FILED SEPTEMBER 23, 2008

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **KEVIN R. McLEAN,** **Member No. 127209** A Member of the State Bar.	)	Case No.: **06-O-13929-PEM** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

I. Introduction

In this contested matter, respondent **Kevin R. McLean** is charged with ten counts of professional misconduct in one client matter, including: (1) committing multiple acts of moral turpitude (four counts); (2) failing to maintain client funds in a trust account; (3) failing to perform legal services competently; (4) failing to promptly release a client file; (5) failing to keep a client informed of significant developments; (6) failing to cooperate in a disciplinary investigation; and (7) paying or offering to pay personal or business expenses for a client.

The court finds, by clear and convincing evidence, that respondent is culpable of seven of the ten charged acts of misconduct. In view of respondent's serious misconduct in this proceeding, and after considering the aggravating and mitigating circumstances surrounding respondent's misconduct, the court recommends that respondent be disbarred from the practice of law.

II. Pertinent 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 September 18, 2007. On November 9, 2007, respondent filed a response to the NDC. On May 15, 2008, the parties filed a Stipulation of Undisputed Facts (stipulation).

A five-day trial was held on the following dates: May 13, 14, and 15, 2008; and June 24 and June 27, 2008. The State Bar was represented by Deputy Trial Counsel (DTC) Manuel Jimenez. Respondent represented himself.

On June 27, 2008, following closing arguments, the court took this matter under submission.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the evidence and testimony introduced at this proceeding and on the parties' May 15, 2008 stipulation.

A. Jurisdiction

Respondent was admitted to the practice of law in California on July 18, 1986, and has been a member of the State Bar of California since that time.

B. Findings of Fact

1. The Harrah Matter

In 1998, Patricia Bean was hit on the head by a slot machine in a casino in Reno, Nevada. Shortly thereafter, Patricia Bean and her husband Charles Bean (the Beans) hired attorney George McNally (McNally) to represent them. McNally filed a personal injury case, entitled *Patricia Bean and Charles Bean v. Harrah 's Operating Company, et. al.*, case No. 98-CV-0081,

in the Ninth Judicial District Court, County of Douglas, District of Nevada (the Harrah's case). McNally informed the Beans that Harrah's Operating Company (Harrah's) had offered $100,000 to settle the lawsuit. The Beans rejected that offer. After the Beans rejected the offer, McNally withdrew from their case.

After McNally withdrew as counsel for the Beans, they had difficulty finding a lawyer to represent them. After going through a telephone book of trial attorneys and speaking to at least 10 attorneys, Patricia Bean (Bean) reached the Law Offices of Belli and McLean L.L.C.; she spoke with respondent. Initially, respondent did not take the Beans' case. However, by the end of 2002, respondent finally agreed to complete the case for the Beans, if they would lower their expectations as to the outcome, i.e., the settlement value of the case. By November 2002, the Beans had in fact lowered their expectations as to the worth of their case.[1] Thus, respondent agreed to take the Beans' case. But, as he was not a Nevada attorney, he enlisted the help of local Nevada counsel, Cal Potter (Potter).

According to the Beans, respondent told them that he and Potter were representing them on a pro bono basis and were only requesting to be reimbursed $2,700, their costs in conducting the settlement negotiations. Yet, in her faxed note to respondent's secretary, Bean acknowledges that she will have to pay various liens and "Kevin," i.e., respondent, from any settlement that might be negotiated. (Ex. B.) The Beans also claim that it was not until February 2007, five years after receiving the settlement funds, that respondent informed them that he wanted $60,000 in attorney fees.

[1] The Beans initially thought the case was worth at least a million dollars. Respondent believed that at most the settlement value of the case was $250,000, and that after all the costs and liens were assessed, the Beans might net $150,000. By November 2002, Patricia Bean faxed a note to respondent's secretary, Nicole, stating that if she could net $150,000 from a settlement she would accept the settlement. (See Exhibit B.)

Respondent acknowledges that he had no written fee agreement with the Beans. But, he maintains that when he agreed to represent the Beans, he informed them that he and Potter would take their case, using the same fee arrangement as the Beans had with McNally. That fee agreement entitled the attorneys to a contingency fee of 40%.[2] Respondent claims that when he realized that the liens on the case might actually exceed the settlement amount, he and Potter then agreed to take only $60,000 in attorney fees.

The court finds respondent's testimony regarding the fee arrangement credible. The court does not believe that respondent agreed to represent the Beans on a pro bono basis.[3] It is highly implausible that respondent would agree to represent people with whom he had no previous relationship on a pro bono basis. The contention that Potter would agree to represent the Beans on pro bono basis makes even less sense.

In November 2002, respondent and Potter, conducted a settlement conference in Reno, Nevada. Together, they negotiated a settlement of $250,000 on behalf of the Beans. Harrah's agreed to pay $175,000 of the settlement monies; Anchor Coin (Anchor), another defendant, agreed to pay $75,000 of the settlement monies.

In early December 2002, respondent received check No. 002273210X, in the amount of $175,000 from Harrah's. The check was issued to Patricia Bean & Belli & McLean L.L.C. & Potter Law Offices. Respondent deposited the funds into his client trust account at Wells Fargo

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[2] Forty percent of $ 250,000 is $100,000.

[3] As there is no written fee agreement between the Beans and respondent, the Beans might have been left with the impression that respondent was working on a pro bono basis however, unreasonable or misguided that impression was. It should be noted that the Business and Professions Code requires that an attorney, who contracts to represent a client on a contingency basis, put the contract in writing. (Bus. & Prof. Code, § 6147, subd. (a).) Failure to comply with any provision of section 6147 renders the fee agreement voidable at the option of the plaintiffs and the attorney is thereupon entitled to collect a reasonable fee. (Bus. & Prof. Code, § 6147, subd. (b).)

Bank, account No. 058-8466391 (CTA) on December 6, 2002. Shortly thereafter, respondent received check No. DN71396760, in the amount of $75,000, from Anchor Gaming. That check was issued to Belli & McLean and Ms. Patricia Bean. On December 9, 2002, respondent deposited the funds into his CTA. Prior to his deposits from Harrah's and Anchor, respondent had $81.87 in his CTA.

Between December 9 and December 20, 2002, after having deposited the Bean settlement funds from Harrah's and Anchor into his CTA, respondent withdrew $21,000 and transferred the $21,000 to his business account. The source of these funds was the Bean settlement funds. While respondent did not have authority from the Beans to withdraw $21,000 from the settlement funds, respondent and Potter were entitled to attorney fees totaling $60,000. The $21,000 that respondent transferred to his business account could have been part of the attorney fees to which respondent was entitled. Between December 9 and December 20, 2002, there being no apparent fee dispute, respondent had no obligation to keep the earned attorney fees in trust.

On December 27, 2002, respondent issued a check for $100,000 to the Beans as a partial disbursement of their settlement funds. At that time, respondent advised the Beans that he would keep the remaining settlement funds in his trust account to address outstanding liens, including medical liens and prior counsel's legal lien. The medical liens were in excess of $180,000; and McNally was asserting a lien of nearly $70,000.

On July 13, 2003, respondent paid $300 to Dr. Dozier from the CTA on behalf of Bean. On October 2, 2003, respondent paid $75.00 to the Potter Law Office (the associated Nevada counsel for the Beans) from the CTA on behalf of Bean.

It is the State Bar's contention that after disbursing $100,000 to the Beans, $300 to Dr. Dozier, and $75.00 to Potter, respondent should have maintained $149,625 in his CTA account on behalf of the Beans. That contention would be correct, only if respondent had been working on a pro bono basis for the Beans. But, as discussed *ante*, the court does not find that respondent agreed to take the Beans' case on a pro bono basis. The court finds that in addition to the $21,000 that respondent withdrew from the CTA between December 9 and December 20, 2002, he was entitled to withdraw an additional $39,000 as an earned fee.[4] After withdrawing $60,000 ($21,000 + $39,000) from his CTA, to which he was entitled as an earned fee, there should have remained a balance of $89,625 in the CTA from which to pay the Beans' outstanding liens. But, by December 31, 2004, the balance in respondent's CTA dropped to $552.08. None of the funds that respondent disbursed from the CTA between December 28, 2002 and December 31, 2004, other than the $300 payment to Dr. Dozier, the $75.00 payment to Potter, and the $39,000 withdrawal to which he was entitled as an earned fee, were expended on behalf of the Beans. Thus, between December 28, 2002 and December 31, 2004, respondent misappropriated at least $89,072.92.

2. The Malpractice Matter and the Liens

Respondent and Potter also represented the Beans in a malpractice action against McNally, entitled *Bean v. Laub and Laub and McNally, et.al.*, case No. CV-N-03-00140-HDM-

[4] Between December 2002 and December 31, 2004, the time period during which respondent withdrew funds from the CTA, there was no dispute as to attorney fees. As, discussed, *ante*, the Beans and respondent were clearly laboring under very different ideas regarding the fee arrangement, which would govern how respondent and Potter were to be paid for their services. Respondent and Potter rightly believed that they were entitled to 40% of the settlement funds. However, they were willing to take only $60,000 because respondent realized the liens on the case might exceed the settlement amount. There being no apparent fee dispute, respondent had no obligation to keep the attorney fees in trust.

RAM (McNally malpractice case),[5] which was filed in the United States District Court, District of Nevada in March of 2003. As in the Harrah's case, there was no written fee agreement. But, respondent agrees that he waived his rights to attorney fees in the McNally malpractice case. In May 2005, respondent settled the malpractice matter for $30,000. The malpractice claim, however, did not include the McNally lien for attorney fees.

On May 26, 2005, ALPS, the insurer for Laub & Laub, issued check number 14682, to Law Offices of Belli & McLean and its clients, Patricia & Charles Bean, in the sum of $15,000. On July 19, 2005, respondent had $49.89 in his CTA. On July 22, 2005, respondent received the check from ALPS and deposited it into his trust account. Between July 25, 2005 and August 3, 2005, respondent made two disbursements from his CTA. One of the disbursements was for $5,000 to his business account; the other was for $500 cash.

On August 9, 2005, Laub & Laub issued check number 26158, to Charles Bean, Patricia Bean, Belli & McLean, in the sum of $15,000. Respondent received the check on August 15, 2005, and deposited it into his CTA. On September 12, 2005, the balance in respondent's CTA dropped to $48.39. None of the funds disbursed between July 22, 2005, and September 12, 2005, were disbursed on behalf of the Beans. Therefore, between July 22, 2005 and September 12, 2005, respondent misappropriated $30,000 from the Beans.

After the McNally malpractice case settled, the Beans did not receive any funds from the Harrah's case and the McNally malpractice case until February 1, 2006. On February 1, 2006, Potter and respondent met with the Beans in San Francisco. In the meeting, respondent confessed that he had spent the money he had held in trust for the Beans. As a result of that meeting, respondent gave the Beans a check for $50,000 from his CTA. The $50,000 that

[5] The McNally malpractice case arose out of McNally's failure to advise the Beans during the time he was representing them in the Harrah's case of a loss of consortium claim.

respondent paid to the Beans did not come from the settlement funds that he had received on behalf of the Beans. Soon after the meeting, at the request of respondent, Potter sent the Beans $30,000, the source of which was money owed to respondent from another lawsuit that he had done with Potter.

At that same February 1, 2006 meeting, the Beans implored respondent to address all the outstanding liens against them. But respondent's strategy, regarding the McNally lien was to wait until the lien expired.

On August 3, 2006, the Beans filed a complaint with the State Bar complaining of respondent's misappropriation of their settlement funds in the Harrah's case and the McNally malpractice case, as well as respondent's failure to deal with the liens in the Harrah's case.

In mid-September 2006, respondent again visited the Beans in their home. At that time respondent promised to give the Beans another $30,000 by the end of the year. In February 2007, respondent gave the Beans $30,000. The source was from a $60,000 loan which respondent had taken.

In 2006, respondent settled the outstanding liens in the Harrah's case. In October 2006, respondent paid a Blue Cross lien of $5,000. Bean, however, was outraged that respondent had paid that lien because she thought the lien only should have been $1,393. In November 2006, respondent negotiated a chiropractor's lien down to $9,562.85, and paid it. In that same month, a Blue Cross lien was reduced to $254.40; that lien was paid in January 2007 by respondent. In November 2007, the McNally lien claim expired.

On January 25, 2007, Bean wrote respondent asking for her records and giving respondent a deadline of February 2, 2007. Respondent testified that he returned the records in

February 2007. There was no testimony from the Bean with respect to this issue. The court finds that respondent gave Bean the records he had in his possession in February 2007.

On February 28, 2007, respondent sent the Beans a letter and fax. In his letter, respondent stated, "We have separate agreements which cover any claims that George McNally may still bring against Pat and Chuck. In addition, our agreements anticipate me indemnifying Pat and Chuck from any other claims by George McNally." In a separate letter, also sent on February 28, 2007, respondent wrote,

> I have agreed to indemnify and hold you harmless as it related to the lien amount Mr. McNally may claim. As we have discussed and agreed, this indemnify [sic] includes that I will pay to Mr. McNally any amounts of money he may be awarded for his lien claim including his attorneys's [sic] fees, his lien claim for approximately $69,000.00, any interest on that lien claim, as well as, any attorney's fees necessary to defend Pat and Chuck from George McNally's claims.

3. Respondent's Representations Relating to His Bankruptcy Filing

On May 15, 2007, respondent filed for bankruptcy in the United States Bankruptcy Court, Northern District of California, case No. 07-30568 DM111. Respondent filed a Creditor Matrix Cover Sheet, and declared that the attached sheet contained the correct, complete, and current names and addresses of all priority, secured and unsecured creditors listed in the debtor's filing. Respondent listed the Beans in the Creditor Matrix list of creditors. But, he did not provide the Beans' address. Instead, he listed his own address as the address for the Beans: "c/o Belli & McLean 473 Jackson Street 2nd Floor, San Francisco, CA, 94111."

On May 18, 2007, the Bankruptcy Court issued a Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, and Deadlines (Notice). The Notice advised that the meeting of creditors would take place on June 12, 2007, at the San Francisco U.S. Trustee's Office. The Notice also indicated that the deadline to file a complaint to determine dischargeability of certain debts was

August 13, 2007. A Proof of Claim form was also enclosed with the Notice. On that same date, the Bankruptcy Noticing Center, by Joseph Speetjens, served the Beans by sending the Notice to Patricia and Charles Bean, c/o Belli & McLean, 473 Jackson Street, 2nd Fl., San Francisco, California 94111-1607. Respondent received the Notice from the Bankruptcy Court; but he did not forward the Notice to the Beans or advise them of its contents. Nor did he advise them of the Proof of Claim Form.

On July 11, 2007, respondent met with the Beans at their home. At that time, he gave them an undated check in the amount of $30,000 and asked them to hold it until he had money in the bank account. He advised the Beans that the check would not be good until he contacted them and told them when to deposit it. Respondent also told the Beans that he might have to file for bankruptcy. Respondent gave the Beans no additional information about the bankruptcy. He did not advise them of the Notice, the meeting of the creditors or the opportunity to file a Proof of Claim. In fact, the Beans did not find out that respondent was actually in bankruptcy, until they were provided with that information by the State Bar.

4. Respondent's Further Acts

In December 2007, Charles Bean was admitted into the hospital for open heart surgery. While in the hospital respondent visited him and left him a cashier's check for $30,000. Charles Bean cashed the check. In addition to leaving a cashier's check, respondent asked Charles Bean to tell the State Bar that he had given respondent permission to use the funds respondent held in trust for the Beans.[6]

In early February 2008, respondent dropped by the Beans house to discuss how much more money the Beans felt they were owed. At that visit, respondent again requested that the

[6] It was respondent's contention at trial that the Beans loaned the proceeds of their settlement to him. The court does not find that contention to be credible.

Beans tell the State Bar that they had given their permission for him to use the funds he held in trust for them. Respondent also discussed the possibility of giving the Beans collateral for the amount of money they felt he owed them. By January 2008, respondent had given the Beans $240,000 and had paid all outstanding liens on their behalf. The court finds that respondent paid the Beans the entirety of any money he owed them; respondent has made full restitution to the Beans.

On May 10, 2008, respondent visited the Beans at their home. He gave the Beans his collection of old comic books and an antique gun belonging to his father. He wanted the Beans to consider this as an exchange for whatever remaining funds they thought he owed them. On May 13, 2008, the morning that Charles Bean testified in this proceeding, respondent met him in the bathroom and asked him if he wanted to see respondent disbarred.

C. Conclusions of Law

Count 1: Misappropriation (Bus. & Prof. Code, §6106)[7]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

In December 2002, respondent received $250,000 in settlement money on behalf of the Beans. Between December 9 and December 20, 2002, respondent withdrew $21,000, which he transferred from his CTA to his business account. On December 27, 2002, respondent issued a check for $100,000 to the Beans as a partial disbursement of the settlement funds. When he paid the Beans the $100,000, respondent told them that he would keep the remaining settlement funds in his trust account to address outstanding liens. In July 2003, respondent paid Dr. Dozier $300 from the CTA on behalf of Bean. On October 2, 2003, respondent paid the Potter Law Office

[7] References to section (§) are to the provisions of the Business and Professions Code, unless otherwise indicated.

$75 from the CTA on behalf of the Beans. The State Bar charges that after disbursing the $100,000 to the Beans, the $300 to Dr. Dozier and the $75 to Potter Law Office, respondent should have had $149,625 remaining in his CTA on behalf of the Beans. The court does not agree that respondent should have had $149,625, remaining in his CTA; as discussed, *ante*, the court finds that he should have had at least $89,625 in his trust account. But, by December 31, 2004 the balance in respondent's CTA dropped to $552.08. By misappropriating $89,072.92 from the CTA when he withdrew those funds between December 2002 and December 31, 2004, respondent committed acts of moral turpitude, dishonesty, and corruption, in willful violation of section 6106.

Count 2: Misappropriation (Bus. & Prof. Code, §6106)

Respondent, who represented the Beans in the McNally malpractice case, waived his right to attorney fees in that case. As discussed, *ante*, respondent settled the McNally malpractice case for $30,000, which he received in two payments of $15,000 each. On July 22, 2005, respondent received the first settlement check for $15,000 and deposited it into his CTA on behalf of the Beans. On August 15, 2005, respondent received the second settlement check for $15,000 and deposited it into his CTA on behalf of the Beans. None of the funds disbursed between July 22, 2005 and September 12, 20005 were disbursed on behalf of the Beans. On September 12, 2005, the balance in respondent's CTA was $48.39. Thus between July 22, 2005 and September 12, 2005, respondent misappropriated $30,000.

By misappropriating $30,000 from the client trust account when he withdrew those funds between July 22 and September 12, 2005, respondent committed acts of moral turpitude, dishonesty, and corruption, in willful violation of section 6106.

Count 3: Misrepresentations and Concealment (Bus. & Prof. Code, §6106)

Acts of moral turpitude include concealment as well as affirmative misrepresentations and no distinction can be drawn among concealment, half-truth, and false statement of fact. (*In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808.)

In count 3, the court finds there is clear and convincing evidence that respondent committed acts of moral turpitude in willful violation of section 6106, by making misrepresentations, stating half-truths, and by concealing the truth, including as follows:

- By listing the Beans as a creditor in the bankruptcy proceeding, but by providing his own address to the bankruptcy court as that of the Beans and by failing to forward the Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, and Deadlines (Notice) and the information and enclosures contained with the Notice to the Beans, respondent misrepresented to the bankruptcy court that the Beans would receive mailings and notices from the bankruptcy court at his address;
- By listing his address as that of the Beans on his bankruptcy petition and receiving the Bean's mail from the bankruptcy court, but not forwarding it to the Beans, respondent committed an act of dishonesty by withholding the Beans' mail and thereby concealing material information about the bankruptcy proceeding from the Beans;
- By meeting with the Beans on July 11, 2007, and telling them that he might have to file for bankruptcy, when, in fact, he already had filed for bankruptcy on May 15, 2007, respondent concealed and withheld information about the bankruptcy proceedings from the Beans.

Thus, by misrepresenting to the bankruptcy court that the Beans would receive notice of the bankruptcy proceedings at his address, by withholding and concealing information about the bankruptcy proceedings from the Beans, and by failing to forward the mail that he received from the bankruptcy court, respondent committed acts of moral turpitude in willful violation of section 6106.

Count 4: Failure to Maintain Client Funds in a Trust Account (Rules Prof. Conduct, Rule 4-100(A))[8]

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith.

Respondent had a fiduciary duty to hold in trust the settlement proceeds he received on behalf of the Beans, until such time as it was paid to them or others for their benefit.

In Count 4, the court finds that there is clear and convincing evidence that respondent failed to maintain client funds in his client trust account as follows:

- On December 6, 2002, respondent deposited $175,000 in settlement proceeds that he had received on behalf of the Beans in his client trust account. Shortly thereafter, respondent received an additional $75,000 in settlement proceeds on behalf of the Beans, which he deposited in his trust account on December 9, 2002. Respondent made various disbursements to the Beans or on their behalf, between December 2002 and December 31, 2004. By December 31, 2004, there should have remained a balance of $89,625 in the trust account on behalf of the Beans. But on December 31, 2004, the balance in respondent's client trust account had

[8] References to rule are to the current Rules of Professional Conduct.

dropped to $552.08. By not maintaining $89,625 received on behalf of the Beans in the client trust account, respondent willfully failed to maintain client funds in a trust account in violation of rule 4-100(A).

- On May 15, 2005, respondent settled the McNally malpractice case for $30,000. As part of that settlement, on July 22, 2005, respondent received a check for $15,000 and deposited it into his trust account. As part of the settlement, on August 15, 2005, respondent received another check for $15,000 and deposited it in his trust account. On September 12, 2005, the balance in respondent's trust account dropped to $48.39. None of the funds disbursed from the trust account between July 22 and September 12, 2005 were disbursed to the Beans or on their behalf. By not maintaining $30,000 received on behalf of the Beans in the client trust account, respondent willfully failed to maintain client funds in a trust account in violation of rule 4-100(A).

Count 5: Failure to Perform Competently (Rule 3-110(A))

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence.

The State Bar alleges in Count 5 that respondent never resolved the lien from McNally, who asserted that the Beans owed him approximately $69,000.

The court cannot conclude, by clear and convincing evidence, that respondent failed to competently perform legal services on behalf of the Beans. The evidence shows that it was respondent's strategy to resolve the lien by waiting out its expiration, so that the Beans would not have to pay anything. The lien expired in November 2007. If respondent had not waited until the McNally lien expired, the Beans clearly would have been entitled to less money than

they received.

Thus, the court finds that there was no showing by clear and convincing evidence that respondent failed to competently perform legal services regarding his handling of the McNally lien.

Accordingly, Count 5 is dismissed with prejudice.

Count 6: Payment of Personal or Business Expenses Incurred by or for a Client (Rule 4-210(A))

Rule 4-210(A) provides that a member must not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or the member's law firm will pay the personal or business expenses of a prospective or existing client.

In his letter dated February 28, 2007 (Ex. 6, pp. 45-46.), respondent addressed the issue of McNally's lien claim for approximately $69,000. Respondent represented in his letter that he would indemnify the Beans as it related to the lien amount that McNally might claim. Respondent wrote:

> My research under both California law and Nevada law shows that Mr. McNally had four years in which to bring a lien claim and that time has passed. Specifically, the statute of limitations under California and Nevada law concerning breach of contract claims which are the basis of McNally's lien are four (4) years only. We had many conversations in the past few years concerning this lien and that George McNally had until November 2006 to file a lawsuit against you.
>
> As it is now the end of February 2007, and we have not been served with a lawsuit from Mr. McNally concerning his lien. I believe that you, Pat and Chuck, can close this case due to McNally's failure to act within the applicable time periods. This letter is meant to give both of you added peace of mind through my express agreement to defend you against any foreseeable expenses associated with George McNally.

Respondent clearly believed and explained in his letter to the Beans that McNally's lien claim had expired. But, respondent further agreed to "be financially responsible for any monies of any form concerning George McNally and Laub and Laub."

Thus, by offering to indemnify the Beans for any "foreseeable expenses associated with George McNally," including any attorney fee lien that McNally might pursue, respondent represented that he would pay the personal expenses of existing clients in willful violation of rule 4-210(A). The court further concludes that there was no evidence of client harm and that the violation was not serious. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal.State Bar Ct. Rptr. 602, 617.)

Count 7: Misrepresentation (Bus. & Prof. Code, §6106)

By misrepresenting in his February 28, 2007 letter that the Beans had agreed to loan him funds from the settlement proceeds, when in fact they had not agreed to loan him funds, and by asking the Beans when he met with them in February 2008, to tell the State Bar that they had given respondent permission to use the funds he held in trust for them, when in fact they had not given such permission, respondent committed acts of moral turpitude, in willful violation of Business and Professions Code, section 6106.

Count 8: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m))

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

Respondent has been charged with and found culpable of misappropriation. Misappropriation, by its nature, is always accompanied by secrecy. Here, respondent took the unusual step of informing his clients that he misappropriated their funds. He waited, however, until February 1, 2006, thirteen months after he misappropriated the Harrah's and Anchor Coin settlement funds and almost seven months after he misappropriated the Laub & Laub and ALPS

settlement funds (i.e., the McNally malpractice case settlement funds) to inform the Beans that he had misappropriated their funds.

Accordingly, respondent failed to keep the Beans reasonably informed of significant developments in a matter in which respondent agreed to provide legal services, in willful violation of Business and Professions Code, section 6068, subdivision (m). By so doing respondent committed what is a technical and de minimis violation of section 6068, subdivision (m), which will not increase the level of discipline in this matter.[9]

Count 9: Failure to Return Client File (Rule 3-700(D)(1))

Rule 3-700(D)(1) requires an attorney whose employment has terminated to promptly release to a client, at the client's request, all the client's papers and property. On January 25, 2007, Bean wrote respondent, asking for her records and giving respondent a deadline of February 2, 2007 to send them to her. Respondent testified that he gave Bean the records he had in his possession in February 2007. When she testified, Bean did not contradict respondent's testimony on this issue. Moreover, there is no evidence that respondent's employment had terminated in February 2007. To the contrary, the State Bar alleged in Count 6 that the Beans were "existing" clients of respondent when he wrote the February 28, 2007 letter referenced in that count. The court found that allegation to be true. Thus, the evidence is not clear and convincing that respondent's employment had terminated in February 2007; nor is there clear and convincing evidence that respondent failed to promptly return the client records to Bean.

Accordingly, as the evidence that respondent violated rule 3-700(D)(1) is not clear and convincing, the court dismisses Count 9 with prejudice.

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[9]Charging an attorney with failing to inform a client of a significant development in a matter in which the attorney has agreed to provide legal services, based on the attorney's failure to inform his client that he has misappropriated the client's funds, is a blatant example of overcharging by the State Bar.

Count 10: Failure to Cooperate in a State Bar Investigation (Bus. & Prof. Code, § 6068, Subd. (i))

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

The State Bar alleges in Count 10 that respondent failed to respond to an October 24, 2006 letter he received from a State Bar investigator. The State Bar further alleges that at an August 16, 2007 meeting that was attended by respondent, his then counsel, Jerome Fishkin, the State Bar Investigator, and Deputy Trial Counsel Robin Brune, respondent declined to make any statements regarding the investigation of this matter.

The court, however, has before it no clear and convincing evidence that respondent failed to cooperate in a State Bar investigation.

Accordingly, as the evidence that respondent violated section 6068, subdivision (i) is not clear and convincing, the court dismisses Count 10 with prejudice.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Professional Misconduct, standard 1.2(e).)[10] There are some compelling mitigating factors.

The absence of a prior record over many years of practice coupled with present misconduct that is not deemed serious is a mitigating circumstance. (Std. 1.2(e)(i).) Respondent's misconduct, however, is serious. Thus, in light of the serious nature of

[10] All further references to standards are to this source.

respondent's misconduct, the court gives the approximately 17 years of practice of law without a prior record of discipline at the time of respondent's misconduct[11] minimal weight as a mitigating factor

Respondent suffered emotional and financial difficulties at the time of his misconduct. (Std. 1.2(e)(iv).) Respondent joined the law firm of Melvin Belli Firm in 1986. In the 1990's the firm had at least 400 breast implant cases. Although the firm won the breast implant cases and expected a huge settlement, DOW Chemical, the manufacturer of the implants, declared bankruptcy, leaving the Belli firm with large debts. In 1996, Belli declared bankruptcy; he died that same year. By 1997, respondent was the only partner in the firm who had not declared bankruptcy. Respondent was sued by every creditor of the Belli firm and was responsible for all the debts of the firm. The Dow bankruptcy dragged on and caused cash flow problems. In 1998 respondent was involved in acrimonious divorce proceeding that also involved a young child. From 1998 until 2007, respondent dealt with custody and visitations issues involving move away orders regarding his child. From 2001-2003, two of respondent's college roommates, who were close friends of his, died. In 2006, respondent's father died. Respondent, who thought he could pay the Beans by refinancing his house, learned that unbeknownst to him an employee of the Belli firm had placed a lien on his house so that he could not refinance the house. Eventually respondent's home was sold at a foreclosure sale.

Respondent presented three witnesses regarding his good character. (Std. 1.2(e)(vi).)

Harry Kim

Harry Kim (Kim) has been a friend of respondent for at least 15 years. He is currently a city commissioner in San Francisco. Previously, he served as a

[11] Respondent was admitted to the practice of law in July 1986; his misconduct began sometime between December 2002 and December 31, 2004. (See Conclusions of Law, Count 1.)

Golden Gate District Board Director. Kim finds respondent a trustworthy, honest person, who has good ethics. Kim testified that respondent does pro bono work by giving advice to senior citizens. Kim did not understand the details of the charges against respondent.

Bishop McKinney

Bishop George McKinney (McKinney) has been a pastor since 1962; since 1985 he has been a bishop in the Bishop of God and Christ Church in San Diego, a six million member church. He trained in theology and social work, and is experienced as a probation officer and social worker. He has authored eight books.

McKinney met respondent in 1995, when respondent represented him on a pro bono basis for two years. He has found respondent to be a person of integrity and sensitivity. McKinney feels comfortable referring cases to respondent. McKinney testified that he has an understanding of respondent's misconduct and believes it to have been aberrational. McKinney believes that respondent was under a lot of family and financial pressure at the time of his misconduct. McKinney further testified that kind of pressure causes one to do things one might not ordinarily do. As far as McKinney understands the funds that were taken have been repaid.

Stephen Cornet

Stephen Cornet (Cornet) has practiced law since 1971. He is currently working at a firm specializing in commercial litigation. He primarily does personal injury cases. He is president of the Alameda/Contra Costa Trial Lawyers

association. He is also an adjunct professor at Hastings College of the Law in San Francisco.

Cornet met respondent in 1997, while they were working on cases. He then started doing cases with respondent. They once had lunch together; but they have never done anything on a social basis.

When Cornet testified, he was aware of the trust violations allegations against respondent. Cornet stated that those allegations might cause him to reevaluate his opinion of respondent. Prior to learning of the trust violations, he never heard anything negative regarding respondent.

This evidence of good character is given little weight, however, because three witnesses do not represent an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities as required by standard 1.2(e)(v), especially where one of the witnesses did not understand the charges against respondent.

Respondent took the stand on his own behalf regarding mitigation. His testimony made it clear that as recently as last year, he borrowed $40,000 from a client without a written contract or a secured note.

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent committed multiple acts of wrongdoing, which include misappropriation, misrepresentation, concealment, acts of moral turpitude, trust fund violations; offering to pay personal expenses incurred by a client; and failure to communicate. (Std. 1.2(b)(ii).)

Respondent's misconduct was surrounded by bad faith, dishonesty, concealment, and overreaching. (Std. 1.2(b)(iii).) At trial, the evidence showed that on May 13, 2008, the morning

that Charles Bean testified, respondent met Charles Bean in the bathroom before his testimony. Respondent began a conversation, the substance of which was to ask Charles Bean if he wanted to see respondent disbarred.

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve confidence in the profession and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std 1.3.)

Respondent's misconduct involved one client matter and multiple acts of moral turpitude. The standards for respondent's misconduct provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the client. (Stds. 1.6, 2.2(a), 2.3, 2.4(b), 2.6(a), and 2.10.)

Standard 1.6(a) provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standard 2.2(a) provides that willful misappropriation of entrusted funds must result in disbarment absent compelling mitigation. Respondent's misappropriation of over $119,000 is significant.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment. As set forth, *ante*, respondent's misappropriation and misrepresentations to his clients and the bankruptcy court

were acts of moral turpitude.

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.) The court will look to applicable case law for guidance. Nevertheless, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar asserts that the appropriate discipline which should be imposed in this matter is disbarment. The court agrees.

It is settled that an attorney-client relationship is of the highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Here, respondent flagrantly breached his fiduciary duties to his client by taking over $119,000.

The misappropriation of client funds is a grievous breach of an attorney's ethical responsibilities, violates basic notions of honesty and endangers public confidence in the legal profession. In all but the most exceptional cases, it requires the imposition of the harshest discipline—disbarment. (*Grim v. State Bar* (1991) 53 Cal.3d 21.)

Respondent's misappropriation and misrepresentations to his clients and to the bankruptcy court weigh heavily in assessing the appropriate level of discipline. Like the attorney in *Grim*, the "misappropriation in this case. . .was not the result of carelessness or mistake; [respondent] acted deliberately and with full knowledge that the funds belonged to his client." (*Grim v. State Bar, supra,* 53 Cal.3d at p. 30.) However, unlike the attorney in Grim, the evidence does not support an inference that respondent intended to permanently deprive his

clients of their funds. Rather, respondent first started making restitution to the Beans shortly after their February 1, 2006 meeting, in which respondent confessed that he had misappropriated the settlement funds that he should have held in trust for the Beans. Respondent gave his clients a check for $50,000 and then had Potter send them another check for $30,000. Thus, respondent started reimbursing the Beans prior to any State Bar involvement in this matter and prior to the August 3, 2006 filing of the Beans' complaint with the State Bar.[12]

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) While the court recognizes that respondent had and continues to have many financial difficulties, some of which were and are beyond his control, his own financial difficulties do not outweigh his fiduciary duty to his clients. "It is precisely when the attorney's need or desire for funds is greatest that the need for public protection afforded by the rule prohibiting misappropriation is greatest." (*Grim v. State Bar, supra,* 53 Cal.3d at p. 31.) Instead of accepting responsibility for his misconduct, respondent asked the Beans to tell the State Bar that they loaned him the settlement funds he had misappropriated, although they had not loaned respondent any funds.

Respondent "is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law." (*Resner v. State Bar* (1960) 53 Cal.3d 605, 615.) Therefore, balancing all relevant factors, respondent's serious misconduct, and the mitigating and aggravating evidence, the court recommends disbarment.

VI. Recommended Discipline

Accordingly, the court recommends that respondent **Kevin R. McLean** be disbarred from

[12] As discussed in the penultimate paragraph of the Findings of Fact, by January 2008, respondent paid the Beans $240,000 and paid all outstanding leans on their behalf. Thus, respondent has paid the Beans the entirety of any money he misappropriated. Respondent has made full restitution to the Beans.

the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

The court recommends that respondent 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.

Finally, the court recommends 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.

VII. Order of Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4) and rule 200(c) of the Rules of Procedure of the State Bar, it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California. The inactive enrollment will become effective 45 calendar days after service of this order.[13]

Dated: September __, 2008

PAT McELROY
Judge of the State Bar Court

[13] To provide respondent adequate time to give proper notice to all concerned parties due to his current heavy caseload, respondent is ordered to be enrolled as an inactive member effective 45 days, instead of the customary three days, after service of this order. (Rules Proc. of State Bar, rule 220(c).)