

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No.: 12-O-14863-RAP
)	
SCOTT CUMMINGS McKEE,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
Member No. 154077,)	ENROLLMENT
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

In this contested disciplinary proceeding, respondent Scott Cummings McKee is charged with multiple acts of misconduct, which include: (1) failing to support the Constitution and laws of the United States and the State of California; (2) committing acts of moral turpitude; and (3) failing to comply with the terms of his probation.

Having considered the facts and the law, and balancing the mitigating and aggravating factors, including his three prior records of discipline, the court recommends that respondent be disbarred from the practice of law.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on May 13, 2013. On June 12, 2013, respondent filed a response the NDC.

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

In September 2013, respondent and his attorney, Ellen Pansky, executed a Partial Stipulation as to Facts and Admission of Documents. On October 25, 2013, Kimberly Anderson, senior trial counsel for the State Bar, also executed the Partial Stipulation. The Partial Stipulation as to Facts and Admission of Documents was filed on October 25, 2013.

The trial in this matter was held on October 31, 2013. Senior Trial Counsel Kimberly Anderson represented the State Bar. Respondent was represented by attorney Ellen Pansky.

The court took this matter under submission at the trial's conclusion on October 31, 2013.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on October 17, 1991, and has been a member of the State Bar of California at all times since that date.

Credibility Determinations

With respect to the credibility of the witnesses, the court has carefully weighed and considered their demeanor while testifying; the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; and their capacity to accurately perceive, recollect, and communicate the matters on which they testified. (See, e.g., Evid. Code section 780 [list of factors to consider in determining credibility].) Except as otherwise noted, the court finds the testimony of the witnesses to be credible.

Case No. 12-O-14863

Facts

General Background

In April 2011, respondent and the State Bar executed a stipulation regarding facts, conclusions of law and disposition. The discipline to which the parties stipulated included a six-month actual suspension of respondent's license to practice law in California, in a case entitled, *In the Matter of Scott Cummings McKee*, State Bar Court case No. 09-O-14555.

On April 21, 2011, the State Bar Court Hearing Department filed an order in State Bar Court case No. 09-O-14555, making disciplinary recommendations to the California Supreme Court, including but not limited to a recommendation that respondent receive a six-month actual suspension of his license to practice law in California.

On August 25, 2011, the California Supreme Court ordered that respondent be actually suspended from the practice of law for six months (Supreme Court case No. S194072; State Bar Court case No. 09-O-14555) (the August 25, 2011 Order).

The August 25, 2011 Order became effective on September 24, 2011, 30 days after it was filed. Respondent received the August 25, 2011 Order. (Partial Stipulation As to Facts and Admission of Documents, p. 2 ¶4.)

As of August 25, 2011, respondent had actual knowledge that he would be suspended between September 24, 2011 and March 25, 2012, from the practice of law in California. Respondent has acknowledged that at all times between September 24, 2011 and March 25, 2012, he was suspended from the practice of law in California. (Partial Stipulation as to Facts and Admission of Documents, p. 2, ¶6.)

Additional Facts

On September 24, 2011, respondent began working as an independent contractor in the capacity of legal assistant for attorney Robert Amidon (Amidon).

Sometime in February 2012, respondent was contacted by Steven Gomez (Gomez) concerning a landlord/tenant matter. Prior to respondent's employment with Amidon, Gomez had contacted respondent about his landlord/tenant matter. Gomez knew that respondent was suspended from the practice of law.

In February 2012, when Gomez contacted respondent, Amidon was in Ohio on another matter. Respondent contacted Amidon about the Gomez matter, but Amidon was too busy to

handle the matter. In an email, Amidon advised respondent to contact Neil Anapol (Anapol) another attorney in their office building. Respondent has acknowledged that Amidon never accepted the Gomez matter and that Amidon's law office never represented Gomez in his landlord/tenant matter.

Respondent met with Anapol and they had a brief discussion about the Gomez matter. Anapol knew respondent was an attorney. Respondent, however, did not inform Anapol that he was currently suspended from the practice of law. Anapol never authorized respondent to send a letter on behalf of Gomez. Nor did Anapol supervise respondent in any way.

On March 2, 2012, respondent prepared and sent a letter on behalf of Gomez to Gomez's landlord, Gary Small (Small), and also sent a copy of the letter to the property owner, Lily Baer (Baer), regarding a landlord-tenant matter. The March 2, 2012, eight-page letter was written on Amidon's law firm letterhead. Respondent signed the letter. At the time respondent signed and sent the letter on behalf of Gomez, respondent knew that he was unable to represent Gomez due to respondent's six-month actual suspension.

According to Gomez, respondent informed Gomez that respondent had confirmed with Amidon that he could write a letter to Gomez's landlord on Amidon's letterhead. Amidon, however, had never authorized respondent to prepare and send a letter on behalf of Gomez regarding Gomez's landlord/tenant matter.

Despite the fact that respondent's March 2, 2012, letter to Small and Baer contains legal argument and makes a demand, respondent testified that he did not realize that the letter to Small constituted the practice of law. Respondent asserted that during the time period that he was preparing the letter and sending it to Small, he never viewed it as being a letter from a lawyer. Respondent's assertion, however, is undercut, when he directly says on page six of his letter that ". . . I feel strongly that if *we* went to trial on the above issues, Mr. Gomez would be awarded far

more. . . .” [Italics added.] As the letter is signed by respondent and respondent includes himself as possibly going to trial on Gomez’s behalf, respondent knew or should have known that he was holding himself out as practicing law.

Additionally, respondent falsely represented in the March 2, 2012, letter that Gomez had retained the services of the Amidon firm to represent him. However, respondent’s July 2, 2012, email exchange with Amidon shows that respondent knew that was not the case. In his email to Amidon, respondent wrote that, “[t]he issue with the Bar is not that Gomez was or was not a firm client – he was not, and I cannot honestly ever say he was – it is that I advised Gomez while suspended, which was a direct violation of the Supreme Court’s order of suspension. I have no defense to that. . . .” (Exh. 9.)

Respondent tries to explain away his actions by asserting that his judgment had been altered by depression and a substance abuse problem, which involved alcohol and an illegal substance, which respondent was unwilling to identify or name in his testimony. According to respondent, he was drinking a bottle or more of wine each day and abusing the unnamed substance during this period in which he drafted and sent the March 2nd letter. It is respondent’s contention that he only became aware of the significance of his March 2nd letter when he was later contacted by the State Bar. Respondent does not claim that was unaware as to what constitutes the unauthorized practice of law; but, rather he claims that his mental faculties were impaired when he wrote the letter. The court finds respondent’s testimony (i.e., his assertion that because of his alleged substance abuse problem he was not aware that by sending his March 2nd letter, he was practicing law and/or holding himself out as entitled to practice law) lacks credibility.

The eight-page letter (Exh. 6), which respondent wrote, was articulate, well-organized, and cogent. It is not credible that respondent’s letter, which appears to have been the product of

someone who had the mental focus and ability to draft a detailed, eight-page demand letter that sets forth extensive legal analysis and arguments, could also have been the product of someone, who at the time he was drafting the letter, lacked the mental capacity to understand that he was performing services, which constituted the practice of law.²

Sometime after March 2, 2012, Amidon was contacted by Stanley Green (Green), an attorney representing Small in the Gomez matter. Apparently, Green became aware that respondent was not entitled to practice law and complained to Amidon about the March 2, 2012, letter, which respondent had prepared and signed.

Respondent admits that he had actual knowledge of the August 25, 2011 Order and conditions of probation at all relevant times from the effective date of his probation through the pendency of his probation. Respondent also has acknowledged that at all times between September 24, 2011 and March 25, 2012, he was suspended from the practice of law in California.

The August 25, 2011 Order requires that respondent comply with the following conditions of probation, among other conditions:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
2. Respondent must submit quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation, stating under penalty of perjury whether he had complied with

² The court is not finding that respondent did not have a substance abuse problem. It simply concludes that his March 2nd letter is the product of someone who was thinking clearly and was capable of rational thought when he drafted the letter. As noted, *ante*, respondent had actual knowledge that he was suspended from the practice of law from January 1 through March 31, 2012. Respondent's ability to draft and organize the detailed eight-page demand letter, indicates that he was not so mentally impaired that he would have been unable to understand the rather simple concept, that while suspended, he was not entitled to provide legal advice to individuals or perform any legal service that normally would and should have been performed only by an attorney licensed to practice law.

the State Bar Act and the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter; and

3. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the probation conditions.

On April 6, 2012, respondent submitted a quarterly report to the Office of Probation in Supreme Court case No. S194072 for the period of January 1, 2012 through March 31, 2012. In the quarterly report, respondent stated under penalty of perjury, "I did not practice law at any time during the reporting period noted above or applicable portion thereof during which I was suspended pursuant to the Supreme Court order in this case." Respondent also represented under penalty of perjury in his quarterly report that he had not violated any provision of the State Bar Act or Rules of Professional Conduct.

Respondent contends that despite having actual knowledge of the dates of his suspension from the practice of law, when he prepared, signed, dated, and submitted his April 2012 quarterly report, he was unaware that he had committed misconduct, and, that therefore, he did not intentionally or willfully submit a false and misleading quarterly report. The court does not agree.

When respondent declared in his April 2012 quarterly report that he had not practiced law at any time during the reporting period from January 1 through March 31, 2012, he knew or should have known that while he was suspended, he had provided legal services for Gomez by drafting and sending the March 2, 2012 letter to Small and Baer, in direct violation of the Supreme Court's order of suspension. Respondent also falsely declared that that he was in compliance with all provisions of the State Bar Act and Rules of Professional Conduct. By so doing, respondent submitted a false and misleading April 2012 quarterly report to the Office of Probation.

Conclusions

Count One - (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

By sending the March 2, 2012 demand letter to Small and Baer, when he knew or should have known that he was giving the false impression that he was a lawyer entitled to practice law, and by representing in that letter that Gomez had retained the Amidon law firm to represent him, when in fact respondent was aware that was not true (Exh. 8, p. 00001), respondent committed an act of moral turpitude or dishonesty in willful violation of section 6106.

Count Two - (§ 6068, subd. (a) [Attorney's Duty to Support Constitution and Laws of United States and California])

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California. Section 6125 requires an individual to be a member of the State Bar in order to practice law in California. Section 6126, subdivision (a) makes it a misdemeanor for an individual to advertise or to hold himself or herself out as practicing or entitled to practice law or otherwise practicing law when he or she is not an active member of the State Bar of California.

By sending the March 2, 2012 letter (Exh. 6) to Small and Baer on Amidon's letterhead and making settlement demands in that letter, as well as stating that the Amidon firm had been retained to represent Gomez in Gomez's landlord/tenant matter and discussing Gomez's legal rights and remedies and the potential liability of Small and Baer, respondent intentionally created the impression that he was entitled to practice law, thereby holding himself out as entitled to practice law and actually practicing law, when he was not so entitled. By engaging in the afore-listed acts, respondent violated sections 6125 and 6126 and failed to support the laws of the State of California, in willful violation of section 6068, subdivision (a).

Count Three - (§ 6068, subd. (k) [Failure to Comply with Probation Conditions])

Section 6068, subdivision (k), provides that an attorney has a duty to comply with all conditions attached to any disciplinary probation.

The court finds that there is clear and convincing evidence that respondent failed to comply with the probation conditions by committing misconduct, while on disciplinary probation. By violating sections 6106, 6068, subdivision (a), 6125, and 6126, as found in Counts One and Two, *ante*, respondent violated the probation condition, requiring that he comply with provisions of the State Bar Act and Rules of Professional Conduct during his probation period.

And, by falsely stating in his April 6, 2012 quarterly report that he had not practiced law at any time during the reporting period, when he had held himself out as entitled to practice law and practiced law during his probation period, respondent violated the probation condition requiring that he answer fully and truthfully any inquiries of the Office of Probation, as well as his quarterly reporting probation condition.

Accordingly, the court finds by clear and convincing evidence that respondent failed to comply with the probation conditions imposed on him in Supreme Court case No. S194072, in willful violation of section 6068, subdivision (k).

Count Four - (§ 6106 [Moral Turpitude])

The court finds that there is clear and convincing evidence that respondent committed an act of dishonesty, moral turpitude, or corruption, in willful violation of section 6106, by falsely stating under penalty of perjury in his quarterly report that he had not practiced law from January 1, 2012 through March 31, 2012, during which period he was not entitled to practice law, and that he had not violated any provisions of the State Bar Acts or the Rules of Professional Conduct during that period, even though he knew or should have known that he had held himself

as entitled to practice law and engaged in the unauthorized practice of law during that time period.

Aggravation³

Prior Record of Discipline (Std. 1.5(a).)⁴

Respondent has three prior records of discipline.

In respondent's first prior record of discipline, he stipulated to culpability in one matter for failing upon termination of employment to take reasonable steps to avoid reasonably foreseeable prejudice to a client, in violation of rule 3-700(A)(2). In aggravation, respondent's misconduct harmed his client. In mitigation, respondent had no prior record of discipline and suffered from physical illness which affected his ability to perform legal services. The court imposed a private reproof with conditions on August 1, 2005, effective August 23, 2005. (State Bar Court case Nos. 04-O-15360.)

In respondent's second prior disciplinary matter, effective June 9, 2010, respondent stipulated to failing to comply with conditions attached to his private reproof in violation of rule 1-110, by not timely filing four quarterly reports, failing to file his final probation report, and failing to file satisfactory proof of restitution. He was ordered suspended for two years, stayed, placed on probation for five years, and actually suspended from the practice of law for 60 days. (Supreme Court case No. S181032; State Bar Court case No. 07-H-11874.) In aggravation, respondent had a prior record of discipline. In mitigation, he displayed candor and cooperation in the State Bar investigation and proceeding, suffered severe financial distress, was diagnosed with a terminal illness and severe depression. Due to his illness, respondent was unable to

³ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

⁴ Previously standard 1.2(b)(i).

maintain a full-time law practice and earn funds to timely pay restitution as had been ordered in his first prior disciplinary matter.

In respondent's third disciplinary matter, effective September 24, 2011, respondent stipulated to failing to maintain client funds and funds of a third party to whom he owed a fiduciary duty in a client trust account in violation of rule 4-100(A), misappropriated \$12,000 of settlement funds in violation of section 6106, and failed to comply with a court order in violation of section 6103. In aggravation, respondent had two prior records of discipline, and exhibited indifference toward rectification of or atonement for the consequences of his misconduct. In mitigation, respondent displayed candor and cooperation regarding the State Bar investigation and proceeding, was remorseful, and was suffering from severe financial distress, as well as emotional and physical difficulties. Respondent produced letters of good character from three individuals. Additionally, respondent's psychiatrist and psychotherapist expressed their opinion that respondent's misconduct was aberrational and caused by his having been diagnosed in January 2003, with a debilitating and life threatening illness that caused him to suffer from severe depression. In 2005, respondent voluntarily sought medical care to treat his depression, but was still suffering from depression at the time of his misconduct. Thereafter, respondent produced medical evidence that showed he was no longer suffering from depression and that his illness was under control. (Supreme Court case No. S194072; State Bar Court case No. 09-O-14555.)

Multiple Acts/Pattern of Misconduct (Std. 1.5(b).)⁵

Respondent's has been found culpable of four acts of misconduct. Multiple acts of misconduct are an aggravating factor.

⁵ Previously standard 1.2(b)(ii).

Mitigation

Extreme Emotional/Physical Difficulties (Std. 1.6(d).)⁶

Respondent testified that at the time of his misconduct in this matter, he was suffering from major depression due to his life threatening illness and was also suffering from the effects of substance abuse due to his drinking a bottle of wine or more each day.⁷

Respondent also presented a letter (Exh. B) from his primary care doctor, James Adams, M.D. (Dr. Adams). Dr. Adams's letter mentions respondent's alleged drug abuse, which may have been a contributing cause of respondent's misconduct in this matter. The letter also comments on respondent's quest to live a sober life. Dr. Adams writes in his letter to the court that respondent has maintained his sobriety since October 2012.

The court, however, notes that there is nothing in the letter to support the contention that respondent has been sober since October 2012, other than Dr. Adams's reliance on respondent's statements to his health care providers. The letter does not state whether respondent engaged in a substance abuse recovery program. Nor does Dr. Adams indicate whether respondent participated in alcohol/drug screening, i.e., an objective test to confirm whether respondent consistently maintained sobriety for an extended period of time.

Respondent prepared a declaration, made under penalty of perjury, for Meghan Carr (Carr), a Board Certified Adult Psychiatric-Mental Health Nurse Practitioner, which outlines her interactions with respondent since 2005. Carr's declaration notes that while she was treating respondent for a diagnosis of Major Depressive Disorder, he had been battling substance abuse,

⁶ Previously standard 1.2(e)(ii).

⁷ Respondent contends that he was also suffering from substance abuse based on his use of alcohol and another substance. When asked to identify the other substance, he invoked his right against self-incrimination under the Fifth Amendment. The court acknowledges respondent's right to invoke his constitutional rights, but is unable to consider respondent's claim for mitigation for substance abuse in relation to a substance which respondent will not name or identify.

which was ongoing during the time of the misconduct at issue in this proceeding. Carr, however, does not mention if respondent took any steps toward enrolling in a substance abuse recovery program to address his specific substance abuse issues and his “commitment to a healthy lifestyle.” Nor does Carr state whether or not respondent submitted to alcohol and/or drug screening to verify that he has been clean and sober.

Thus, the basis for Carr’s conclusion that respondent has maintained sobriety since October 2012 is unknown. The only reference that Carr makes to treatment is that respondent has attended “mental health therapy sessions” with her and currently attends monthly follow-up sessions. No specifics as to the nature of those therapy sessions have been provided to the court. How Carr came to her conclusion that respondent has been sober since October 2012, and on what factors or objective evidence, if any, that conclusion is based is not set forth in her declaration and is not included in the record before the court.

There is evidence on the record that respondent was suffering from depression, at the time of his misconduct and a statement from Carr that his depression has since stabilized. Statements and conclusions, similar to Carr’s current comments, were made regarding respondent’s depression, in his prior disciplinary matter, i.e., State Bar Court case No. 09-O-14555; Supreme Court Order No. 194072 (Exh. 5, p. 00006). It appears, however, that respondent’s depression was not under control at the time those statements, set forth in State Bar Court case No. 09-O-14555, were made – as is evidenced by the reemergence of respondent’s depression, which respondent and his health care providers acknowledge as a contributing cause to the misconduct at issue in the instant proceeding.

According to Carr, respondent now has a “near non-existent potential for relapse of his substance abuse given his compliance with his on-going treatment plan.” The court, however, finds Carr’s statement concerning respondent’s potential for relapse, based on compliance with a

treatment plan that does not include alcohol/ drug-screening or participation in any substance abuse program, questionable. Indeed, little, if any, evidence has been provided to show what steps respondent has taken to prevent his turning to alcohol and/or other substances, if he is again faced with a stressful situation with which he cannot cope.

The court, finds that respondent has failed to establish by clear and convincing evidence that he has taken or will take appropriate steps to overcome his substance abuse difficulties and/or that he no longer suffers or will suffer from the difficulties caused by his alcohol/substance abuse. Without such evidence there is no assurance that if respondent undergoes another depressive episode or faces other stress that he would not again abuse alcohol and/or other substances. Under such circumstances, the court declines to find that his alcohol/substance abuse issues warrant mitigation. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443.)

The court finds, based on Carr's declaration, that respondent was suffering from depression during the time frame in which the misconduct at issue in the instant matter occurred and that his depression is now stabilized. But, even though respondent's depression is currently "stabilized," no clear and convincing evidence of a full recovery from his depressive disorder has been offered into evidence. Since respondent has not provided clear and convincing evidence that he has recovered from his emotional difficulties to the point that they would no longer affect his fitness to practice law, respondent cannot be is accorded full mitigation for his emotional difficulties. (Cf. *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158-159.)

Good Character (Std. 1.6(f).)⁸

Respondent presented the testimony of two character witnesses who testified to his good character. Respondent is entitled to minimal weight for this mitigation factor, as two character witnesses are insufficient to constitute a wide range of references. (*In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430 [no mitigation for testimony from two attorneys and one client because they were not considered a wide range of references]; *In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, 624 [two character witnesses entitled to little weight as they do not represent the broad showing contemplated by standard 1.2(e) (vi), renumbered as of January 2014, as standard 1.6(f)].)

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.1.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court

⁸ Previously standard 1.2(e)(vi).

considers relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.7(a) provides that, “if a member commits two or more acts of misconduct and the standards specify different sanctions for each act, the most severe sanction must be imposed.

Standard 1.8(b) provides that, “[i]f a member has two or more prior records of discipline, disbarment is appropriate in the following circumstance unless the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct:

1. Actual suspension was ordered in any one of the prior disciplinary matters;
2. The prior disciplinary matters coupled with the current record demonstrate a pattern of misconduct; or
3. The prior disciplinary matters coupled with the current record demonstrate the member’s unwillingness or inability to conform to ethical responsibilities.

In the instant matter, standards 1.8(b)(1) and 1.8(b)(3) are applicable, and respondent has three prior records of discipline and no compelling mitigation has been shown to predominate.

Also applicable are standards 2.7, 2.8(a), and 2.10.

Standard 2.7 provides, in pertinent part, that disbarment or actual suspension is appropriate for an act of moral turpitude, dishonesty or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member’s practice of law.

Standard 2.8(a) provides that that disbarment or actual suspension is appropriate for disobedience or violation of a court order related to the member's practice of law, the attorney's oath, or the duties required of an attorney under Business and Professions Code sections 6068(a)-(h).

Standard 2.10 provides that actual suspension is appropriate for failing to comply with a condition of discipline. The degree of sanction depends on the nature of the condition violated and the member's unwillingness or inability to comply with disciplinary orders.

Respondent has been found culpable of serious misconduct involving the unauthorized practice of law, violations of his probation conditions, and acts of moral turpitude, dishonesty, and concealment.

The State Bar argues that respondent be disbarred from the practice of law. Respondent, on the other hand, argues that disbarment is unwarranted and that a period of actual suspension would be appropriate.

But, because respondent has engaged in acts of escalating misconduct since 2004, the court cannot agree with his position. Respondent has engaged in acts of misconduct over a span of approximately eight years and has demonstrated an inability to conform his conduct to the high ethical standards required of members of the Bar.

The court finds guidance in *Morgan v. State Bar* (1990) 51 Cal.3d 598. The Supreme Court disbarred an attorney who engaged in the unauthorized practice of law. The court held that disbarment was the appropriate level of discipline, noting that he had been found culpable in four disciplinary proceedings, his misconduct demonstrated an indifference to the Supreme Court's disciplinary orders, had been under suspension for an accumulated period of two years and on probation for an accumulated period of 11 years during his 31 years as an attorney. Although he had five good character witnesses and made contributions to his community, he did

not demonstrate that compelling mitigating circumstances predominated in the case. Disbarment is particularly appropriate when a respondent repeatedly demonstrates indifference or an inability to comply with successive disciplinary orders of the Supreme Court. (*Id.* at p. 607.) The attorney was thus disbarred.

In determining the degree of discipline, the Supreme Court considers an attorney's prior disciplinary record and the harm resulting from his misconduct. "Significantly, in examining the combined record of this disciplinary proceeding and [the attorney's] prior discipline, we are confronted not by isolated or uncharacteristic acts but by 'a continuing course of serious professional misconduct extending over a period of several years.' [Citation.] We are therefore concerned with what appears to have become an habitual course of misconduct. We believe that the risk of [the attorney] repeating this misconduct would be considerable if he were permitted to continue in practice. [Citation.] As [the attorney] has previously demonstrated, the public and the legal profession would not be sufficiently protected if we merely, once again, suspended [him] from the practice of law. [Citation.]" (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.) This court concludes that the Supreme Court's reasoning is equally applicable in this case.

Respondent here is not a candidate for suspension and/or probation. In his first disciplinary matter, respondent engaged in misconduct that put a client at risk of foreseeable prejudice and which actually caused harm to a client. Thereafter, in his second disciplinary matter, respondent was unable to comply with his reproof conditions as ordered by the court. In his third disciplinary matter, respondent engaged in an act of misconduct involving the intentional misappropriation of \$12,000 of settlement funds without an honest or good faith belief that he was entitled to those funds. In the current disciplinary matter respondent engaged in acts of moral turpitude, failed to comply with the Supreme Court order suspending him from the

practice of law, and failed to comply with the probation conditions imposed by the Supreme Court.

Respondent's characterization of his misconduct, as set forth in his October 31, 2013, trial brief, as a mistaken belief that he had been authorized to send the March 2, 2012, letter to Amidon is not credible. As the evidence shows, Amidon clearly informed respondent that the Amidon firm was too busy to take on Gomez as a client. The evidence fails to support respondent's assertion that he acted under a mistaken belief that he was authorized to send the March 2, 2012, letter on the Amidon firm's letterhead. Moreover, respondent not only held himself out as entitled to practice law when he knew that he was not so entitled, but, he also intentionally misrepresented a material fact in the letter. In the first sentence of the March 2, 2012, letter respondent writes that Gomez had retained the Amidon firm. Respondent's statement misrepresents the facts. Respondent knew that Gomez was not and had never been a client of the Amidon firm. (Exh. 8.) Additionally, respondent's misrepresentations made under penalty of perjury in his quarterly report regarding his compliance with the State Bar Act also reveals an inability or a disregard and indifference by respondent to his ethical responsibilities, including that of honesty.

Moreover, respondent's failure to comply with his professional duties has repeatedly burdened the resources of this court and the State Bar disciplinary system, also a matter of concern to the court. Respondent has been provided with opportunities to conform his conduct to the ethical requirements of the profession, but has failed to do so. Probation and suspension have proven inadequate in the past to prevent continued misconduct. (See *In the Matter of Rose* (Review Dept. 1994) 3 Cal.State Bar Ct. Rptr. 646.)

Lesser discipline than disbarment would be inappropriate because there are no compelling mitigating circumstances that clearly predominate in this case. The serious and

prolonged nature of the misconduct in this and the three prior disciplinary matters suggests that respondent is capable of future wrongdoing and raises concerns about his ability to comply with his ethical responsibilities to the public and to the State Bar. It is evident that the prior instances of discipline have not served to deter him from further misconduct.

Additionally, the court finds that respondent's most recent misconduct indicates that the risk of respondent engaging in further misconduct would be considerable, if he were permitted to continue in practice.

Thus, having considered the evidence, the standards, other relevant law and respondent's inability to show by clear and convincing evidence that his alcohol/ substance abuse problem has been adequately addressed, the court must recommend disbarment as the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

Recommendations

It is recommended that respondent Scott Cummings McKee, State Bar Number 154077, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

Costs

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

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: January 24, 2014

RICHARD A. PLATEL
Judge of the State Bar Court