PUBLIC MATTER – DESIGNATED FOR PUBLICATION

FILED OCTOBER 3, 2012

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

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| In the Matter of | ) | Case Nos. 09-O-10499 (10-O-03144; |
| | ) | 10-O-09819; 10-O-10285); 09-O-12479 |
| JAMES VINCENT REISS, | ) | (Cons.) |
| | ) | |
| A Member of the State Bar, No. 128020. | ) | OPINION AND ORDER |
| | ) | |

This case illustrates the disciplinary consequences of dishonesty. Respondent James Vincent Reiss seeks review of a hearing judge's recommendation that he be disbarred for serious misconduct that involved six clients and occurred from 2000 to 2010. The State Bar's Office of the Chief Trial Counsel (State Bar) has charged, and the hearing judge found, that Reiss: (1) took client money by false pretenses; (2) lied to the court and his clients about the status of cases; (3) forged a client's signature on a settlement agreement; (4) retained unearned fees; (5) failed to render a proper accounting; (6) wrote non-sufficient funds (NSF) checks; (7) made client loans without proper written disclosures and consent; and (8) failed to cooperate with a State Bar investigator.

Reiss contends that the State Bar did not prove his culpability except for one count of improperly loaning money to a client, which he concedes. Reiss requests no more than a 90-day actual suspension. The State Bar asks us to affirm the hearing judge's decision.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we adopt all of the hearing judge's culpability findings and the disbarment recommendation. In sum, Reiss

repeatedly took advantage of several clients by deceiving them and taking their money. As the hearing judge aptly noted, Reiss has "demonstrated a profound detachment from the honesty and integrity that serve as pillars for the legal community." Given his significant aggravation, including lack of insight, we recommend that Reiss be disbarred to protect the public, the courts, and the legal profession.[1]

## I. THE CHAMBERS MATTER (09-O-10499)

### A. FINDINGS OF FACT[2]

In January 2005, Julie Chambers hired Reiss to represent her in a personal injury case. She lost her job and could not meet her financial obligations due to her injuries. Reiss advanced Chambers a total of $20,100 in two loans against her anticipated monetary recovery. Her case settled for $25,000, which Reiss deposited into his client trust account (CTA). He did not distribute any money to Chambers because he calculated his costs at $29,148, including the two loans. Chambers requested the settlement money less attorney fees. Reiss believed that his office staff sent her a "Costs Expended" list that detailed the $29,148, but Chambers testified that she never received it.

[1] In a separate case (Case No. 11-TE-18592), a different hearing judge ordered that Reiss be enrolled as an inactive member of the bar after finding that he substantially harmed a client from 2007 to 2011, and the State Bar was reasonably likely to prevail on the merits of proving acts of moral turpitude, including misappropriation and dishonesty. (§ 6007, subd. (c)(1) [involuntary inactive enrollment upon finding attorney poses threat of harm to clients or public].) The TE case is the subject of disciplinary proceedings currently pending in the hearing department. (Case No. 11-O-14067.) Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

[2] The hearing judge's findings of fact are entitled to great weight on review. (Rules Proc. of State Bar, rule 5.155(A).) We adopt these findings in each client matter and summarize them with additional relevant facts from the record.

## B. LEGAL CONCLUSIONS[3]

**Count One: Avoiding Interests Adverse to Client (Rules Prof. Conduct, rule 3-300[4])**

Before an attorney enters a business transaction with a client, rule 3-300 requires that: (1) the transaction and its terms are fair and reasonable and are fully disclosed and transmitted in writing; (2) the client is advised in writing that he or she may seek independent legal advice and is given a reasonable opportunity to do so; and (3) the client consents in writing to the terms of the transaction. Reiss concedes that he failed to obtain Chambers's written consent for the loans or to provide the written disclosures required for business transactions with a client. He stipulated to facts establishing a violation of rule 3-300 and does not challenge the hearing judge's culpability finding, which we adopt.

**Count Two: Failure to Account for Client Funds (rule 4-100(B)(3))**

Rule 4-100(B)(3) requires an attorney to "render appropriate accounts to the client" for "all funds, securities, and other properties of a client" that come into the attorney's possession. The hearing judge dismissed this count because the State Bar failed to establish Reiss's culpability by clear and convincing evidence.[5] The State Bar did not seek review nor does it request that this count be revived. Reiss testified that he provided an accounting for client funds

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[3] The State Bar filed two Notices of Disciplinary Charges (NDCs), which were consolidated for trial. The first NDC charged 13 counts in four client matters (Chambers, Ruff, Grizzle, and Dumont). The hearing judge granted the State Bar's request to dismiss Counts Six and Ten. The second NDC charged 10 counts in two client matters (Robert and Randall Humphreys). The hearing judge granted the State Bar's request to dismiss Counts One, Three, and Six of that NDC. We discuss the counts out of numerical order to organize Reiss's misconduct according to client matter and note that some count numbers appear more than once due to the consolidated NDCs.

[4] Unless otherwise indicated, further references to "rule(s)" are to the State Bar Rules of Professional Conduct.

[5] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

in the "Cost Expended" list that was sent to Chambers. This evidence supports the hearing judge's dismissal of the charge.

## II. THE RUFF MATTER (10-O-03144)

### A. FINDINGS OF FACT

Beginning in 2003, Gregory Ruff hired Reiss to provide legal services in several cases, including *Ruff v. Alvarez*, a civil lawsuit. Ruff paid Reiss a total of $123,000 in legal fees for the *Alvarez* case. In 2008, Ruff told Reiss that he had mistakenly overpaid $50,000 in advance fees. Reiss claims that he refunded the entire $50,000, and that the funds advanced were for investigative services, not legal fees. Ruff testified that Reiss refunded only $25,000 and, as detailed below, bank documents corroborate Ruff's testimony.

Ruff agrees that Reiss refunded him the first $25,000 in two January 2008 checks. Reiss issued one check for $12,500 from his law firm "general account" and a second check for $12,500 from his law firm "cost account."[6] Each check noted that payment was for "Refund of Attorneys Fees."

To pay the remaining $25,000, Reiss issued two checks to Ruff for $12,500 each on February 6, 2008. Again, one was from the general account (no. 8081) and the other from the cost account (no. 11564). Each check bore the handwritten notation "REFUND - Attys Fee Ruff v. Alvarez." Ruff testified that he deposited both checks but his bank notified him a few days later that the checks were returned because of insufficient funds. Reiss's own bank records establish that although the checks were initially recorded as "Paid," they were later rejected as NSF. Reiss's bank charged an "OD/REJECTED ITEM CHG" (overdraft/rejected item fee) on

[6] Reiss's bank statements indicate that he used his cost and general accounts both to manage law firm expenses and to handle certain funds for clients. He testified that he used a "ledger" system to account for monies between his CTA and other accounts. Reiss did not produce any documentation of his ledger system.

both checks and did not debit them against his accounts. Ruff reported the NSF checks to Reiss, who pledged to take care of the matter.

On February 21, 2008, Reiss issued two new checks for $12,500 each and deposited them directly into Ruff's bank account. As before, one check was drawn from the general account (no. 8102) and the other from the cost account (no. 11606). These checks, like the others, were initially recorded by Reiss's bank as "Paid," but were later rejected as NSF. Each check triggered an overdraft/rejected item fee to Reiss and neither check was debited against his general or cost account.

When Ruff discovered that this second set of checks did not clear, he again reported it to Reiss. Reiss promised to "get it cleared up." Months later, on May 9, 2008, Reiss deposited into Ruff's account a single check drawn on the general account (no. 8145) for $12,500. Less than a week later, Ruff's bank reversed the deposit because Reiss's check did not clear. Reiss made no other payments and his representation of Ruff ended in 2009.

## B. LEGAL CONCLUSIONS

### Count Three: Moral Turpitude – Issuing NSF Checks (§ 6106[7])

The State Bar alleged that Reiss committed acts involving moral turpitude because he knowingly or with gross negligence issued NSF checks to Ruff. We agree. Reiss issued *several* checks to Ruff that he knew or should have known the bank would not honor. Such a practice involves moral turpitude. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54 [issuing NSF checks on personal account constitutes act of moral turpitude].) The Supreme Court has repeatedly warned that issuing checks with insufficient funds violates "the fundamental rule of [legal] ethics – that of common honesty – without which the profession is worse than valueless in the place it holds in the administration of justice." (*Bowles v. State Bar*

[7] Section 6106 prohibits an attorney from committing any act that involves moral turpitude, dishonesty, or corruption.

(1989) 48 Cal.3d 100, 109; *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1088; *Bambic v. State Bar* (1985) 40 Cal.3d 314, 324.)

Reiss claims that he refunded the second $25,000 to Ruff. To support his claim, he testified that he called the operations department of his bank and confirmed that his February 6, 2008 check number 8081 for $12,500 and his February 21, 2008 check number 8102 for $12,500 had been paid. Reiss also cited bank documents that imaged the checks showing them marked as "Paid."

We reject his claim. First, if Reiss's checks had cleared, he would have had no reason to issue replacement checks as late as May 2008. Second, although the *initial* bank documents show imaged checks as "Paid," Reiss's month-end final bank statements establish that those same checks were ultimately returned for insufficient funds and were not debited against the accounts. Reiss did not call witnesses from his bank or provide other documentary evidence to prove the checks were paid, despite his duty to present all favorable evidence at his disciplinary trial. (*Warner v. State Bar* (1983) 34 Cal.3d 36, 42.) The record before us proves that Reiss did not refund Ruff's $25,000 overpayment of legal fees.

**Count Four: Failure to Account for Client Funds (rule 4-100(B)(3))**

The State Bar alleged that Reiss failed to account for advance fees that Ruff paid him. Reiss argues that he owed no accounting to Ruff because the retainer agreement did not call for advance fees. Even though the retainer agreement states that Reiss would represent Ruff for a $3,000 retainer and $150 hourly fee thereafter, it did not prohibit Ruff from paying fees in advance. Ruff did in fact pay a total of $50,000 in advance fees, $25,000 of which Reiss did not refund. Consequently, Reiss should have provided Ruff with an accounting in order to comply with rule 4-100(B)(3).

**Count Five: Failure to Refund Unearned Fees (rule 3-700(D)(2))[8]**

The State Bar alleged that Reiss violated rule 3-700(D)(2) when he did not refund $25,000 to Ruff for unearned attorney fees. We agree. Ruff credibly testified that he paid Reiss this amount as legal fees, and not as investigative fees, as Reiss claimed. Ruff's testimony is corroborated by the checks' notations stating that the payments were for refund of attorney fees.

## III. THE GRIZZLE (10-O-09819) AND DUMONT (10-O-10285) MATTERS

### A. FINDINGS OF FACT

Dave Grizzle and Herve Dumont are neighbors who successfully defended a civil lawsuit filed by another neighbor. In April 2006, they separately retained Reiss to recover their defense costs from their respective insurance carriers. For the next four years, Grizzle and Dumont sought information from Reiss about the status of their cases. Grizzle tried to reach Reiss over 30 times and Dumont did the same at least 10 times.

Reiss would often not return their calls, but even when he did, he lied. He told Grizzle that he was "working with the insurance company, and still filing papers with the Court." He also told Grizzle that the insurance company "had approved the money, and they were going to write [Grizzle] a check." Reiss told Dumont on several occasions that everything was taken care of and he should not worry. In fact, Reiss had neither contacted the insurance companies nor filed the lawsuits. The clients finally called their insurance companies in 2010 and discovered that Reiss had done nothing on their cases. By this time, the statute of limitations had expired. Grizzle and Dumont filed complaints with the State Bar.

A State Bar investigator sent letters to Reiss on November 17 and December 1, 2010, requesting a written response to the complaints. Reiss failed to provide one.

[8] When an attorney's employment ends, rule 3-700(D)(2) requires the attorney to "Promptly refund any part of a fee paid in advance that has not been earned."

On December 9, 2010, Reiss used personal funds to purchase two cashier's checks and sent one each to Grizzle and to Dumont. Grizzle received $18,600 and Dumont received $19,750. The checks covered their defense costs in the neighbor's lawsuit. Reiss included cover letters with the checks that stated: "This amount reflects reimbursement for attorneys fees paid to your defense counsel which was not reimbursed by your insurance carrier[.] [¶] Thank you for your courtesy and cooperation throughout this litigation."

## B. CONCLUSIONS OF LAW[9]

### Counts Seven and Nine (Grizzle) and Counts Eleven and Thirteen (Dumont): Moral Turpitude – Misrepresentations (§ 6106)

The State Bar alleged that Reiss committed acts of moral turpitude by making several oral misrepresentations to Grizzle and Dumont, including that their cases were progressing and would soon be settled. Reiss asserts that his misrepresentations were not intentional because he mistakenly thought that a law firm associate was handling the cases. He testified that he had been out of the office each time he spoke to his clients from 2006 to 2010, and could not confirm the status of the cases without the files. Reiss claimed that he first discovered that no work had been done on the cases in mid-2010, when he personally looked at the files.

The hearing judge disbelieved Reiss's testimony and instead relied on the testimony of Grizzle and Dumont to find that Reiss repeatedly provided them with "false and misleading [case] updates." We give great weight to testimonial credibility assessments "because the hearing judge heard and saw the witnesses and observed their demeanor. [Citations.]" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315; Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight]; *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055 [court reluctant to reverse hearing department on matters of credibility].) We find that Reiss made several oral misrepresentations to his clients.

[9] The State Bar alleged identical ethical violations in the Grizzle and Dumont matters.

The State Bar also alleged that Reiss made written misrepresentations to Grizzle and Dumont in the cover letters that accompanied their checks. The hearing judge found that these letters were "intentionally vague and misleading" and were crafted to conceal Reiss's failure to perform. We agree. The letters omitted critical information the clients were entitled to know – that Reiss never contacted the insurance companies, failed to file lawsuits, and paid the checks with personal funds, not insurance settlement monies. Moreover, Reiss implied in his letters that he had actually filed the lawsuits by thanking Grizzle and Dumont for cooperating in "this litigation." For purposes of moral turpitude, "[n]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315.) Reiss's letters contained such concealments, half-truths, and false statements. We find Reiss culpable of committing acts of moral turpitude by making both oral and written misrepresentations to Grizzle and Dumont.

**Counts Eight (Grizzle) and Twelve (Dumont): Failure to Cooperate[10] (§ 6068, subd. (i))**

The State Bar alleged that Reiss failed to cooperate because he did not respond in writing to the State Bar investigator's November and December 2010 letters. Although Reiss admits he did not respond in writing, he claims that he discussed the Grizzle and Dumont matters with a State Bar senior deputy trial counsel on an unspecified date in 2011. But Reiss's claim fails to address why he did not provide a *written* response as the investigator directed. Further, even if he had met with trial counsel as early as January 2011, the two-month delay from the investigator's November 17, 2010 first request is not timely cooperation. (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 677, 684-685 [no cooperation where

[10] Section 6068, subdivision (i), requires an attorney "To cooperate and participate in any disciplinary investigation . . . ."

attorney met with investigator more than six weeks after request for written response].) We find that Reiss failed to cooperate with the State Bar investigator.

## IV. THE HUMPHREYS MATTER – C-CURE CORPORATION OF TEXAS (09-O-12479)

### A. FINDINGS OF FACT

In the late 1990s, brothers and business associates Randall and Robert Humphreys hired Reiss to represent them in several business matters.[11] In a 2000 case that was resolved by binding arbitration, C-Cure Corporation of Texas (C-Cure) obtained a $50,515.36 judgment, which was later amended to $74,651.25, against Robert over a property lease. The Humphreys made no payments for seven years, and the judgment amount had nearly tripled to over $140,000. By then, the C-Cure debt was affecting their business credit, so the Humphreys asked Reiss to settle it.

In March 2007, Reiss wrote a letter to Randall informing him that he had settled the C-Cure debt. The correspondence stated: "We have negotiated a resolution of the outstanding judgments in the [C-Cure] matters. [¶] Please have a check made payable to Reiss & Johnson Attorney Client Trust account in the amount of $68,500.00 We will be preparing all of the appropriate pleadings and closing documents including full Satisfaction of Judgment, Release of Lien and Dismissal with prejudice." Unbeknownst to the Humphreys, Reiss had not negotiated any settlement of the C-Cure debt.

Following Reiss's directive, Randall issued a check for $68,500 to Reiss, who deposited it into his CTA on March 22, 2007. Less than a month later, on April 3, 2007, the CTA balance fell to $273.49, and Reiss had made no distributions on behalf of the Humphreys. Reiss claimed

[11] We refer to the Humphreys brothers by first name to avoid confusion, not out of disrespect.

that he removed the money because he thought it was to be utilized as a "budget" to settle the C-Cure judgment and he knew he "was obligated to pay that toward whatever resolution it was."

Near the end of 2007, Reiss began negotiating a settlement of the C-Cure judgment. In January 2008, he settled the matter without consulting the Humphreys. To memorialize the settlement, Reiss either signed Robert's name or caused it to be signed on a forbearance agreement (dated January 30, 2008) that obligated Robert to pay a $120,000 settlement in monthly $10,000 installments beginning on January 15, 2008. If payments were not timely made, Robert would owe the judgment balance.

Without the Humphreys' knowledge, Reiss issued several $10,000 checks from his cost account to C-Cure's counsel to be applied against the $120,000. In 2008, he wrote five $10,000 checks when he did not have adequate funds to cover them. The bank honored three of the checks using Reiss's overdraft protection. The other two checks were returned for insufficient funds. By the time of his discipline trial in November 2011, Reiss had paid the full $120,000 and C-Cure had filed a satisfaction of judgment.[12]

The Humphreys were upset about the C-Cure judgment and having to pay $68,500 to settle it. As a result, Reiss testified that in 2008 he agreed to pay them $84,000 in $7,000 monthly payments to make up for their loss and to "stand behind this matter." To pay the debt, in November 2008, Reiss issued two $3,500 checks to Robert from his cost account. The bank did not honor the checks due to insufficient funds. Reiss testified that he paid $84,000 to the Humphreys, but he failed to present documentary evidence supporting his claim.

[12] The Humphreys first found out about the 2008 forbearance agreement during a 2011 deposition in a lawsuit they filed against Reiss in another matter.

## B. CONCLUSIONS OF LAW

### Count Two:[13] Moral Turpitude – Theft by False Pretenses (§ 6106)

The State Bar alleged that Reiss committed acts involving moral turpitude by using false pretenses to persuade Randall to pay him $68,500 as a settlement in the C-Cure matter. We agree. Since there had been no settlement and Reiss immediately withdrew most of the $68,500 from his CTA without paying anything to C-Cure, we find he obtained this money by false pretenses. (*Cutler v. State Bar* (1969) 71 Cal.2d 241, 252-253 [attorney's deceit of another involves moral turpitude].)

We reject Reiss's claim that the Humphreys agreed to pay him the money as an overall "budget" for resolving the C-Cure matter. Randall credibly testified that he only discussed with Reiss the "specific amount" of $68,500 for the settlement. Further, Reiss's March 2007 letter to Randall never mentioned a budget.

### Count Four: Moral Turpitude – Forged Signature on Forbearance Agreement (§ 6106)

The State Bar alleged that Reiss committed moral turpitude by signing Robert's name to the forbearance agreement or caused it to be signed without Robert's knowledge or consent. Reiss testified that he discussed the settlement with Robert, sent him the forbearance agreement to sign, and received it back with what he thought to be Robert's signature. The hearing judge did not believe Reiss but found credible Robert's testimony that he never signed the agreement and Randall's testimony that he did not sign on behalf of Robert. Again, we defer to these credibility findings in favor of the Humphreys and conclude that Reiss acted with moral turpitude when he signed Robert's name or caused it to be signed on the forbearance agreement. (*In re Prantil* (1989) 48 Cal.3d 227, 234 [forgery involves moral turpitude].)

[13] As previously noted, Counts One, Three, and Six were dismissed.

**Count Five: Moral Turpitude – NSF checks to C-Cure (§ 6106)**

The State Bar charged that Reiss committed acts of moral turpitude because he knowingly or with gross negligence issued NSF checks from his cost account to pay C-Cure's counsel under the forbearance agreement. We agree. Reiss wrote five $10,000 checks to C-Cure's counsel when his cost account had a negative balance. And when the checks were presented for payment to the bank, the balance remained negative. Each of the five checks triggered an overdraft/rejected item fee. The bank honored three of them and rejected the other two for insufficient funds. We find that Reiss issued all five checks when he knew or should have known that his account was negative and he lacked sufficient funds to cover them. The following chart details the banking record for each check:

| *Check No & Amount* | *Issue Date & Account Balance* | *Date Presented & Account Balance* | *Outcome* |
|---|---|---|---|
| 11491<br>$10,000 | 1/25/08<br>(-) $4,528.44 | 2/4/08<br>(-) $10,782.78 | On 2/4/08, bank paid check against insufficient funds and charged overdraft/rejected item fee |
| 11616<br>$10,000 | 2/21/08<br>(-) $8,149.56 | 3/3/08<br>(-) $6,497.06 | On 3/3/08, bank paid check against insufficient funds and charged overdraft/rejected item fee |
| 11792<br>$10,000 | 4/7/08<br>(-) $5,393.81 | 4/11/08<br>(-) $4,726.65 | On 4/14/08, bank paid check against insufficient funds and charged overdraft/rejected item fee |
| 12277<br>$10,000 | 8/22/08<br>(-) $5,672.04 | 8/28/08<br>(-) $12,592.92 | Bank did not pay check but charged overdraft/rejected item fee on 8/28/08 |
| 12307<br>$10,000 | 8/29/08<br>(-) $812.92 | 9/5/08<br>(-) $1,235.37 | Bank did not pay check but charged overdraft/rejected item fee on 9/5/08 |

Reiss claims he is not culpable because he was entitled to rely on overdraft protection to cover any overdrawn checks. (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 58, fn. 9 [defense to

moral turpitude charge if overdraft protection creates reasonably certain belief checks will be honored].) We disagree. Reiss could not *reasonably* expect that any of his $10,000 checks would be honored since his overdraft limit was $10,000, and his account balance was negative when each check was written and presented for payment. Moreover, the bank did not honor two of the $10,000 checks despite Reiss's reliance on his overdraft coverage.

Overdraft protection is "not a substitute for the proper handling of clients' money." (The State Bar of Cal., Handbook on Client Trust Accounting for California Attorneys (2011) § IV, p. 10 [referencing use of overdraft protection in CTA accounts].) We recognize that in some circumstances, establishing overdraft coverage may benefit clients by insuring that checks will not bounce due to an occasional bank error or delay resulting in an unexpected shortfall in funds. (The State Bar of Cal., Handbook on Client Trust Accounting for California Attorneys (2011) § IV, p. 10.) But overdraft protection will not relieve an attorney from unethical conduct that caused the overdraft. (State Bar of Cal. Standing Com. on Prof. Responsibility and Conduct, opn. No. 169 (2005) p. 4.) [use of overdraft protection to issue checks before funds become available in CTA may result in violation of rule 4-100].)

Here, Reiss abused his overdraft protection and, in doing so, grossly mismanaged his cost account. Reiss's bank charged an overdraft/rejected item fee more than 50 times per month for 11 straight months in 2008. Excessive use of overdraft protection is improper in any account for the purpose of covering NSF checks that are paid to or on behalf of clients. We conclude that Reiss committed acts of moral turpitude by issuing $10,000 NSF checks to C-Cure's counsel to pay on the forbearance agreement.

**Count Seven: Moral Turpitude – NSF Checks to Robert Humphreys (§ 6106)**

The State Bar alleged that Reiss committed acts of moral turpitude because he knowingly or with gross negligence issued two $3,500 NSF checks from his cost account to Robert on the

$84,000 he promised to pay the Humphreys. We agree. Reiss's bank records show that the two checks were not honored, as detailed below:

| *Check No. & Amount* | *Issue Date & Account Balance* | *Date Presented & Account Balance* | *Outcome* |
|---|---|---|---|
| 12497<br>$3,500 | 11/5/08<br>(-) $2,164.09 | 11/17/08<br>$1,969.91 | Bank did not pay this check and charged overdraft/rejected item fee on 11/17/08 |
| 12500<br>$3,500 | 11/5/08<br>(-) $2,164.09 | 11/21/08<br>(-) $2,348.53 | Bank did not pay this check and charged overdraft/rejected item fee on 11/21/08 |

Reiss argues that he is not culpable because, again, he believed that his $10,000 overdraft protection would cover these checks. As we previously noted, an attorney may not rely on a bank's overdraft protection to cover NSF checks issued to or on behalf of clients. The purpose of overdraft protection is to avoid harm to the client for an *occasional* shortfall in funds due to bank errors or delay in processing funds. Reiss did not use his overdraft coverage for this purpose. Instead, he tapped it dozens of times in November 2008 to cover checks he had issued. Given Reiss's banking history of negative balances and overdraft abuse, we find that he knew, or was grossly negligent in not knowing, that the $3,500 checks to Robert would not be honored.

## V. THE HUMPHREYS MATTER – WESTERN STATES WHOLESALE (09-O-12479)

### A. STATEMENT OF FACTS

In 2000, Reiss represented Robert and Randall Humphreys as corporate officers of Western States Wholesale against Tracy Beblie and others in litigation to recover the cost of defective customized software they had purchased. Reiss filed a complaint but never served it. He failed to appear at a September 8, 2000 case management conference and the superior court set an Order to Show Cause (OSC) regarding dismissal for October 24, 2000.

To cover up his inaction on the case, Reiss made four misrepresentations to the court. The day before the October 24th OSC hearing, Reiss filed a declaration stating under penalty of

perjury that he had missed the September 8, 2000 conference due to a calendaring error but that the parties "have informally resolved this matter," some of it "by way of settlement." At an April 2001 hearing, Reiss told the court that there was a tentative settlement. At a June 2001 hearing, Reiss told the court he was waiting for settlement funds from one party. And at an August 2001 hearing, Reiss told the court that the last installment of the settlement was due that day. These statements to the court were not true – Reiss had never even served the complaint in the lawsuit.

Reiss also lied to Randall about the status of the case. On June 20, 2001, Reiss wrote to Randall informing him that at the April and June court hearings, the superior court judge had ordered mediation and appointed a retired judge to preside over the case. Reiss also told Randall that he expected the trial to be set in October or November 2001. The superior court's minute orders establish that Reiss's statements were false.

Randall testified that Reiss told him several years later, in 2008, that the Western States Wholesale case had settled in the Humphreys' favor for $250,000, which would be paid in two $125,000 installments. Reiss never forwarded the money to Randall. At his disciplinary trial, Reiss denied that he told Randall there had been a settlement in the Western States Wholesale matter but admitted that in September 2001, he filed a Request for Dismissal of the lawsuit, which was granted.

## B. CONCLUSIONS OF LAW

### Counts Eight, Nine and Ten: Moral Turpitude – Misrepresentations (§ 6106)

The State Bar alleged that Reiss committed acts involving moral turpitude when he misrepresented: (1) to the superior court that the Western States Wholesale matter had settled and payment was forthcoming; (2) to Randall that the superior court ordered the case mediated, appointed a mediator, and would set the case for trial; and (3) to Randall that the case settled for

$250,000. Randall's testimony and the superior court's minute orders prove that Reiss's statements were misrepresentations amounting to moral turpitude. (*Bach v. State Bar* (1987) 43 Cal.3d 848, 855-856 [attorney's false statement to judge constitutes moral turpitude warranting discipline].)

Reiss's claims he based his misstatements to the superior court on information Randall gave him about a settlement in a different case that he had litigated on behalf of Western States Wholesale. But Randall distinctly recalled that Reiss told him the Western States Wholesale case involving the Tracy Beblie defendant had been settled for $250,000. Moreover, Reiss specifically referenced "*Western States Wholesale v. Tracey Beblie, et al.*" in his June 20th letter to Randall that falsely reported the superior court's rulings and the upcoming trial date. The record establishes that Reiss's misrepresentations were not based on a mistake.

## VI. AGGRAVATION AND MITIGATION

The offering party bears the burden to prove aggravating and mitigating circumstances. The State Bar must establish aggravating circumstances by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)[14]), while Reiss has the same burden to prove mitigating circumstances. (Std. 1.2(e).)

### A. THREE SIGNIFICANT AGGRAVATING FACTORS

The hearing judge found two aggravating factors: (1) multiple acts of misconduct; and (2) significant harm. We adopt both factors and find additional aggravation for lack of insight and remorse.

#### 1. Multiple Acts / Pattern of Misconduct (Std. 1.2(b)(ii))

Reiss engaged in multiple acts of misconduct involving six clients, which is an aggravating factor. However, the most serious aggravation is found in Reiss's 10-year pattern of

[14] Unless otherwise noted, all further references to "standard(s)" are to this source.

deception in order to cover up mismanagement of his clients' cases or for his personal economic gain. (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149, fn.14, citing *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367 [pattern of misconduct characterized by "only the most serious instances of repeated misconduct over a prolonged period of time"].) Reiss's pattern of serious misconduct greatly aggravates this case.

**2. Significant Harm (Std. 1.2(b)(iv))**

Reiss significantly harmed several clients. First, he never refunded unearned attorney fees of $25,000 to Ruff. Second, he caused harm to Grizzle, Dumont, and the Humphreys when each lost the opportunity to pursue his case in court due to Reiss's inaction and dishonesty. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 283 [attorney's failure to perform resulting in loss of cause of action is significant client harm].) Finally, Reiss harmed the administration of justice when he wasted judicial time and resources by appearing at hearings only to misrepresent the status of the Western States Wholesale case. The totality of this harm constitutes significant aggravation.

**3. Lack of Insight and Remorse (Std. 1.2(b)(v))**

Lack of remorse and failure to acknowledge wrongfulness of misconduct are properly considered aggravating factors in attorney discipline cases. (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506.) Without a hint of remorse, Reiss has refused to acknowledge his misconduct despite overwhelming evidence of his dishonesty and the harm he caused to his clients. While the law does not require Reiss to be falsely penitent, it "does require that [he] accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) He has not done this. We assign the most weight to this aggravating factor because Reiss's lack of insight and remorse makes him an ongoing danger to the public.

## B. TWO MITIGATING FACTORS

The hearing judge found two mitigating factors: (1) no prior record of discipline; and (2) good character. We assign no credit for Reiss's lack of prior record and only nominal mitigating weight to his good character. We find an additional factor in mitigation for his community service.

### 1. No Prior Disciplinary Record (Std. 1.2(e)(i))

Standard 1.2(e)(i) provides that mitigation shall be considered for the "absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious." Under the standard, a respondent is entitled to have a discipline-free practice considered in mitigation if: (1) no discipline has been imposed for many years; and (2) the misconduct is not serious. Reiss meets the first requirement as he was admitted to the Bar on June 17, 1987, and practiced law for more than 13 years before he committed his first act of misconduct in 2000. (See, e.g., *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 116 [mitigation credit for nine years of discipline-free practice before misconduct began].) However, we have found Reiss culpable of committing a pattern of serious misconduct that includes repeated acts of moral turpitude, theft, dishonesty, rule violations, and failure to cooperate. In light of such serious misconduct, the issue is what significance, if any, should be given to Reiss's lack of a prior record in determining the proper degree of discipline.

The Supreme Court in *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029, has instructed on this very point: "Prior exemplary conduct and a distinguished career may be relevant as factors indicative of the probability that misconduct will not likely recur." The presence of this mitigation could signify that a lower level of discipline may fulfill the goals of attorney discipline. For instance, if the serious misconduct occurred during a "single period of aberrant behavior," the past record of discipline-free practice is a factor that suggests disbarment may be

unnecessary. (*Ibid.*) "[B]ut if the attorney guilty of a pattern of serious misconduct does not show that he is presently able to avoid such misconduct, appropriate action must be taken to protect the public. [Citation.]" (*Ibid.*; see *In re Dedman* (1976) 17 Cal.3d 229, 235 [purpose of discipline proceedings is "to inquire into the fitness of the attorney to continue in that capacity for the protection of the public, the courts, and the legal profession"].) Thus, to determine the proper degree of discipline, we must ask whether Reiss's lack of a prior record is relevant to show that his misconduct will likely not recur.

Here, Reiss engaged in a 10-year pattern of dishonesty and serious misconduct and has not proved significant mitigation or demonstrated his rehabilitation. In fact, he denies his many unethical actions. Given Reiss's failure to accept responsibility for his wrongdoing, we do not find his lack of prior record from over 10 years ago (before his first act of misconduct) to be relevant to prove he will avoid future misconduct. Therefore, we assign no mitigation credit for Reiss's 13-year discipline-free record.[15]

**2. Good Character (Std. 1.2(e)(vi))**

The hearing judge gave "some consideration" to Reiss's evidence of good character as a factor in mitigation. We agree and assign nominal mitigating weight.

Standard 1.2(e)(vi) requires "an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who

[15] The Supreme Court and this court have assigned mitigation credit to attorneys with no prior record of discipline who committed serious misconduct. But those cases are not analogous here because they involved only isolated instances of wrongdoing rather than a pattern of misconduct and did not result in disbarment. (See, e.g., *Edwards v. State Bar* (1990) 52 Cal.3d 28 [12 years of discipline-free practice in one client matter where extenuating circumstances were present]; *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [almost 20 years of discipline-free practice in one client matter]; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar. Ct. Rptr. 41, 49 [17 years of discipline-free practice in one client matter with other mitigation]; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576 [12 years of discipline-free practice in one client matter with strong mitigation]; *In re Trillo* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 59 [14 years of discipline-free practice in two client matters].)

are aware of the full extent of the member's misconduct." Reiss presented four witnesses – two former criminal clients who are business owners and two attorneys he has known for several years. Although none had extensive relationships with Reiss, each testified to his general honesty, integrity, good character, and competence.

These four witnesses do not necessarily represent a wide range of references in the legal and general communities. (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 590, 594-595 [character evidence from attorney, district sales manager, and department store owner not wide range of references].) But we generally give significant consideration to attorney witnesses because they have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown, supra,* 2 Cal. State Bar Ct. Rptr. at p. 319.) Here, however, we discount the testimony of the two attorneys since neither was fully knowledgeable about Reiss's misconduct. (See *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477 [limited mitigation where declarants not fully aware of misconduct].)

**3. Community/Pro Bono Service**

Service to the community is a mitigating factor. (*Schneider v. State Bar* (1987) 43 Cal.3d 784, 799.) Between 1995 and 2010, Reiss provided pro bono legal services and participated in community activities. He volunteered 10 to 15 hours per week as a coach or administrator for youth sports programs, worked four hours per week for charitable organizations, and annually spent 100 hours providing free legal services to the California Interscholastic Federation Legal Services Volunteer Program. In addition, Reiss spent a few hours per week working at various animal protection organizations. Such commitment to the community is commendable. Yet we assign modest mitigating weight since Reiss presented only his own testimony to establish this public service. (*In the Matter of Sullivan* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 189,

193 [community service established only by respondent's testimony entitled to "modest" mitigating weight].)

**4. No Additional Mitigation**

Reiss argues that he should receive mitigation credit for remorse, absence of client harm, and good faith for acting in his clients' best interests. We find that he is not entitled to this additional mitigation in light of his extensive dishonesty and the harm he caused his clients.

## VII. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession. (Std. 1.3.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) We begin our analysis with the standards and follow their guidelines whenever possible because they promote uniformity. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.)

Although several standards apply here,[16] we focus on standard 2.3 because it addresses the crux of Reiss's misconduct and imposes the most severe discipline. (Std. 1.6(a) [must apply most severe sanction when multiple acts of misconduct suggest different sanctions].) Standard 2.3 calls for actual suspension or disbarment for acts of moral turpitude, fraud, intentional dishonesty or concealment of material facts depending on "the extent to which the victim of the misconduct is harmed or misled and . . . upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." As the standard directs, we look to: (1) the seriousness of Reiss's misconduct; (2) its connection to the practice of law; and (3) any consequential harm.

[16] Standard 2.2(b) imposes a three-month actual suspension for rule 4-100 violations not involving misappropriation; standard 2.6 imposes disbarment or suspension for section 6068 violations; standard 2.8 imposes suspension for rule 3-300 violations; and standard 2.10 calls for reproval or suspension for rule violations not specified in the standards.

For nearly a decade, Reiss displayed callous dishonesty that was central to his practice of law and caused significant harm to his clients and to the administration of justice. His many misrepresentations to the superior court undermined its ability to rely on his word as an officer of the court. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 48 [attorneys long known as officers of the court].) His repeated lies to clients diminished their confidence in the integrity of the legal profession. Even when Reiss attempted to remedy his lies by paying defense costs to Grizzle and Dumont and $120,000 to C-Cure, he did so under a shroud of deception that involved fabricated settlements, multiple misrepresentations, and forgery. (*Read v. State Bar* (1991) 53 Cal.3d 394, 426 [dishonesty directly pertaining to practice of law warrants harshest discipline].)

In sum, Reiss has engaged in a 10-year pattern of grievous misconduct and inexcusable dishonesty. After carefully considering all relevant factors, the aggravation, the mitigation, and the guiding case law, we conclude that nothing short of disbarment will adequately protect the public, the courts, and the legal profession. (*Lebbos v. State Bar*, *supra,* 53 Cal.3d at pp. 43-44 [disbarment where attorney with no discipline record lacked remorse for multiple acts of misconduct involving moral turpitude and dishonesty]; *Read v. State Bar*, *supra*, 53 Cal.3d at p. 426 [disbarment where attorney with no discipline record displayed "high degree of dishonesty"]; *Cannon v. State Bar* (1990) 51 Cal.3d 1103, 1115 [disbarment where attorney with no discipline record in six years of practice committed multiple acts of serious misconduct involving moral turpitude].)[17]

## VIII. RECOMMENDATION

We recommend that James Vincent Reiss, State Bar member no. 128020, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

[17] Having independently reviewed all arguments set forth by Reiss, those not specifically addressed have been considered and are rejected as having no merit.

We further recommend that he make restitution to Gregory L. Ruff in the amount of $25,000 plus 10 percent interest per annum from February 6, 2008 (or reimburse the Client Security Fund to the extent of any payment from the Fund to Gregory L. Ruff, in accordance with Business and Professions Code section 6140.5).

We further recommend that he 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.

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable as provided in Business and Professions Code section 6140.7 and as a money judgment.

## IX. ORDER

When the hearing department recommended disbarment, it ordered Reiss involuntarily enrolled as an inactive member of the State Bar as required under section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 5.111(D)(1). The involuntary inactive enrollment became effective on March 2, 2012. Reiss has remained on involuntary inactive enrollment since that time and will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.

**Case Nos. 09-O-10499 (10-O-03144; 10-O-09819; 10-O-10285); 09-O-12479 (Cons.)**

***In the Matter of***

**JAMES VINCENT REISS**

Hearing Judge

**Richard A. Honn**

Counsel for the Parties

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|---|---|
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