FILED DECEMBER 11, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **TIMOTHY GAIL DALLINGER**, **Member No. 50357**, A Member of the State Bar.	**Case No. 98-O-01781; 98-O-03660; 98-O-03661; 99-O-12048; 99-O-12071; 99-O-12514; 00-O-10619; 00-O-12362** **DECISION AND ORDER FILING AND SEALING CERTAIN DOCUMENTS**

INTRODUCTION

This disciplinary proceeding is based on acts of misconduct including, inter alia, the misappropriation of client funds, the issuance of checks on insufficient funds, commingling, and other trust account violations, as well as the failure to cooperate in State Bar investigations.

Respondent reached a stipulation as to facts and conclusions of law with the Office of the Chief Trial Counsel of the State Bar of California ("State Bar"). Thereafter, respondent entered into a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program ("ADP"),[1] and the court accepted respondent as a participant in the ADP. (Rules Proc. of State Bar, rules 800-807.)

As set forth below in greater detail, respondent has successfully completed the ADP. Accordingly, pursuant to rule 803 of the Rules of Procedure of the State Bar of California ("Rules of Procedure"), the court hereby recommends that respondent be suspended from the practice of law for a period of four (4) years and until he (a) makes and provides proof of specified restitution; and (b) provides satisfactory proof to the State Bar Court of his rehabilitation, present fitness to practice law and present learning and ability in the general law

[1]The ADP was formerly known as the State Bar Court's Pilot Program for Respondents with Substance Abuse or Mental Health Issues ("Pilot Program"). The court will use ADP throughout this decision to refer to this program.

pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, that execution of such suspension be stayed, and that respondent be placed on probation for a period of five (5) years, on conditions including that respondent be actually suspended from the practice of law for the first two (2) years of the period of probation and until he makes and provides satisfactory proof to the Office of Probation that he has made specified restitution and until he satisfies the requirements of standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

SIGNIFICANT PROCEDURAL HISTORY

On April 18, 2002, the State Bar filed a Notice of Disciplinary Charges (NDC") against respondent in the above-entitled matter.

On May 13, 2002, respondent filed a response to the NDC.

On March 10, 2003, respondent contacted the State Bar's Lawyer Assistance Program ("LAP") for assistance with his mental health issues.

In an Order Pursuant to Telephonic Status Conference filed on March 25, 2003, the court referred this case to the Honorable Robert M. Talcott,[2] as respondent had elected to participate in the LAP.

On June 3, 2003, respondent submitted a declaration establishing a nexus between his mental health issues and his misconduct in this matter.

On July 19, 2003, respondent executed a LAP Participation Agreement to assist him with his mental health issues.

On September 4, 2003, the State Bar submitted to the court its brief regarding discipline in this matter, and on October 22, 2003, the State Bar submitted an addendum to its discipline brief.

On October 24, 2003, the parties' Stipulation Re Facts and Conclusions of Law was lodged with the court.

In mid-December 2003, respondent executed a Contract and Waiver for Participation in

[2]Judge Talcott's judicial appointment terminated November 1, 2006.

the State Bar Court's ADP which was subsequently lodged with the court.

On December 15, 2003, the court lodged its Decision Re Alternative Recommendations for Degree of Discipline in this matter.

Respondent was officially accepted into the ADP on December 15, 2003.

At a status conference on October 11, 2006, the court found that respondent had successfully completed the ADP.

The LAP issued a Certificate of One Year Participation in the Lawyer Assistance Program dated October 20, 2006, which reflects that respondent has complied with the requirements set forth in the LAP Participation Agreement/Plan for at least one year prior to October 20, 2006, and that during this time period, respondent has maintained mental health and stability and has participated successfully in the LAP.

On October 26, 2006, the parties' Stipulation Re Facts and Conclusions of Law was filed with the court,[3] and this matter was submitted for decision on said date. Therefore, in light of respondent's successful completion of the ADP, the court issues this decision as to the lower level of discipline set forth in the court's Decision Re Alternative Recommendations for Degree of Discipline.

FACTS AND CONCLUSIONS OF LAW

The Stipulation Re Facts and Conclusions of Law filed on October 26, 2006, is incorporated by reference as if set forth fully herein.

A. Jurisdiction

Respondent was admitted to the practice of law in California on January 5, 1972, and has been a member of the State Bar of California at all times since that date.

B. Count One - Case No. 98-O-01781 - (NSF Checks)

In 1997 and 1998, respondent maintained a client trust account at California Federal

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[3]Although the Stipulation Re Facts and Conclusions of law was filed on October 26, 2006, the attached Order approving the stipulation was not executed by the court. Accordingly, said stipulation is deemed approved, and the Order approving the stipulation is deemed executed by the court as of October 26, 2006, the date the stipulation was filed.

Bank. Between February and June 1998, respondent issued at least ten checks drawn upon his client trust account for which there were insufficient funds for the payment of the checks. Respondent's client trust account was overdrawn by as much as $1,928.29 on May 29, 1998. At the time respondent issued these checks, he knew or should have known that there were insufficient funds in his client trust account at California Federal Bank for the payment of the checks.

By issuing these NSF checks, respondent committed acts of moral turpitude in violation of Business and Professions Code section 6106.

C. Counts Two Through Seven - Case No. 98-O-03660 - (The Bennet Matter)

In January 1998, Layla Bennet sought respondent's advice regarding a medical malpractice action entitled *Bennet* v. *Horace C. Jenkins, M.D.*, Los Angeles Superior Court Case No. EC 021501, in which Bennet was representing herself. Although there was no written fee agreement, respondent agreed to negotiate a settlement of the action on Bennet's behalf. Respondent subsequently settled Bennet's action for $4,500.

On June 4, 1998, respondent received a settlement check payable solely to Bennet in the amount of $4,500. Respondent deposited this check into an account at California Federal Bank that was not a client trust account and, thereafter, wilfully misappropriated Bennet's funds.

On June 12, 1998, respondent issued a check from his client trust account at California Federal Bank payable to Bennet in the amount of $1,500. On the memorandum portion of the check, respondent wrote "partial settlement dist." On July 21, 1998, this check was returned by the bank due to insufficient funds. Bennet tried to negotiate the check a second time on August 24, 1998, but the check was again returned for insufficient funds. Bennet then contacted respondent and demanded her settlement proceeds.

Respondent closed his client trust account at California Federal Bank on August 27, 1998. He did not pay Bennet any portion of her settlement proceeds prior to closing the account.

The State Bar opened a disciplinary investigation on September 7, 1999, relating to Bennet's complaint. On September 13, 1999 and February 2, 2000, State Bar investigators wrote to respondent asking him to respond in writing to specific allegations of misconduct being

investigated by the State Bar in the Bennet matter. Although both letters were properly mailed to respondent at his official membership address and were not returned as undeliverable by the U.S. Postal Service, respondent neither responded to the investigators' letters nor otherwise communicated with them.

Respondent (a) willfully violated rule 4-100(A) of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct") by failing to deposit Bennet's settlement check into a client trust account; (b) willfully violated rule 4-100(A) by commingling client funds with his personal funds when he deposited Bennet's settlement check into an account that was not designated as a client trust account; (c) violated Business and Professions Code section 6106 by misappropriating Bennet's funds; (d) willfully violated rule 4-100(B)(4) by failing to promptly pay Bennet the funds to which she was entitled; (e) violated Business and Professions Code section 6106 by issuing an NSF check to Bennet from an account in which none of her settlement funds had been deposited and then closing the account before the check was paid; and (f) violated Business and Professions Code section 6068, subdivision (i), by failing to cooperate with the State Bar's disciplinary investigation of Bennet's complaint.

D. Counts Eight Through Twelve - Case No. 98-O-03661 - (The Kern Matter)

Respondent was retained by Roland Kern on May 30, 1999, to represent him with a pending insurance claim for a property loss he suffered as a result of the sinking of the vessel *Spicewind I*. Respondent and Kern agreed that respondent would be compensated for his legal services at the rate of $200 per hour.

On April 25, 1997, after settling the insurance claim, respondent received a settlement check in the amount of $125,000, payable to both respondent and Kern. On April 29, 1997, respondent deposited the settlement check into his client trust account at California Federal Bank.

Since Kern had already paid about $140,000 in legal fees, respondent agreed to disburse the entire $125,000 to Kern. However, on June 23, 1997, respondent's client trust account at California Federal Bank became overdrawn by $46.21, even though respondent had not distributed any portion of those funds to Kern. Respondent admitted that he misappropriated

Kern's settlement funds.

On August 5, 1997, the Internal Revenue Service ("IRS") issued a Notice of Levy to respondent, asserting that Kern owed the IRS the sum of $148,036.84. The IRS requested that respondent turn over to them any funds that he was holding for Kern.

On September 5, 1997, respondent sent to Donald Price, Kern's attorney for the IRS matter, an "Instructions, Release and Indemnity Agreement" which provided that respondent would transfer the funds respondent held on Kern's behalf to the IRS in response to its Notice of Levy. On September 9, 1997, Price wrote to the IRS and enclosed an assignment signed by Kern that assigned to the IRS the funds held by respondent on Kern's behalf. Price's letter notified the IRS that the funds would be forthcoming.

On October 29, 1997, respondent issued a check drawn payable to the Internal Revenue Service in the amount of $125,662, drawn upon respondent's general business account at California Federal Bank. The amount of the check represented the $125,000 settlement, plus accrued interest. On November 18, 1997, the check from respondent was returned to the IRS for insufficient funds. Respondent immediately closed this general business account on November 20, 1997, and has failed to pay the outstanding IRS levy with Kern's settlement funds.

The State Bar opened an investigation of respondent on September 7, 1999, pursuant to a complaint filed by Kern. On September 13, 1999, a State Bar investigator wrote to respondent asking him to respond in writing to specific allegations of misconduct in the Kern matter. Although the investigator's letter was properly mailed to respondent at his official membership address and was not returned as undeliverable by the U.S. Postal Service, respondent neither responded to the investigator's letter nor otherwise communicated with the investigator.

Respondent (a) willfully violated rule 4-100(A) of the Rules of Professional Conduct by failing to maintain the $125,000 he received on behalf of Kern in his client trust account; (b) violated Business and Professions Code section 6106 by misappropriating $125,000 of Kern's settlement funds; (c) committed acts of moral turpitude in violation of section 6106 by issuing a check payable to the Internal Revenue Service for $125,662 against insufficient funds and by thereafter closing the account before the check was paid; (d) willfully violated rule 4-100(B)(4)

of the Rules of Professional Conduct by failing to promptly pay funds to which Kern was entitled; and (e) violated Business and Professions Code section 6068, subdivision (i), by failing to cooperate with the State Bar's disciplinary investigation of Kern's complaint.

E. Counts Thirteen Through Sixteen - Case No. 99-O-12048 - (The Lundberg Matter)

Respondent was retained by Guy Lundberg on September 10, 1998, to review a resignation agreement prepared by Lundberg's employer. Lundberg paid $5,000 to respondent for the purpose of reviewing the agreement. Later that same day, however, Lundberg called respondent and told him to stop work on the matter because he had reached an agreement with his employer. Lundberg asked respondent to send him a billing statement and to refund the unearned portion of the $5,000 fee. Respondent told Lundberg that he would refund the unearned fees.

On September 29, 1998, Lundberg wrote a letter to respondent asking when he could expect to receive the billing statement and the refund of unearned fees. Lundberg sent this letter to respondent by both facsimile transmission and by mail to respondent's official membership address. On the same date, respondent faxed a message to Lundberg in which he promised that he would provide a billing statement and refund of unearned fees as soon as possible.

On November 30, 1998, Lundberg wrote a second letter to respondent requesting an accounting of the fees and a refund of the unearned portion of the fees. Lundberg sent this letter to respondent by both facsimile transmission and by mail to respondent's official membership address. The letter was not returned as undeliverable. Additionally, between December 1998 and May 1999, Lundberg left several additional messages on respondent's telephone answering machine in an effort to obtain the accounting and refund of unearned fees.

Despite Lundberg's repeated requests, respondent has neither provided him with an accounting nor refunded any portion of the $5,000 in advanced fees. Likewise, respondent has not responded to any of Lundberg's requests and messages after September 29, 1998.

The State Bar opened an investigation of respondent on September 27, 1999, pursuant to a complaint filed by Lundberg. On October 8, 1999 and February 2, 2000, State Bar investigators wrote letters to respondent asking him to respond in writing to specific allegations

of misconduct in the Lundberg matter. Although these letters were properly mailed to respondent at his official membership address and were not returned as undeliverable by the U.S. Postal Service, respondent has neither responded to the investigators' letters nor otherwise communicated with them.

Respondent (a) willfully violated rule 3-700(D)(2) of the Rules of Professional Conduct by failing to promptly refund the $5,000 in unearned fees paid to him by Lundberg; (b) willfully violated rule 4-100(B)(3) by failing to provide a billing statement or accounting to Lundberg as he requested; (c) violated Business and Professions Code section 6068, subdivision (m), by failing to respond to Lundberg's reasonable status inquiries; and (d) violated Business and Professions Code section 6068, subdivision (i), by failing to cooperate with the State Bar's disciplinary investigation of Lundberg's complaint.

F. Counts Seventeen Through Nineteen - Case No. 99-O-12071 - (The Maxwell Matter)

Respondent was retained by Sy Maxwell in January 1998, regarding interests in a real estate partnership known as Balboa Enterprises. No written fee agreement was entered into at the time respondent was retained by Maxwell. In April 1998, respondent completed the legal services for which he had been retained. At that time, respondent submitted a final billing statement to Maxwell showing a balance owed to respondent in the amount of $3,500.

On May 20, 1998, Maxwell issued a personal check to respondent in the amount of $3,500. Respondent wanted the money immediately and did not want to wait for receipt of a check from Balboa Enterprises because Balboa's account was not yet funded. Respondent agreed to reimburse the $3,500 to Maxwell upon respondent's receipt of payment from Balboa Enterprises. On May 22, 1998, Maxwell issued a check to respondent from Balboa Enterprises in the amount of $3,500, representing payment in full of respondent's fees.

Respondent subsequently issued a check to Maxwell drawn upon his personal account in the amount of $3,500. On the memorandum line, respondent wrote "loan pymt". The check from respondent was presented for payment on June 2, 1998, but was returned unpaid for insufficient funds. The check was again presented for payment on June 5, 1998, but was returned unpaid a second time due to insufficient funds.

On August 7, 1998, Maxwell filed a small claims action against respondent entitled *Maxwell v. Dallinger*, Van Nuys Municipal Court, Small Claims Case No. 98V20959. Notice of Entry of Judgment in favor of Maxwell and against respondent in the amount of $3,520, plus $46 in costs, was filed on September 15, 1998.

Respondent wrote a letter to Maxwell, dated September 25, 1998, stating that he planned to pay Maxwell all the monies owed to him by the following week. However, respondent failed to pay Maxwell as promised.

On January 25, 1999, respondent and Maxwell signed an Agreement to Satisfy Judgment in which respondent agreed to pay Maxwell a total amount of $3,566 in three installments, with $1,250 to be paid on February 10, 1999; $1,250 to be paid on March 10, 1999; and the balance of $1,066 to be paid on April 10, 1999. Respondent made the first installment payment to Maxwell on February 12, 1999, but thereafter failed to make any further payments.

On September 27, 1999, the State Bar opened an investigation of respondent pursuant to a complaint filed by Maxwell. On October 7, 1999, a State Bar investigator wrote to respondent asking him to respond in writing to specified allegations of misconduct in the Maxwell matter. Although the investigator's letter was properly mailed to respondent at his official membership address and was not returned as undeliverable by the U.S. Postal Service, respondent neither responded to the investigator's letter nor otherwise communicated with him.

Respondent (a) willfully violated rule 3-700(D)(2) of the Rules of Professional Conduct by failing to refund $3,500 in unearned fees to Maxwell; (b) committed acts of moral turpitude in violation of Business and Professions Code section 6106 by writing an insufficiently funded check to Maxwell and failing to repay the monies owed to him; and (c) violated Business and Professions Code section 6068, subdivision (i), by failing to cooperate with the State Bar's disciplinary investigation of Maxwell's complaint.

G. Counts Twenty Through Twenty-Three - Case No. 00-O-10619 - (The Fleming Matter)

Respondent was retained by Fred Fleming on December 22, 1994, to represent him in a matter entitled *AT&T Corp. v. Fleming & Berkley*, U.S. District Court Case No. 94-6024.

Respondent and Fleming agreed that respondent would be paid on an hourly basis.

On January 3, 1996, the U.S. District Court entered judgment in favor of AT&T in the amount of $35,636.82. Respondent filed a Notice of Appeal and Representation Statement with the U.S. District Court in the *AT&T Corp. v. Fleming & Berkley* action.

On February 2, 1996, Fleming gave respondent a check in the amount of $35,636.82. In the memorandum portion of the check, Fleming wrote "For Appeal Bond, ATT v. Fleming." Respondent agreed to deposit Fleming's check in his client trust account and to obtain a cashier's check in the same amount for the purpose of posting a bond with the U.S. District Court while Fleming appealed the judgment in the *AT&T Corp. v. Fleming & Berkley* action.

Respondent deposited the check from Fleming in his client trust account at California Federal Bank on February 2, 1996, and was required to maintain those funds in his client trust account until he obtained the cashier's check for posting the appeal bond.

Respondent never obtained a cashier's check nor disbursed any of the monies he received from Fleming to the U.S. District Court on Fleming's behalf. Nevertheless, on February 27, 1996, the balance in respondent's client trust account fell to $5,375.35 and, on March 26, 1996, the balance in that account was only $236.26. Respondent admitted that he wilfully misappropriated the monies that Fleming had delivered to him for posting the appeal bond.

On March 9, 2000, the State Bar opened an investigation of respondent pursuant to a complaint filed by Fleming. On June 8, 2000 and March 6, 2001, State Bar investigators wrote to respondent asking him to respond in writing to specific allegations of misconduct in the Fleming matter. Although these letters were properly mailed to respondent at both his official membership address and at a second address in Sherman Oaks, and none of the letters were returned as undeliverable by the U.S. Postal Service, respondent neither responded to the investigators' letters nor otherwise communicated with them.

Respondent (a) willfully violated rule 4-100(A) of the Rules of Professional Conduct by failing to maintain the $35,636.82 he received from Fleming in his client trust account; (b) willfully violated rule 4-100(B)(4) by failing to pay the funds he had received from Fleming to the U.S. District Court in accordance with Fleming's instructions; (c) violated Business and

Professions Code section 6106 by misappropriating $35,636.82 in funds received from Fleming; and (d) violated Business and Professions Code section 6068, subdivision (i), by failing to cooperate with the State Bar's disciplinary investigation of Fleming's complaint.

H. Counts Twenty-Four Through Twenty-Six - Case No. 00-O-12362 - (The Williams Matter)

From 1978 through 1998, respondent acted as personal attorney for Roger Williams and as attorney for his business, Roger D. Williams & Company. In September 1990, respondent counseled Williams to loan $21,000 to individuals recommended by respondent.

On November 5, 1990, respondent signed a promissory note as guarantor for the $21,000 loan that Williams made to the individuals recommended by respondent. Respondent did not advise Williams in writing of his right to seek independent legal advice regarding whether the $21,000 loan was fair and reasonable.

On April 5, 1993, respondent and Williams executed a written agreement that Williams would loan $80,000 to respondent, but respondent did not advise Williams in writing of his right to seek independent legal advice regarding whether the terms of the loan were fair and reasonable.

The terms of the promissory note signed by respondent and Williams regarding the $80,000 loan included the following: (1) respondent was to repay the loan with 10% interest; (2) respondent was to repay the principal through four installment payments of $20,000 each; (3) all principal and accrued interest was to be paid by June 30, 1995; (4) respondent assigned to Williams an unrecorded deed of trust on respondent's residential real property as security for the loan, but the promissory note specified that Williams could not record the deed unless and until respondent had been in default for a period of at least 90 days; (5) respondent assigned to Williams the attorney fees that respondent expected to recover in contingency cases in which respondent was the attorney of record. One of these cases was *Dallinger v. Cortez*.

Notwithstanding the terms of the promissory note with Williams, on January 18, 1998, respondent entered into a "Stipulation for First Lien Against Recovery" that assigned the legal fees he expected to recover in the *Dallinger v. Cortez* action to a creditor other than Williams.

This January 18, 1998, stipulation gave the other creditor a "first lien" in the sum of $125,000 against any judgment recovered in the *Dallinger v. Cortez* action.

On June 12, 1998, respondent stopped making payments to Williams on the loan, leaving an unpaid balance of $42,188.

Respondent (a) willfully violated rule 3-300 of the Rules of Professional Conduct by failing to advise Williams in writing of his right to seek the advice of independent counsel before entering into a business transaction with respondent regarding the $21,000 loan to individuals whom respondent had recommended; (b) willfully violated rule 3-300 by failing to advise Williams in writing of his right to seek the advice of independent counsel before entering into the agreement to loan $80,000 to respondent; and (c) committed an act of moral turpitude in violation of Business and Professions Code section 6106 by assigning the fees that respondent expected to receive in the *Dallinger v. Cortez* action as a "first lien" to another creditor after he had already assigned those fees to Williams in the April 5, 1993, promissory agreement.

I. Counts Twenty-Seven Through Twenty-Nine - Case No. 99-O-12514 - (The Auerbach Matter)

Respondent was retained by Rolfe Auerbach on February 25, 1998, to hold Auerbach's money in respondent's client trust account and to use the money to pay certain debts, bills and obligations of Auerbach's business. Between February 25, 1998 and March 20, 1998, Auerbach delivered funds to respondent in three installments, totaling $275,780.

Respondent deposited the funds he received from Auerbach in his client trust account at California Federal Bank and agreed to pay Auerbach's bills periodically as instructed by Auerbach.

Auerbach authorized respondent to properly pay out $229,932 from respondent's California Federal Bank client trust account. After these payments, respondent was still required to retain the balance of $45,848 in his trust account on Auerbach's behalf.

Without returning any portion of the remaining $45,848 to Auerbach, respondent closed his client trust account at California Federal Bank on August 27, 1998. On the date respondent closed the account, the remaining balance was $7.10. Respondent admitted that he wilfully

misappropriated $45,848 of Auerbach's funds.

In June 1998, Auerbach requested that respondent return the remaining $45,848 to him. When respondent failed to return the monies, Auerbach filed a lawsuit against respondent on July 21, 1999. On November 30, 2000, respondent and Auerbach entered into a settlement agreement in which respondent agreed to pay Auerbach the sum of $37,500 in monthly installments.

Respondent (a) willfully violated rule 4-100(A) of the Rules of Professional Conduct by failing to maintain Auerbach's funds in his client trust account; (b) willfully violated rule 4-100(B)(4) by failing to refund Auerbach's funds to him upon his request; and (c) committed an act of moral turpitude in violation of Business and Professions Code section 6106 by misappropriating $45,848 in funds belonging to Auerbach.

AGGRAVATION AND MITIGATION

A. Aggravating Circumstances

Respondent has admitted to multiple acts of wrongdoing in this proceeding. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b)(ii) ("standard").)

Respondent's misconduct was surrounded by bad faith, dishonesty, concealment and overreaching (standard 1.2(b)(iii)) and his misconduct significantly harmed his clients (standard 1.2(b)(iv)).

Respondent displayed a lack of candor and cooperation to the victims of his misconduct.[4] (Standard 1.2(b)(vi).)

B. Mitigating Circumstances

Respondent has no record of discipline in approximately nineteen years of practice prior

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[4]While Respondent also displayed a lack of cooperation with the State Bar's disciplinary investigations of the complaints against him, he has been charged with and found culpable of failing to cooperate with the State Bar's disciplinary investigations in the Bennet, Kern, Lundberg, Maxwell and Fleming matters. Respondent's failure to cooperate with those investigations cannot also be considered as an aggravating circumstance. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 497.)

to the commencement of his misconduct in the current proceeding.[5] Such a lengthy period of practice without prior discipline is entitled to significant weight in mitigation. (Standard 1.2(e)(i); *In re Chefsky* (1984) 36 Cal.3d 116, 132, fn. 10 [almost twenty of practice without prior discipline is an important mitigating circumstance]; *In re Young* (1990) 49 Cal.3d 257, 269 [twenty years of practice without prior discipline is an important mitigating factor].)

At the time of his misconduct, respondent was suffering from severe financial stress which resulted from circumstances that were not reasonably foreseeable or which were beyond his control and which were directly responsible for the misconduct. In particular, respondent's home suffered approximately $80,000 in damage during the 1994 Northridge earthquake and, in early 1995, respondent's law office burned down, resulting in a further loss of about $50,000 for respondent and his partner. Additionally, respondent began experiencing severe back pain in 1997 which resulted in surgery the following year. His recovery from back surgery required his absence from the law office for a lengthy period of time, thereby exacerbating the financial difficulties. (*In re Naney* (1990) 51 Cal.3d 186, 196; *Amante v. State Bar* (1990) 50 Cal.3d 247, 254; *Bradpiece v. State Bar* (1974) 10 Cal.3d 742, 747-748.)

Finally, respondent was suffering from mental health issues at the time of his misconduct which expert testimony would establish was directly responsible for the misconduct in this matter, and respondent has established through clear and convincing evidence that he no longer suffers from such difficulties. (Standard 1.2(e)(iv).)

Respondent's declaration establishes that, at the time of his misconduct, respondent was suffering from mental health issues. In addition, respondent's declaration and the stipulated facts also establish a causal connection between respondent's mental health issues and the misconduct found in this disciplinary proceeding. The court therefore finds that respondent has adequately established a nexus between his mental health issues and his misconduct in this matter, i.e., that

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[5]Respondent wilfully violated rule 3-300 of the Rules of Professional Conduct in November 1990, as a consequence of the $21,000 loan he counseled his client, Roger Williams, to make to individuals whom respondent had recommended. Respondent again violated rule 3-300 in April 1993, when he entered into an $80,000 loan agreement with Williams. The remainder of respondent's misconduct occurred between 1996 and 1998.

his mental health issues directly caused the misconduct set forth in this matter.

Furthermore, respondent sought assistance from the LAP in March 2003 to assist him with his mental health issues. Respondent signed an agreement to be evaluated by the LAP and complied with LAP conditions and requests for evaluation. On June 30, 2003, respondent met with the LAP's Evaluation Committee and entered into a long-term participation agreement with the LAP. Since entering into the LAP, respondent has maintained compliance with the terms of his participation agreement. Pursuant to rule 804 of the Rules of Procedure, in May 2006, respondent provided the court with a letter from his mental health professional dated April 13, 2006, which was satisfactory to the court. In addition, the LAP issued a Certificate of One Year Participation in the Lawyer Assistance Program dated October 20, 2006, which reflects that respondent has complied with the requirements set forth in the LAP Participation Agreement/Plan for at least one year prior to October 20, 2006, and that during this time period, respondent has maintained mental health and stability and has participated successfully in the LAP.

In addition to participating in the LAP, respondent was accepted into the court's ADP effective December 15, 2003. Respondent's participation in the ADP allowed the court to monitor respondent's progress in the LAP and his overall efforts at addressing the problems that led to his misconduct. Since his acceptance in the ADP, respondent has complied with all the terms and conditions of the program. Accordingly, based upon respondent's dedication to his mental health and emotional stability and to the ADP and the LAP, the court found in October 2006 that respondent had successfully completed the ADP.

Respondent is entitled to significant mitigating credit for his participation in the LAP and his successful completion of the court's ADP.

DISCUSSION

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

Standard 2.2 provides that culpability of a member of wilful misappropriation of entrusted funds or property must result in disbarment, unless the amount of funds or property misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate. Respondent has admitted to the misappropriation of at least $220,196.82, from six clients.

Standard 2.3 provides that culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending 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. In addition to his admitted misappropriation of client funds, respondent has admitted to the commission of acts of moral turpitude in violation of Business and Professions Code section 6106 by (a) issuing at least ten NSF checks drawn on his client trust account when he knew or should have known there were insufficient funds in his account for the payment of those checks; (b) closing his accounts in the Kern and Auerbach matters before the NSF checks he had issued in those matters had cleared; and (c) assigned his attorney fees in the *Dallinger v. Cortez* action as a "first lien" to another creditor after he had already assigned those same fees to his client, Roger Williams, as partial security for a loan. The court concludes that respondent's commission of these acts of moral turpitude were directly related to the practice of law and that they caused significant harm to his clients and others.

Standard 2.6 provides that culpability of a member of, among other things, a violation of Business and Professions Code section 6068 shall result in disbarment or suspension depending upon the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline. Respondent has admitted to his violation of section 6068, subdivision (i), as a result of his failure to cooperate with the State Bar's disciplinary investigation of the Bennet, Kern, Lundberg, Maxwell and Fleming matters. In addition, he has admitted to his violation of section 6068, subdivision (m), by failing to respond to his client's repeated requests for status information in the Lundberg matter.

Standard 2.8 provides that culpability of a member of a wilful violation of rule 3-300 of

the Rules of Professional Conduct shall result in suspension unless the extent of the member's misconduct and the harm to the client are minimal, in which case the degree of discipline must be reproval. Respondent has admitted to his culpability of two separate violations of rule 3-300 relating to the Williams matter. In the case of the $80,000 loan, the court concludes that respondent's misconduct significantly harmed his client since respondent did not timely repay the monies he had borrowed and he violated the promissory agreement by granting a superior lien to another creditor on the attorney fees he had pledged as partial security for the loan.

Finally, standard 2.10 provides that culpability of a member of a violation of, among other things, any Rule of Professional Conduct not specified in the Standards must result in reproval or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline. Respondent admitted that he failed to promptly refund to Maxwell unearned fees of $3,500 in wilful violation of rule 3-700(D)(2).

Respondent has also been found culpable of multiple violations of rule 4-100(A), 4-100(B)(3) and 4-100(B)(4) of the Rules of Professional Conduct in the Bennet, Kern, Lundberg, Fleming and Auerbach matters. While standard 2.2(b) provides a disciplinary guideline for violations of rule 4-100, it is limited to factual circumstances which do not involve the misappropriation of client funds. Since respondent has admitted to his misappropriation of client funds in each of these five matters, the court concludes that standard 2.2(b) is inapplicable.

Standard 1.6(a) states, in pertinent part, "If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding, and different sanctions are prescribed by these standards for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions."

Furthermore, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid

standards." (*Id*. at p. 251.)

In its brief and addendum regarding the issue of discipline, the State Bar set forth its position that if respondent successfully completes the ADP, he should be actually suspended for a period of two years and until (a) he makes restitution to the six clients from whom he misappropriated funds; and (b) he complies with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. Respondent did not submit a brief regarding the issue of discipline in this matter.

The wilful misappropriation of client trust funds warrants disbarment in the absence of significant mitigating circumstances. (*Grim v. State Bar* (1991) 53 Cal.3d 21, 29; *Finch v. State Bar* (1981) 28 Cal.3d 659, 665; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 518.) Clearly, respondent's admitted misappropriation of more than $220,000 from six clients amply warrants his disbarment in the absence of compelling mitigating circumstances.

However, in determining the appropriate discipline to recommended in this proceeding, the court notes that respondent has no prior record of discipline over many years of practice, he has recognized the wrongfulness of his conduct, and he has made a significant amount of restitution to the victims of his misappropriations. Such restitution may be properly considered in determining the amount of discipline to be imposed. (*In the Matter of Elliott* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 541, 544.)

Furthermore, at the time respondent engaged in the misconduct for which he has been found culpable, respondent was suffering from mental health disorders, and respondent's mental health disorders directly caused the misconduct in this proceeding. Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that those emotional difficulties were directly responsible for the misconduct, provided that the attorney has also established , through clear and convincing evidence, that he or she no longer suffers from such difficulties. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Naney*, *supra*, 51 Cal.3d at p. 197; *In re Lamb* (1989) 49 Cal.3d 239, 246; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.)

However, the Supreme Court has also held that, absent a finding of rehabilitation,

emotional problems are not considered a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney*, *supra*, 51 Cal.3d at p. 197.)

Respondent has been participating in the LAP since 2003 and has successfully completed the ADP. Respondent's successful completion of the ADP, which required his compliance with all terms and conditions set forth by the LAP, as well as the letter from his mental health professional pursuant to rule 804 of the Rules of Procedure and the Certificate of One Year Participation in the Lawyer Assistance Program from the LAP, qualify as clear and convincing evidence that he no longer suffers from the mental health disorders which led to his misconduct.

Accordingly, it is appropriate to recommend discipline less than that warranted by the standards in this matter. Therefore, the court recommends to the Supreme Court the imposition of the discipline set forth below in this matter.

RECOMMENDED DISCIPLINE

IT IS HEREBY RECOMMENDED that respondent **TIMOTHY GAIL DALLINGER** be suspended from the practice of law for a period of four (4) years and until he (a) makes and provides proof of the restitution set forth below; and (b) provides satisfactory proof to the State Bar Court of his rehabilitation, present fitness to practice law and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, that execution of such suspension be stayed, and that respondent be placed on probation for a period of five (5) years, on the following conditions:

1. Respondent must be actually suspended from the practice of law for the first (2) two years of the period of probation and until he provides satisfactory proof to the Office of Probation that he has made restitution to (a) Layla Bennet in the amount of $3,416.67, plus interest of 10% per annum from July 1, 1998; (b) Roland Kern in the amount of $47,916.67, plus interest of 10% per annum from July 1, 1997; (c) Guy Lundberg in the amount of $4,416.67, plus interest of 10% per annum from October 1, 1998; (d) Sy Maxwell in the amount of $2,316.00, plus interest of 10% per annum from April 1, 1999; (e) Fred Fleming in the amount of $11,636.72, plus interest of 10% per annum from February 1, 1996; and (f) Roger Williams in the amount of $42,188.00, plus interest of

10% per annum from June 1, 1998, and furnishes satisfactory proof thereof to the State Bar's Office of Probation. If the Client Security Fund ("CSF") has reimbursed any of the above-named individuals for all or any portion of his or her losses, respondent must make restitution to CSF to the extent of any payment from the fund to any of the above-named individuals, plus interest and costs, in accordance with Business and Professions Code section 6140.5, and furnish satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the CSF is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d). To the extent that respondent has paid any restitution prior to the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent will be given credit for such payments provided satisfactory proof of such is or has been shown to the Office of Probation;

2. Respondent will also remain actually suspended from the practice of law until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice law and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct;

3. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;

4. Within ten (10) calendar days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, respondent must report such change in writing to both the Office of Probation and to the Membership Records Office of the State Bar;

5. Respondent must comply with all provisions and conditions of his Participation Agreement with the Lawyer Assistance Program ("LAP") and shall provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this court with information regarding the terms and conditions of respondent's participation in the LAP and his compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition;

6. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) calendar days, that report must be submitted on the reporting date for the next calendar quarter and must cover the extended period. In addition to all quarterly reports, respondent must submit a final report, containing the same information required by the quarterly reports. The final report must be submitted no earlier than twenty (20) calendar days before the last day of the probation period and no later than the last day of the probation period;

7. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully, all inquiries of the Office of Probation which are directed to him personally or in writing, relating to whether respondent is complying or has complied with these probation conditions;

8. Within one year after the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must provide the Office of Probation with satisfactory proof of his attendance at a session of State Bar Ethics School and of his passage of the test given at the end of that session;

9. The period of probation will commence on the effective date of the Supreme Court's final disciplinary order in this proceeding.

It is further recommended that respondent be required, during the period of his actual suspension, to take and pass the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, and that he be ordered to provide satisfactory proof of his passage of the MPRE to the Office of Probation within said period.

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court (renumbered to 9.20 effective January 1, 2007), and that he be ordered to perform the acts specified in subdivisions (a) and (c) of that rule within thirty (30) and forty (40) calendar days, respectively, after the effective date of the Supreme Court's

final disciplinary order in this proceeding.

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 FILING AND SEALING CERTAIN DOCUMENTS

The court orders the Clerk to file this Decision and Order Filing and Sealing Certain Documents. Thereafter, pursuant to rule 806(c) of the Rules of Procedure, all other documents not previously filed in this matter will be sealed pursuant to rule 23 of the Rules of Procedure.

Dated: December 11, 2006

RICHARD A. HONN
Supervising Judge of the State Bar Court