shares that Helen sold had been about $60,000. Given that Helen was still alive at the time of the trial of this matter and her trust has been receiving these fixed annuity payments each year since 2006, the wisdom of this investment decision by her can hardly be characterized as an act of moral turpitude by someone else against her, especially one by Respondent.

This count is dismissed with prejudice.

<u>Count 7 – Section 6106 [Moral Turpitude]</u>

During the same time that Helen was using the 265 bank shares in the "A" Trust to purchase the Sun Life annuity, she decided to use 445 bank shares in the "B" to purchase an annuity from AIG, which annuity would also be held in the 2006 Charitable remainder Trust (2006 CRT). As always, she turned to Ron to act as the sales broker for her purchase, for which

he received a commission from the issuing insurance company. No money was received by Respondent as a result of either the sales of the stock or the purchases of the annuities.

In this count the State Bar alleges:

> By inducing Helen t sell 445 shares of Farmers and Merchants Bank stock from the irrevocable "B" Trust of the 1984 Trust and using the proceeds to purchase an AIG annuity that was held in the 2006 CRT and for which Ron was paid a significant commission by AIG due to Helen's purchase of the AIG annuity, Respondent committed an act or acts involving moral turpitude.

Once again, this court declines to reach any such finding.

As discussed above, the decisions to do the above transactions were made by Helen. As reflected in Helen's deposition testimony and the uncontroverted evidence at trial, Helen's decisions to sell the 445 bank shares and to purchase the AIG annuity were made by her and were not the result of any urging or advice by Respondent. She did not look to him for financial advice.

For this transaction, Respondent did provide Helen with strong advice, however. He advised her that it was a violation of the terms of the "B" trust for her to deplete the assets of that trust under the circumstances. While she was free to sell the bank shares, the proceeds of the sale must remain within that trust.

Helen chose to ignore Respondent's legal advice. Under the terms of the "B" trust, on Helen's death the remaining corpus would be distributed to Donna's heirs. To Helen's dismay, this would include a number of individuals who were related to Donna only through Carl's side of the family. These were people for whom Helen had considerable ill-will, and she was committed to avoiding having them receive any of "her money" after she died.[8]

[8] This desire by Helen to avoid the relatives of her deceased husband receiving anything from her estate was confirmed by both Respondent and by the attorney who replaced Respondent. Helen, as described by the successor attorney, "knew what she wanted to do."

Respondent had communicated to Helen, even in writing, that she could not deplete the "B" trust. When he protested her decision to ignore his advice with regard to the AIG policy, the eventual result was that he was replaced as counsel.

This count is dismissed with prejudice.

Count 8 – Section 6106 [Moral Turpitude]

In this count the State Bar alleged:

> By inducing Helen to liquidate approximately $1,000,000.00 of other assets held outside of the 1984 Trust and using the proceeds to purchase the Sun Life annuity II that was held in the 2006 CRT and for which Ron was paid a significant commission by Sun Life due to Helen's purchase of the annuity, Respondent committed an act or acts involving moral turpitude.

During the latter portion of the trial, the State Bar asked that this count be dismissed. To formalize the court's oral order at that time, this count is dismissed with prejudice.

Count 9 – Section 6106 [Moral Turpitude]

In this count the State Bar alleges:

> By not disclosing to Helen that Ron was paid a significant commission due to Helen's purchase of the two Sun Life annuities and the one AIG annuity and by causing the liquidation of assets from the "A" Trust and the irrevocable "B" Trust of the 1984 Trust and the liquidation of Helen's investment accounts and assets held outside the 1984 Trust, all to fund the purchase of the unsuitable Sun Life and AIG annuity investments for Helen which would then be held in the 2006 CRT which was irrevocable and benefitting the Church of God, Respondent committed an act or acts involving moral turpitude, dishonesty or corruption.

As discussed above, Respondent was not involved in Helen's decisions to purchase any of the referenced annuity products. Nor was he involved in Helen's decision as to which charity to name as the eventual beneficiary of the charitable remainder trust.

With regard to Ron's receipt of a commission, there is no evidence that Helen was unaware, surprised, or unhappy that Ron, the person acting as the salesperson for her purchases of these products, would be receiving a commission from the issuing insurance

company as a result of the transactions. With regard to Respondent, he received no money or other compensation from the transactions, and it is also unclear whether either Ron or Naomi was working for Respondent's office at the time of each of these transactions.

At the conclusion of the trial, the court directed the parties to address a list of legal issues presented by the State Bar's allegations, including the following:

> What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of Respondent to disclose to Helen Sprinkles the fact that Ron Campbell was receiving a commission of annuities or other insurance products sold by Campbell? (See, e.g., NDC, paragraph 138.)

In its response to this directive, counsel for the State Bar stated that it had not found any case indicating that Respondent had such a duty. The response also stated that "the attorney may not have a duty to inform his client regarding the receipt of commissions by an independent third party." (Closing Brief, pp. 15-16.)

There is no basis for concluding that Respondent's failure to tell Helen that Ron was receiving a commission on the annuity products that he was selling, or any of the other allegations above, constituted any act of dishonesty or moral turpitude on Respondent's part.

This count is dismissed with prejudice.

<u>Count 10 – Section 6106 [Moral Turpitude]</u>

In this count the State Bar alleged:

> By misrepresenting to Helen that her income would be enhanced and the value of her estate would be increased thereby inducing Helen to purchase three annuities that were not suitable for her estate, when Respondent knew or was grossly negligent in not knowing that this representation was false, Respondent committed an act or acts involving moral turpitude, dishonesty or corruption.

As discussed above, the evidence at trial showed that the annuities purchased by Helen were financially very good investments. The only evidence to the contrary was expert testimony

offered by the State Bar in the early portion of the trial. Each of the experts called by the State Bar, however, had been an expert hired and prepared by the attorney who had previously sued Respondent.[9] Their bias and advocacy in this matter was apparent from the tone and substance of their testimony. On cross-examination regarding their opinions, their credibility and the persuasiveness of their opinions waned dramatically. By way of example, the expert who criticized Helen's decision to purchase the annuities justified that assessment by opining that all annuities are bad investments.

During the latter portion of the trial, the State Bar asked that this count be dismissed. To formalize the court's oral order at that time, this count is dismissed with prejudice.

Count 11 – Section 6106 [Moral Turpitude]

In this count the State Bar alleges:

> By and through all of the transactions, including but not limited to those alleged in paragraphs 90, 93 and 96, which resulted in Helen incurring $1,409,809 in federal and California state tax liability as well as personal liability to the heirs of the 1984 Trust, Respondent committed an act or acts involving moral turpitude, dishonesty or corruption.

As discussed above, the fact that Helen incurred a capital gain tax as a result of her decision to sell the bank shares was a cost of business that she testified that she understood at the time that she would incur. Given the capital loss that she avoided and the financial gain that she achieved, it was a business decision that should be applauded. It was not, however, a business decision for which Respondent had any responsibility or in which he had any involvement.

With regard to Helen's potential liability to the potential beneficiaries of the trust as a result of transferring assets out of the "B" Trust, that risk still remains a complete hypothetical.

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[9] At trial it was disclosed that this lawsuit went on for four years and included numerous depositions, including the many days of videotaped deposition of Helen Sprinkle. It was also disclosed that the case was eventually settled by a payment by Respondent's insurance company of $20,000. The court draws no conclusions regarding the merits of this case from either the filing of that lawsuit or the resolution of it.

Helen is still alive. There is no evidence that any negative consequences have resulted to Helen at all as a result of her actions.

More significantly, any potential liability that Helen might have as a result of her moving those assets is not the result of any act of moral turpitude by Respondent. Instead, it is the result of her refusal to follow his advice.

This count is also dismissed with prejudice.

Count 12 – Section 6106 [Moral Turpitude]

In 1997, Helen and her daughter, Donna, created the Helen Sprinkle Charitable Remainder Trust, dated November 19, 1997 (1997 CRT). The 1997 CRT was created with the assumption that Helen would die before Donna. Donna was named as both the trustee and the beneficiary of the trust but, on the death of Donna, what assets remained in the trust would be distributed to designated charities.

At the time that the trust was created in 1997, the charities designated to receive the remainder of the trust after Donna's death were the American Diabetes Association, the Guide Dog Foundation for the Blind, Inc., and the Friends of the Sea Otters. Those charities had been picked by Donna, rather than by Helen. Helen, however, retained the power to change the designation of the charities ultimately benefitting from the trust; and on September 23, 2005, while Donna was still alive but shortly before her death, Helen replaced the above charities with the Church of God. At the time that Helen made that decision, Respondent was not representing Helen or Donna in any way. Further, he had no involvement in the decision by Helen, and the decision did not benefit him in any way. While Naomi and her husband were involved in the decision, neither of them was working for Respondent at the time and never had.

Less than two weeks after the above decision, Donna died at the age of 55.

Three days after Donna's death, Helen, accompanied by Naomi, contacted Respondent about becoming involved in handling the many issues and problems created by Donna's death. After agreeing on October 8, 2005, to assist Helen in the many issues resulting from Donna's death, Respondent learned that Naomi's brother was the pastor of the Church of God. He then discussed with Helen her decision to change the designation of charities and was assured by Helen that such was her actual wish. As Helen explain her decision, rather than have the money in the 1997 CRT go to a very large charitable organization, where very little benefit of the money would go directly to people needing assistance, Helen felt that the money would be better spent by going to the church, which assisted people in need every day.

In addition, as previously discussed, Respondent felt that it was prudent to have Helen evaluated by an outside medical consultant with regard to her mental competence to be making decisions regarding her finances and estate planning. As a result, he obtained the name of a recommended clinical psychologist, Dr. Jean Beltran, who conducted an evaluation of Helen in December 2005. Dr. Beltran concluded, "It is my professional opinion that Mrs. Sprinkle can make rational decisions about her financial and property affairs at this time, even though she has a depressed mood."

One of the immediate problems created by Donna's death was the fact that there was no named successor trust to the 1997 CRT. While Donna had been alive, she had retained a third-party administrator, Renaissance Administrators, to actually administer the trust's assets. Because of Donna's death, the terms of the trust required that the trust assets now needed to be transferred by the trustee to the designated charity. Because the trust agreement provided for no successor trustee, Renaissance acted unilaterally, pursuant to the terms of the trust agreement, to designate Respondent as the interim trustee after it learned that he had been hired to handle

Donna's estate. Thereafter, on January 5, 2006, Respondent was formally appointed by Helen to be the trustee of the 1997 CRT.

At the end of March 2006, Respondent, as trustee, caused the assets of the 1997 CRT, specifically two Fiserv/AssetMark accounts totaling approximately $279,525.79, to be transferred to the Church of God. At the same time, Respondent also liquidated another asset of the 1997 CRT, the American Equity Investment Life Insurance policy, and received approximately $275,880.98, which Respondent initially deposited into his client trust account and then transferred to the Church of God, the trust beneficiary.

In this count the State Bar alleges:

> By inducing Helen or causing Helen to be induced to sign an amendment to the 1997 CRT which eliminated the original charitable beneficiaries and in their place named the Church of God as the sole charitable beneficiary and by transferring $555,406.77 of the assets of the CRT to the Church of God, all to the detriment of Helen but to the benefit of Respondent, Naomi and Naomi's family, Respondent committed an act or acts involving moral turpitude.

Once again, the evidence fails to support the State Bar's allegations of moral turpitude.

With regard to Helen's decision to replace the original charities designated in the 1997 CRT, this decision was done at a time when Respondent was not representing Helen and before Naomi ever went to work for his office. Respondent had no awareness of this decision at the time and no involvement in it. There is no basis for any conclusion that it represents an act of moral turpitude or any other breach of duty by him.

With regard to the transfers of trust assets to the Church of God, the beneficiary of the policy who was then entitled to receive the benefits, Respondent, as trustee, was obligated to make those transfers. He discussed the matter with Renaissance, which also concurred that he transfer the assets.

The State Bar contends that Respondent had a duty to refuse to pay the proceeds of the trust to the Church of God and instead interplead the funds with a superior court, even though no

one was claiming any competing entitlement to the funds. It argues that Respondent's failure to do so was an act of moral turpitude. This court disagrees. Respondent had previously assured himself that Helen was competent, that she truly desired to change the beneficiary of her trust, that she had a legal right to do so, and that she was not acting under undue influence of anyone else. He had also confirmed that Helen had her own good reason for wanting to make the beneficiary change. Under the terms of the trust, he had an obligation to transfer the remaining assets to the designated charity. There had also been no competing demand for the assets made by any other person or entity.

At the conclusion of the trial, the court directed the parties to address a list of legal issues presented by the State Bar's allegations, including the following:

> What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of an attorney to investigate whether a client's stated wishes regarding the disposition of property owned or controlled by that client are the result of undue influence?
>
> What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of an attorney to investigate whether a client's stated wishes regarding the disposition of property owned or controlled by that client are the result of competence or incompetence of the client?
>
> What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of Respondent in this matter to file an interpleader action regarding funds ostensibly owed to the Church of God, based merely on the possibility that the designation of that charity as the beneficiary of such funds was a result of undue influence on the Helen Sprinkles, where there had been no actual conflicting demands regarding the disposition of those funds?

In its response to these questions, the State Bar reported that it had found no case that states that there is any such duty described in the above three inquiries. Instead, the State Bar's response indicated that it might even be a breach of fiduciary duty for the attorney to take affirmative steps to challenge his client's competence or actions, such as filing a conservatorship action without the consent of the client.

As further indication that an attorney has no affirmative duty to challenge the expressed wishes of his client, Respondent's counsel cited in his response to the cases of *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, and *Boranian v. Clark* (2004) 123 Cal.App.4th 1012, which clearly indicate the absence of any such duty. As stated in the *Boranian* decision:

> In resolving the issue now before us, we emphasize the basic principle that while out of an agreement to provide legal services to the testator, a duty also arises to act with due care with regard to the interests of the *intended* beneficiary, *the scope of duty owed to the beneficiary is determined by reference to the attorney-client relationship*. The primary duty is owed to the testator-client, and the attorney's paramount obligation is to serve and carry out the intention of the testator. Where, as here, the extension of that duty to a third party could improperly compromise the lawyer's primary duty of undivided loyalty by creating an incentive for him to exert pressure on his client to complete her estate planning documents summarily, or by making him the arbiter of a dying client's true intent, the courts simply will not impose that insurmountable burden on the lawyer. (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray, supra,* 109 Cal.App.4th at p. 1298; *Radovich v. Locke-Paddon, supra,* 35 Cal.App.4th at p. 965; *Ventura County Humane Society v. Holloway, supra,* 40 Cal. App. 3d at pp. 904–905.)
>
> Under the rule announced in *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, supra,* 109 Cal.App.4th at page 1298, Clark's sole duty was to Farris, and he did not owe a duty to Farris's beneficiaries to evaluate or ascertain his client's capacity to make a new will. As *Moore* explains, a lawyer "who is persuaded of the client's testamentary capacity by his … own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty to the testator[, and he] should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will." *Id.* at p. 1299 [135 Cal.Rptr.2d 888], italics omitted.) We add to this our own observation that a lawyer who is persuaded of his client's intent to dispose of her property in a certain manner, and who drafts the will accordingly, fulfills his duty of loyalty to his client and is not required to urge the testator to consider an alternative plan in order to forestall a claim by someone thereby excluded from the will (or included in the will but deprived of a specific asset bequeathed to someone else).

(123 Cal.App.4th at pp. 1019-1020.)[10]

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[10] Oddly, counsel for the State Bar did not disclose these two adverse cases in its response to the above inquiry, even though the cases had been identified by name by expert witness, Marshal Oldman, during his testimony at trial and cited by that witness as standing for the proposition that Respondent did not have the duty now claimed by the State Bar.

Here, for Respondent to have unilaterally initiated some formal adverse action, challenging the express wishes and actions of his client Helen, would have been akin to the conduct that the State Bar described above as a potential breach of an attorney's fiduciary duties. This court declines to find that an attorney's duty of loyalty requires such an act of disloyalty.

This court also heard persuasive expert testimony that, were a trustee to take steps to initiate litigation involving trust assets in the absence of any actual conflicting demands over those assets, it might also be deemed a breach of the trustee's duty not to dissipate the assets of the trust.

The evidence fails to prove any act of moral turpitude. This count is dismissed with prejudice.

Count 13 – Section 6106 [Moral Turpitude]

In 2002, Respondent drafted for Helen and Donna the 2002 Irrevocable Insurance Trust. This trust was designed to benefit Donna on the death of Helen. The trust was based on the assumption that Donna would not predecease Helen, which proved not to be the case.

To fund the trust, a policy was purchased by Helen from AIG. Ron was the salesman of the policy and, of course, received a commission on the sale. There is no evidence that Respondent was involved in the decision on how to fund the trust, including the decision to purchase the AIG policy. Once again, Helen's deposition testimony was that she did not look to Respondent for financial advice on matters like this.

The AIG policy insured the life of Helen. When Donna died, there was no longer any reason for Helen to continue to pay for the policy, since Donna was no longer around to eventually benefit from it. Rather than merely allow the policy to lapse, the new beneficiaries of the trust, the niece and nephew on the east coast, were consulted as to whether they wanted to keep the policy in force by continuing to pay the premiums on it. They did not. Helen and

Naomi then seized on the idea of Naomi becoming the owner of the policy and keeping it in force by paying the premiums on it. A form transferring ownership of the policy from the trust to Naomi was then prepared and forwarded to AIG for action. Respondent was involved in this transaction, but only to the extent of notarizing Helen's signature on it.

Unfortunately, as Respondent was notarizing the signature in 2005, he failed to recall that Helen was not designated as the successor trustee of the trust. As a result, she was not entitled to transfer the policy from the trust. Her only option was to allow the policy to lapse for non-payment of the premium.

In this count the State Bar alleges:

> By drafting the 2002 Insurance Trust and permitting it to be used as a vehicle for the collection of an undisclosed and significant commission by Ron; by inducing Helen or causing Helen to be induced to purchase an AIG policy in the amount of $612,817.00 sold by Ron; by aiding Naomi to obtain ownership of Helen's AIG Life Insurance Policy whereby Naomi diverted all the assets of the 2002 Insurance Trust to the Church of God, all to the detriment of Helen, but to the benefit of Respondent, Naomi and Naomi's family, Respondent committed an act or acts involving moral turpitude, dishonesty or corruption.

The evidence fails to prove these allegations of moral turpitude by Respondent. As noted above, Respondent had no involvement in the purchase of the AIG policy. The allegations that the Church of God was a beneficiary of the trust or that Respondent benefitted from the AIG policy in any way are completely unsupported by any evidence at trial and untrue.

While it is true that Respondent notarized Helen's effort to salvage some value from the policy by transferring it to Naomi, rather than merely allowing the policy to lapse, his failure to recall the terms of the trust agreement at that time falls far short of proving any act of dishonesty or moral turpitude by him. Given that neither Helen nor the beneficiaries had any desire to maintain the policy in force, it cannot be concluded that seeking to transfer the policy to Naomi resulted in any harm to them. Had this transfer not occurred, the policy would merely have lapsed.

This count is dismissed with prejudice.

Count 14 – Section 6106 [Moral Turpitude]

In this count the State Bar alleges:

> By drafting the 2003 CRT on behalf of Helen but paid for by Naomi; by using $149,154.09 from the 2003 CRT to purchase an Employee's Life annuity thereby causing the 2003 CRT to be used as a vehicle for the collection of an undisclosed significant commission by Ron; by inducing Helen to allow Respondent to become the successor trustee of the 2003 CRT; by never providing Helen with an accounting of the 2003 CRT after the purchase of the Employee's Life Annuity; and by allowing Naomi to become the acting Trustee if the 2003 CRT, all to the detriment of Helen but to the benefit of Respondent, Naomi and Naomi's family, Respondent committed an act or acts involving moral turpitude, dishonesty or corruption.

Respondent, at the request of Helen and Donna, drafted the 2003 Helen Sprinkle Charitable Remainder Trust (2003 CRT). Donna was both the trustee of the trust and the beneficiary of it so long as Donna lived. Helen was also a beneficiary of the trust. On the death of both Donna and Helen, the proceeds would go to then designated charities. There is no evidence that the terms of this trust were in any way unusual or that they departed from the wishes and instructions of Helen and Donna. They certainly do not support any allegation of an act of moral turpitude by Respondent.

The 2003 CRT was funded by an annuity purchased in June 2003 from Midland Life. Respondent was not involved in any way in that transaction. He had no duty to disclose to anyone the fact that Ron Campbell was receiving a commission on the sale, and there is no evidence suggesting that Donna and Helen were not well aware of that fact.

The Midland life annuity was based on the life of Donna as the annuitant. (Exh. 59, p. 1.) As a result, when Donna died, Midland had no further obligation to pay the annuity benefit. Donna's death also meant that there was no trustee for the trust.

Donna had previously contracted with Renaissance to administer this trust. Renaissance then exercised its authority to appoint Respondent as the interim trustee. On January 5, 2006, Helen appointed him as the new trustee. In that capacity, Respondent contacted Midland to have it disburse any funds owed to the trust on the death of the annuitant.

When the funds were received from Midland, there was a need to invest them.

Helen then applied in March 2006 to Employees Life for an annuity on her own life. The application provided that the 2006 CRT would be the owner of the annuity. Such an annuity would generate income for Helen and the trust for the remainder of her life. When Employees Life agreed to sell the annuity to the trust, Respondent was directed to purchase it with the proceeds of the Midland annuity and did so. That was his only involvement in the purchase of that annuity. While Ron again acted as the securities broker handling the sale, and presumably received a commission from the issuing company as a result of that transaction, there is no evidence that Helen was unaware of that fact.

The State Bar argues in its post-trial brief, "Helen already had an annuity from Midland in the 2003 CRT and did not need to sell and purchase another annuity." (Closing Brief, p. 23.) Based on this belief, it then accuses Respondent of effecting the unnecessary transaction for his own benefit. This argument reflects the State Bar's complete misunderstanding of the history of the trust. The Midland annuity was on the life of Donna. She had died. As a result, that annuity was no longer paying any money as an annuity benefit. In contrast, the Employees annuity was on the life of Helen. No prudent person would have failed to have secured the cash surrender value of Midland

annuity at the time of Donna's death and then reinvest that money in another income-generating security. Helen was alive then, and she still is.

This count is dismissed with prejudice.

Count 15 – Rule 3-310(B)(2) [Conflict – Relationship with a Party or Witness]

In this count the State Bar alleged:

> By agreeing to represent Helen without first disclosing to Helen that he had a legal, business, financial, professional, and/or personal relationship with Naomi, Respondent accepted or continued representation of a client without providing written disclosure to the client that Respondent previously had a legal, business, financial, professional, or personal relationship with a party in the same matter, which Respondent knew or was grossly negligent in not knowing would substantially affect Respondent's representation.

As previously indicated, Naomi had been working with Helen and Donna as a financial advisor well prior to Respondent being introduced by Naomi to them as prospective clients. At the time of this introduction, Respondent had no legal, business, financial and/or personal relationship with Naomi.

During the latter portion of the trial, the State Bar asked that this count be dismissed. To formalize the court's oral order at that time, this count is dismissed with prejudice.

Count 16 – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

In this count the State Bar alleges:

> By failing to provide Helen an accounting for the 1984 Trust, the 1997 CRT, the 2002 Insurance Trust, the 2003 CRT and the 2006 CRT, Respondent failed to render appropriate accounts to a client regarding all funds coming into Respondent's possession.

At the conclusion of the trial, the court directed the parties to address a list of legal issues presented by the State Bar's allegations, including the following:

> What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of an attorney to provide an accounting of transactions by a trustee (other than the attorney) of a trust, which transactions that the attorney "caused to occur"? (NDC, paragraph 89.)

What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of Respondent to provide an accounting to Helen Sprinkles regarding the 1997 CRT? (See NDC, paragraph 116.)

What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of Respondent to provide an accounting to Helen Sprinkles regarding the 2002 Insurance Trust? (See NDC, paragraph 130.)

What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of Respondent to provide an accounting to Helen Sprinkles regarding the 2003 CRT? (See NDC, paragraph 144.)

What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of Respondent to provide an accounting to Helen Sprinkles regarding the 1984 Trust? (See NDC, paragraph 152.)

What authority (statute and case law) exists regarding the existence or non-existence of any duty on the part of Respondent to provide an accounting to Helen Sprinkles regarding the 2006 CRT? (See NDC, paragraph 152.)

In its response, the State Bar referred to rule 4-100(B)(3). In addition, it referred to various Probate Code provisions with regard to a trustee's obligations to report to the beneficiaries of the trust, including sections 16062(a) and 16064, which provide various different exceptions to the reporting obligation.

The evidence offered by the State Bar regarding Respondent's alleged failures to report was neither clear nor convincing. In its closing brief, the State Bar makes clear that it relies on Respondent's testimony, during which he sought to discuss for each of the above trusts whether or not he had a duty <u>as a trustee</u> to provide an accounting to Helen. During the course of that testimony, Respondent referred to the fact that Helen was not a beneficiary of some of the trusts, and, hence, would not be entitled to receive an accounting from the trustee. At other times, he referred to accountings for the trusts being routinely provided by Renaissance, the administrator of the account, and provided to Helen, either through Respondent or with his knowledge. For other trusts, he stated that he was not the trustee of the trust and, as a result, had no duty to

provide an accounting for the trust. None of this examination was focused on Respondent's duties to account either as an attorney or only for funds passing through his client trust account.

This count is dismissed with prejudice.

Count 17 – Business and Professions Code Sections 6068(a) [Failure to Comply with Laws – Breach of Fiduciary Duty)]

Section 6068, subdivision (a), makes it the duty of an attorney "[t]o support the Constitution and laws of the United States and of this state."

In this count the State Bar incorporates all of the preceding allegations of NDC, including everything included in Counts One through Sixteen, and then alleges:

> As set forth above, on or about October 19, 2005, Respondent obtained Helen's signature on a "Uniform Statutory Form Power of Attorney" ("Power of Attorney"). The Power of Attorney granted Respondent, or alternatively Cheryl Templeton, Respondent's employee and friend, a stranger to Helen, sweeping powers, including the power to conduct estate, trust and other beneficiary transactions, transfer Helen's real and personal property, and conduct banking transactions on Helen's behalf. Therefore, the Power of Attorney gave Respondent broad powers to protect Helen's financial interests and prevent any third party from taking advantage of Helen financially.
>
> Respondent did not employ these broad powers to protect Helen's financial interests, nor did Respondent, consistent with his fiduciary obligations as an attorney and/or trustee, work to protect Helen's assets from theft, loss, other financial damages, or penalties, fees, fines and assessments from the taxing authorities of the United States and/or the State of California.
>
> Respondent breached his fiduciary duty to Helen by failing to disclose to Helen the true nature of Respondent's relationship with Naomi, Naomi's felony conviction for four counts of grand theft against elderly people and Naomi's multiple civil judgments for fraud and/or wrongful conversion against elderly people.
>
> Respondent breached his fiduciary duty to Helen by requesting and receiving an up-front retainer of $125,000.00 when Respondent knew or was grossly negligent in not knowing that said retainer was grossly disproportionate to the number of hours necessary to complete the tasks specified in the Attorney Fee Agreement scope of services.

Respondent breached his fiduciary duty to Helen by agreeing to provide legal services for transactions that Respondent knew or was grossly negligent in not knowing that he lacked the expertise to perform.

Respondent breached his fiduciary duty to Helen, between on or about October 2005 and on or about January 2006, by billing Helen a total of $407,683.75, of which $363,882.00 of the total amount billed was for “paralegal services” by Naomi and Ron who were not qualified to be paralegals and “clerical fees” for services by a non-existent person.

Respondent breached his fiduciary duty to Helen when Respondent disbursed an additional $110,348.25 to himself, not for services he performed on behalf of Helen, but rather for Respondent’s purported “supervision” of the paralegal, the paralegal assistant and the non-existent clerk when Respondent provided no such supervision.

Respondent breached his fiduciary duty to Helen when Respondent billed and collected $400,000.00 from Helen which Respondent then characterized $389,000.00 as attorneys fees when Respondent knew or was grossly negligent in not knowing did not qualify a legal and allowable deduction, in order to misrepresent the true use of that money and thereby defrauding the Internal Revenue Service involving Helen in criminal conduct as well as exposing her to civil penalties, fines and fees.

Respondent breached his fiduciary duty to Helen when Respondent hired Waller to present the restatement to Helen because by naming himself as trustee in the Restatement Respondent created an impermissible conflict of interest.

Respondent breached his fiduciary duty to Helen when Respondent failed to disclose to Helen that Waller’s pre-existing relationship relationship with Naomi and Ron was a conflict of interest.

Respondent breached his fiduciary duty to Helen when Respondent failed to tell Helen that the Church of God’s president and head pastor, the treasurer and the secretary were Naomi’s brothers and sister.

Respondent breached his fiduciary duty to Helen when Respondent failed to disclose to Helen that Ron was paid a significant commission for selling the Sun Life annuity to Helen.

Respondent breached his fiduciary duty to Helen when Respondent failed to disclose to Helen that Ron was paid a significant commission for selling the AIG Life annuity to Helen

Respondent breached his fiduciary duty to Helen in the purchase of the Sun Life and AIG annuities because as a result of these transactions Helen ultimately incurred $1,409,809.00 in federal and California state tax liability as well as personal liability for Helen to the heirs of the 1984 Trust.

> Respondent breached his fiduciary duty to Helen when Respondent represented to Helen that the purchase of insurance policies and annuities would enhance her income and add to the value of her estate, which was false, thereby inducing Helen to sell 265 shares and then 445 shares of Farmers and Merchants Bank stock and allow the liquidation of other investment amounts.
> Respondent breached his fiduciary duty to Helen when Respondent eliminated the original charitable beneficiaries of the 1997 CRT and in their place named the Church of God as the sole charitable beneficiary, transferring $555,406.77 of the assets of the 1997 CRT to the Church of God.
>
> Respondent breached his fiduciary duty to Helen when Respondent aided Ron in receiving an undisclosed and significant commission for Helen's purchase of the AIG Life Insurance Policy and aiding Naomi to obtain ownership of Helen's AIG Life Insurance Policy, divert all the assets of the 2002 Insurance Trust and transfer the assets from the 2002 Insurance Trust to the Church of God.
>
> Respondent breached his fiduciary duty to Helen when Respondent drafted the 2003 CRT on behalf of Helen but was paid by Naomi who then used $149,154.09 from the 2003 CRT to purchase an Employee's Life annuity for which Ron was paid an undisclosed significant commission.
>
> Respondent breached his fiduciary duty to Helen when Respondent induced Helen to allow Respondent to become the successor trustee of the 2003 CRT.
>
> Respondent breached his fiduciary duty to Helen when Respondent aided and allowed Naomi to become the acting Trustee of the 2003 CRT.
>
> By committing all of the above-mentioned acts, Respondent breached his fiduciary duties that he owed to Helen and failed to support the Constitution and laws of the United States and of this State.

This count merely recasts all of the allegations of misconduct, discussed above, and asks this court to conclude that Respondent violated his fiduciary duties and, hence, "failed to support the Constitution and laws of the United States and this state."

For all of the reasons discussed above, this court concludes that the evidence, and in many cases the law, fails to provide proof of any culpability by Respondent. Accordingly, this count is dismissed with prejudice.

Count 18 – Section 6106 [Moral Turpitude – Scheme to Defraud]

In this count the State Bar incorporates all of the preceding allegations of NDC, including everything included in Counts One through Seventeen, and then alleges:

> By billing Helen for the "paralegal" and "paralegal assistant" services of Naomi and Ron, neither of whom were qualified to be paralegals nor provided any paralegal or legal services of value to Helen; by charging Helen for "clerk" fees for an unidentified person that Respondent had never met; by charging and collecting Helen a $125,000.00 retainer fee; by charging and collecting Helen $110,348.25 in attorney's fees that are not tied to any legal service Respondent performed; by collecting $400,000 from Helen and then characterizing $389,000.00 as expenses for which Helen paid as attorney's fees, when Respondent knew or was grossly negligent in not knowing that the $389,000.00 did not qualify as a legal and allowable deduction; by splitting the "paralegal" $190.00 per hour billable hour with Naomi, by inducing Helen to execute the Restatement without disclosing to Helen material facts regarding 10who actually drafted the Restatement or 2) explaining the purpose of the Restatement; by inducing Helen to sell 265 shares of her Farmers and Merchants bank stock from the "A" Trust of the 1984 Trust and using the proceeds to purchase a Sun Life annuity that was held in the 2006 CRT and for which Ron was paid a significant commission by Sun Life due to Helen's purchase of the annuity; by inducing Helen to sell 445 shares of Farmers and Merchants Bank stock from the irrevocable "B" Trust of the 1984 Trust and using the proceeds to purchase an IG annuity that was held in the 2006 CRT and for which Ron was paid a significant commission by AIG due to Helen's purchase of the AIG annuity; by inducing Helen to liquidate approximately $1,000,000.00 of other assets held outside of the 1984 Trust and using the proceeds to purchase the Sun Life annuity II that was held in the 2006 CRT and for which Ron was paid a significant commission by Sun Life due to Helen's purchase of the annuity; by not disclosing to Helen that Ron was paid a significant commission due to Helen's purchase of the two Sun Life annuities and the one AIG annuity; by causing the liquidation of assets from the "A" Trust and the irrevocable "B" Trust of the 1984 Trust and the liquidation of Helen's investment accounts and asset held outside the 1984 Trust, all to fund the purchase of the unsuitable Sun Life and AIG annuity investments for Helen which would then be held in the 2006 CRT which is irrevocable and benefitting the Church of God; by misrepresenting to Helen that her income would be enhanced and the value of her estate would be increased thereby inducing Helen to purchase three annuities that were not suitable for her estate, when Respondent knew or was grossly negligent in not knowing that this representation was false; by causing Helen to incur $1,409,809.00 in federal and California state tax liability as well as personal liability to the heirs of the 1984 Trust; by inducing Helen or causing Helen to be induced to sign an amendment to the 1997 CRT which eliminated the original charitable beneficiaries and in their place named the Church of God as the dole charitable beneficiary and transferring $555,406.77 of the assets of God, all to the detriment of Helen but to the benefit of Respondent, Naomi and Naomi's family; by drafting the 2002 Insurance Trust and permitting

it to be used as a vehicle for the collection of an undisclosed and significant commission by Ron; by inducing Helen or causing Helen to be induced to purchase an AIG policy in the amount of $612,817.00 sold by Ron; by aiding Naomi to obtain ownership of Helen's AIG Life Insurance Policy whereby Naomi diverted all the assets of the 2002 Insurance Trust; by aiding Naomi in the transfer of assets from the 2002 Insurance trust to the Church of God, all to the detriment of Helen but to the benefit of Respondent, Naomi and Naomi's family; by drafting the 2003 CRT on behalf of Helen but paid for by Naomi; by using $149,154.09 from the 2003 CRT to purchase an Employee's Life annuity thereby causing the 2003 CRT to be used as a vehicle for the collection of an undisclosed significant com mission by Ron; by inducing Helen to allow Respondent to become the successor trustee of the 2003 CRT; by never providing Helen with an accounting of the 2003 CRT after the purchase of the Employee's Life Annuity; by allowing Naomi to become the acting Trustee of the 2003 CRT, all to the detriment of Helen but to the benefit of Respondent, Naomi and Naomi's family; by agreeing to represent Helen without first disclosing to Helen that he had a legal, business, financial, professional, and/or personal relationship with Naomi, Respondent accepted or continued representation of a client without providing written disclosure to the client that Respondent previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, which Respondent knew or was grossly negligent in not knowing would substantially affect Respondent's representation; and by failing to provide Helen an accounting for the 1984 Trust, the 1997 CRT, the 2002 Insurance Trust, the 2003 CRT and the 2006 CRT, Respondent participated in a scheme to defraud Helen, thereby committing an act or acts involving moral turpitude, dishonesty or corruption.

This count merely recasts all of the allegations of misconduct, discussed above, and asks this court to conclude that they collectively show that Respondent sought to defraud Helen and was guilty of acts of moral turpitude.

For all of the reasons discussed above, this court concludes that the evidence, and in many cases the law, fails to provide proof of any dishonesty, act of moral turpitude or other culpability by Respondent. Accordingly, this count is dismissed with prejudice.

CONCLUSION

Because the court has found that Respondent **Joseph Bernard McHugh** is not culpable of the charged misconduct, this entire proceeding is **DISMISSED WITH PREJUDICE**. In addition, because Respondent has been exonerated of all charges following a trial on the merits, he may file a motion seeking reimbursement from the State Bar for the reasonable expenses,

other than fees for attorneys or experts, of preparing for trial as authorized by Business & Professions Code section 6086.10, subdivision (d). (See Rules Proc. of State Bar, rule 5.131.)

Dated: July _____, 2013

DONALD F. MILES
Judge of the State Bar Court