

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case Nos.: 07-O-10750, 07-O-11492, 07-O-
	)	14309, 07-O-13698, 08-O-10508,
STEVEN ROBERT LISS	)	09-O-13027-DFM
	)	
Member No. 129527	)	DECISION INCLUDING DISBARMENT
	)	RECOMMENDATION AND
A Member of the State Bar	)	INVOLUNTARY INACTIVE
	)	ENROLLMENT ORDER

INTRODUCTION

Respondent **Steven Robert Liss** (Respondent) is charged here with willfully violating (1) Business and Professions Code¹ sections 6068(a), 6125, and 6126 (failure to support laws - unauthorized practice); (2) section 6106 (moral turpitude) [three counts]; (3) rule 4-200(A) of the Rules of Professional Conduct² (illegal fee); (4) section 6068(m) (failure to respond to client inquiries); (5) rule 4-100(A) (failure to deposit client funds in trust account) [two counts]; (6) rule 3-700(D)(2) (failure to refund unearned fees) [four counts]; (7) rule 4-100(B)(3) (failure to render accounts of client funds) [two counts]; (8) rule 4-200(A) (unconscionable fee); (9) rule 3-700(D)(1) (failure to release file); and (10) section 6068(k) (failure to comply with conditions of probation). The court finds culpability and recommends discipline as set forth below.

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

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

PERTINENT PROCEDURAL HISTORY

This decision involves the trial of three consolidated Notices of Disciplinary Charges filed by the State Bar against Respondent during the period from September 2008 through July 2009.

The first Notice of Disciplinary Charges, in Case Nos. 07-O-10750, 07-O-11492, and 07-O-14309, was filed on September 23, 2008. Respondent, then represented by David Cameron Carr, filed his initial response to this NDC on November 4, 2008. A first amended response to this NDC was filed on behalf of Respondent on November 10, 2008.

The second NDC, in Case Nos. 07-O-13698 and 08-O-10508, was filed on October 29, 2008. Respondent filed his response to that NDC on December 2008.

On November 21, 2008, an initial status conference was held in the above pending matters, at which time the cases were consolidated and ordered to commence trial on April 28, 2009.

On December 18, 2008, Mr. Carr, Respondent's counsel, filed a motion to withdraw as counsel, coupled with a request that the trial date be continued. On January 5, 2009, this court issued an order granting the request by Carr to withdraw as counsel but denying the motion for a continuance.

On February 4, 2009, while Respondent was acting as counsel in pro per, the State Bar, represented by Deputy Trial Counsel Melanie Lawrence, filed a motion to compel Respondent to appear for his deposition. After the time for any opposition by Respondent had elapsed, that motion was granted by this court on February 26, 2008. The order included a requirement that Respondent appear for his deposition on March 5, 2009, unless the parties agreed to a different time.

On March 9, 2009, the State Bar filed a new motion, now seeking an order imposing sanctions against Respondent for his failure to appear for the court-ordered March 5 deposition.

On March 13, Respondent filed a substitution of attorneys, designating Ed Lear of the Century Law Group LLP as his new attorney. On March 24, 2009, Respondent filed an opposition to the motion.

On March 27, 2009, this court issued an order finding that Respondent's failure to appear at the court-ordered deposition was willful and without substantial justification. The order also required Respondent (and his counsel) to meet and confer on April 9 with counsel for the State Bar regarding the deposition and, absent an alternative mutual agreement, to appear for his deposition on April 10, 2009. The order further indicated that it was the court's intent to order sanctions against Respondent because of his failure to comply with this court's February 26, 2009 order.

The deposition went forward on April 10.

At the time the matter was scheduled to commence trial, the court was hearing a unexpectedly prolonged trial in San Francisco. As a result, this matter was continued to a date to be determined after the San Francisco trial was completed.

On May 4, 2009, a status conference was held, at which time the matter was rescheduled to commence trial on October 6, 2009.

On June 8, 2009, Respondent filed a motion to dismiss/strike the moral turpitude counts in the two previously filed NDCs. Opposition to that motion was filed by the State Bar. On July 6, 2009, an order was issued by the court granting Respondent's motion with regard to count 3 of the Case No. 07-O-11492, but granting leave to amend. The motion was otherwise denied. A first amended complaint was filed by the State Bar on July 8, 2009.

While the motion to dismiss/strike was pending, Respondent's counsel, Mr. Lear, filed a motion to withdraw as counsel in the case. On July 17, 2009, that motion was granted. The order stated, however, that the trial date of October 6 remained unchanged.

On July 28, 2009, the State Bar filed a new NDC against Respondent in Case No. 09-O-13027. On August 5, 2009, it filed a motion to consolidate the new NDC with those scheduled to start trial in October.

On August 31, 2009, the State Bar moved to file an amended NDC in Case Nos. 07-O-10750, 07-O-11492, and 07-O-14309. After that motion was granted, a second amended NDC was filed on September 25, 2009.

On September 14, 2009, a status conference was held in the matter. At that time, Kevin Gerry filed an appearance as counsel for Respondent. During the conference, the court granted the State Bar's motion to consolidate the new charges with those already scheduled to start trial. As part of that decision, the trial date for the newly-consolidated actions was rescheduled to November 10, 2009, and a pretrial conference ordered for October 26, 2009.

Thereafter, on September 28, 2009, Respondent filed a motion to strike the moral turpitude counts from the second amended NDC. On the same date, a request was made by Respondent to be referred to another judge for evaluation for the Alternative Discipline Program. That request was denied by this court on October 5, 2009, because the request had been made less than 45 days prior to the first scheduled trial date in the proceeding. (Rule 801.) On the same day, October 5, 2009, Respondent's motion to strike was also denied.

On October 6, 2009, Respondent's counsel, Mr. Gerry, filed a motion to withdraw as counsel in the proceeding. On October 20, 2009, Respondent filed a declaration opposing the request and asking that the trial be continued until February or March 2010.

On October 21, the court issued an order allowing Mr. Gerry to withdraw as counsel but requiring him to continue to act as counsel for Respondent in the pretrial conference meet-and-confer process and to participate with Respondent in the pretrial conference itself. The order denied Respondent's request for a continuance of the trial.

On October 27, 2009, when the scheduled pretrial conference was called by the court, Mr. Gerry was present but Respondent failed to appear. An immediate order was issued requiring Respondent to meet and confer with counsel for the State Bar on October 29 regarding pretrial disclosure issues and then to appear at a continuation of the pretrial conference later that same day.

On October 29, 2009, Respondent appeared at the scheduled pretrial conference. He also filed a formal request for a continuance of the trial. That motion was denied by the court on the same day.

On November 5, Joseph Russo filed an appearance as counsel for Respondent in the matters.

Trial commenced on November 10 and was completed on November 24, 2009. The State Bar was represented at trial by Deputy Trial Counsel Lawrence. Respondent was represented at trial by Mr. Russo.

During the trial, the State Bar moved to dismiss counts 5, 6, 8 & 9 of Case No. 07-O-14309. No objection being made by Respondent, those counts were dismissed by the court with prejudice. Following a period of post-trial briefing requested by the parties, the matter was submitted on December 22, 2009.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on the stipulation of undisputed facts and conclusions of law previously filed by the parties and on the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on September 15, 1987, and has been a member of the State Bar at all relevant times.

Case No. 07-O-13698 (Higgins Matter)

Beginning on September 18, 2006 and ending on September 25, 2006, Respondent was administratively suspended and not entitled to practice law for failing to pay his annual State Bar dues.

On September 20, 2006, Shani Higgins (Higgins) met Respondent and employed him to represent her in a matter related to her dissolution of marriage from Brett Higgins. At the time that Higgins first met and employed Respondent, Respondent was not entitled to practice law. He did not, however, tell Higgins of that fact at the time that he was hired by her.

On the same day, September 20, 2006, Respondent provided to Higgins a Contract for Legal Services, which he and Higgins both signed and dated September 20, 2006. This agreement stated that Respondent agreed to provide legal services “and Client agrees to pay to Attorney a minimum fee of \$5,000. This amount is a true retainer fee and its payment by Client to Attorney only guarantees that the Attorney will be available for this case. This retainer is meant to assure my availability to represent you in this matter and is non-refundable if the fees and costs in this matter do not exhaust the full amount.” The agreement went on to provide that all legal work “will be billed against the retainer. You will be billed at an hourly rate of \$295.00 per hour.”

In addition, the fee agreement contained the following language regarding costs:

“Costs are assessed for court filing fees, messenger and expedited delivery services, certified copies of documents, service of process[,] service of papers, witness fees, delivery charges, deposition and transcript costs, photocopy, interpreters and investigators’ fees. Local telephone, photocopy, facsimile, file set up, and postage costs will be charged per case at a flat fee of \$500. Any authorized extraordinary photocopying projects will be charged separately to

client. In cases involving long distance phone charges to counsel and/or Clients, an additional \$150 will be charged, or more if Clients are so advised. A fee of \$100 in bookkeeping costs will also be charged to administer the client trust funds. Returned checks, money orders or certified checks will be charged \$50.00 per bank charge for same. Therefore, Clients shall pay the sum of \$1000.00 to cover all aforementioned costs. Client has given to attorney 1000.00 towards said costs.”

Later in the fee agreement, the contract provided, “Attorney will send you periodic statements describing the services rendered, the charges therefor and costs expended.”

On that same day, September 20, 2006, Respondent prepared, executed, and had Higgins execute a substitution of attorney in the *Higgins* matter, then pending in the San Diego Superior Court, Case No. D495559. This substitution was filed by the court on September 25, 2006.

Between September 20 and September 23, 2006, Higgins paid Respondent a total of \$6,000, including \$5,000 for advanced fees and \$1,000 was for costs. Respondent did not deposit any of the \$6,000 into his client trust account.

On or about September 20, 2006, while he was still ineligible to practice, Respondent wrote a letter on his firm letterhead to Brett Higgins, requesting that Mr. Higgins contact Respondent. This letter described Respondent as being an “Attorney at Law.”

Respondent continued to represent Higgins into 2007. During the period from March to May 2007, Higgins became increasingly concerned that nothing was happening with her case and she sought on numerous occasions to reach Respondent to get a status report. Although she left messages at his office requesting that he return he calls, Respondent failed to do so.

In late April, Higgins received a call from a paralegal named Anthony in Respondent’s office, who indicated that he was taking over the case. Concerned that she was going to be represented by a non-lawyer and not by the attorney she had hired, Higgins emailed and mailed a

letter to Respondent on May 3-4, 2007, complaining about the situation and again asking that he contact her.

After sending this letter, Higgins received a call from Anthony, who indicated that an appointment had been arranged for Higgins to talk with Respondent. When Higgins went to Respondent's office to meet with him, however, he was not there. Only Anthony was present. He then presented Higgins with a declaration which he wanted her to sign. Higgins declined to do so and left the office.

On May 20, 2007, Higgins mailed a letter and sent an email to Respondent, notifying him that she was terminating his services. The letter also requested that Respondent provide an accounting, return any unearned fees, and provide Higgins with her files.

On the following day, Respondent contacted Higgins about the situation. Higgins followed up on the conversation by again emailing a request to Respondent that he provide an accounting. She also asked for a timeline on how he was proposing to handle the matter. Respondent did not provide either to her.

When nothing happened after the conversation on May 21, Higgins wrote a letter to Respondent on May 30, 2007, again complaining of his handling of the matter. She again demanded that he provide an accounting. She also demanded that he refund all unearned fees by June 14, 2007.

On June 14, 2007, Respondent replied to Higgins' May 30 letter. In Respondent's reply, he indicated that no fees were unearned because they "agreed upon a flat rate, which covers approximately 17 hrs. of time to be spent on your matter." He also indicated that the "funds were used as a nonrefundable retainer, and were not comingled anywhere but as stated in my retainer were placed in my general account."

After this letter from Respondent, there was an apparent reconciliation between Respondent and Higgins. On June 15-16, 2007, they had a conversation about the matter,

resulting in Higgins sending a letter on June 16 stating, “Thank you for responding to my concerns. I would love to move forward with this and hope you can continue to keep me updated on a regular basis; that is really all I am asking from you and your office.”

On July 10, 2007, Higgins wrote Respondent and again asked for an accounting of her funds. She also asked for a “letter of intent as to what the next step in my case is going to be[.]” Respondent responded the same day with his thoughts about future handling. He ignored Higgins’ request for an accounting.

For the balance of the month of July, Higgins pressed Respondent for a solution to a financial predicament she had with her estranged husband. This problem resulted from a property settlement agreement that Higgins had agreed to and that had been filed with the court before Higgins hired Respondent. In this agreement, Higgins had agreed to have her name removed from the title to the condo that she and her husband had jointly purchased, but her name nonetheless remained on the mortgage. Since the condo had been purchased, it had gone down significantly in value. Higgins was now concerned because her husband was overdue in making the mortgage payments. She wanted off the loan but did not want to re-finance the condo, become the sole ownership of the property, re-assume any co-ownership interest in the condo, participate in any financial loss from a sale of the condo, or seek to have the property acquired by her parents (who might be in a position to benefit from a capital loss). As she stated simply at trial, she “didn’t want anything to do with the property.” Each of the options suggested by Respondent as to how Higgins could respond was unacceptable to her.

On August 27, 2007, Higgins signed a substitution of attorney, substituting attorney Laura Miller in for Respondent. On September 5, 2007, Respondent signed the substitution of attorneys. At about the same time Higgins filed a complaint with the State Bar.

Respondent did not return to Higgins any of the \$6,000 he had previously been paid. Instead, on August 1, 2008, nearly a year after he had been terminated by Higgins, Respondent

sent her an invoice in which he billed an additional \$3,578.75, over and above the \$6,000 that he had already received.

Count 1 – Business and Professions Code Sections 6068(a), 6125, and 6126 [Failure to Support Laws/Practicing While Enrolled in In-Active Status]

By holding himself out as an attorney, preparing and executing legal pleadings, and providing legal services to his client during a time when he was not eligible to practice, Respondent participated in the unauthorized practice of the law. Such conduct by Respondent, beyond a reasonable doubt, constituted a willful violation by him of Business and Professions Code, sections 6068(a), 6125 and 6126. It is not necessary that the State Bar prove that Respondent was aware of his ineligible status at the time of his actions in order for a willful violation of these sections to occur. (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318-319.)

Count 2– Section 6106 [Moral Turpitude]

In this count, the State Bar alleges that Respondent was aware of his ineligible status at the time he practiced law on the Higgins matter, and that his conduct in holding himself out as authorized to practice during that time and in actually practicing constituted acts of moral turpitude, in violation of section 6106 of the Business and Professions Code.

The authorized practice of law is not necessarily an act of moral turpitude. (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 905; *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 239.) Here, however, the State Bar alleges that Respondent knew at the time of his improper conduct that he was not eligible to practice law but that he nonetheless willfully misrepresented to Higgins that he was entitled to practice. This court agrees. Respondent misrepresented his status to Higgins when he held himself out to be an attorney at their first meeting and when he had her enter into a contract that obligated her to pay a purportedly non-refundable fee for his being available to work on her case. More significantly, Respondent held himself out as authorized to practice law when he submitted a bill to Higgins in

August 2008, well after he was aware that he had previously been unauthorized to practice. That bill charged Higgins for the work that Respondent had done during the period when he was not authorized to practice. Such conduct by him constituted acts of moral turpitude and dishonesty, in willful violation of section 6106.

Count 3 –Rule 4-200(A) [Illegal Fee]

Rule 4-200 provides, “A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Fees charged and collected for legal services by a member who is not entitled to practice law are illegal under rule 4-200(A). (*Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 136-137; *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 904.)

Respondent entered into a written fee agreement with Higgins and collected purportedly non-refundable fees and costs to provide legal services when he was not authorized to practice law. Pursuant to that written agreement Respondent sought to perform services for Higgins and be compensated by her for legal services when he was not entitled to provide them. In fact, the itemized bill that he subsequently sent to Higgins in August 2008 included more than \$1,166 for work performed while Respondent was unauthorized to practice. This conduct by Respondent constituted a willful violation by him of rule 4-200(A).

Count 4 – Section 6068(m) [Failure to Respond to Client Inquiries]

Business and Professions Code section 6068(m) requires an attorney to respond promptly to reasonable status inquiries by or on behalf of the client. Respondent willfully violated that professional standard by failing to return repeated calls and other inquiries by Higgins regarding the status of her case for the period between March and May 20, 2007.

Count 5 - Rule 4-100(A) [Failure to Deposit Client Funds in Trust Account]

Rule 4-100(A) provides that all funds” received or held for the benefit of clients must be deposited in an identifiable bank account which is properly labeled as a client trust account and

that no funds belonging to an attorney or law firm shall be deposited in such an account or otherwise commingled with such funds.” As set forth above, Respondent received \$1,000 from Higgins as an advance toward costs. The fee agreement said these costs would be billed in the future. Although Respondent had not yet incurred or billed Higgins for any of such costs, he did not deposit the cost advance into a client trust account. Instead, he deposited all of the money into his own personal account.

Respondent contends that he was immediately entitled to keep all of the advanced costs based on the language in the fee agreement stating: “Therefore, Clients shall pay the sum of \$1,000 to cover all aforementioned costs. Client has given to attorney 1000.00 towards said costs.” He contends that the \$1,000 was an advance ‘flat rate for all costs’ agreement, entitling him to retain as his own money all of the \$1,000 as soon as it was received.

This court disagrees. Respondent’s contention is inconsistent with the actual language of the fee agreement. The fee agreement consistently refers to the identified costs as ones that “will be charged”, not one that “have been charged.” It refers to other costs, such as court filing fees, as being assessed in the future. The \$1,000 was “given to attorney ... towards said costs.” Further, if all of the charges for costs identified in the fee agreement, such as the charge of \$50 per returned check, were covered by the \$1,000 payment, there would be no reason to break out the specific amount being charged for each item.

Respondent had a duty to place into his client trust account the \$1,000 advanced by Higgins for future charges for costs. His failure to do so constituted a willful violation by him of his duties under rule 4-100(A).

Count 6 – Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

Rule 3-700(D)(2) provides: “A member whose employment has terminated shall: (2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not

applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.”

The State Bar has failed to present clear and convincing evidence that Respondent collected any fee that was unearned and required to be refunded. Instead it placed in evidence an itemized statement of his time and efforts showing that he had expended more than \$8,000 of time on Higgins’ matter at the time that he was terminated as her attorney. Even after deducting from this bill the value of the time charged by Respondent when he was not eligible to practice, the remaining balance exceeds the fees advanced by his client. No expert or other testimony was offered that the work reported in this bill was not done, that his hourly charge for his work was unreasonable, or that the time spent was excessive. Nor did the State Bar present clear and convincing evidence that the flat fee charged by Respondent for costs was excessive or unconscionable.³ Instead, the testimony of Higgins on cross-examination revealed that Higgins new attorney billed an additional \$2,700 on the file, even though she used the work product generated by Respondent to obtain a resolution satisfactory to Higgins.

This count is dismissed with prejudice.

Count 7 – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

Rule 4-100(B)(3) requires a member to “maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them[.]”

Higgins repeatedly requested that Respondent provide her with an accounting of the fees she had previously paid to him. In response to these requests, Respondent for the most part ignored the requests completely.

³ This conclusion is further buttressed by the result of the fee arbitration between Respondent and Higgins. The fee arbitrator also concluded that Respondent was entitled to retain the \$6,000 that had previously been advanced to him.

On one occasion, Respondent did reply by stating that the fees paid would not be refunded because they were a “flat fee” and a non-refundable retainer. This accounting, however, was factually and legally inappropriate. The fee agreement entered into by Higgins did not provide for a “flat rate” for his services. Instead, the agreement provided that the fee would be calculated at a rate of \$295/hour and would be a “minimum fee” of \$5,000. A higher fee of \$375 per hour would be charged for rush or legal work performed in evenings or weekends. To the extent the total charges for the time expended exceeded the \$5,000 minimum level, Respondent was entitled under the fee agreement to bill Higgins for the additional charges. In fact that is precisely what he subsequently sought to do.

Under such circumstances, it was important for Higgins, when she asked, to be provided with an accounting of the extent to which the previously advanced fees had been used to pay for time spent working on the file. Respondent made no effort to provide any such accounting until August 2008, when he submitted a bill for \$9,578.75 fees and costs, far more than the fees that had previously been advanced. Such an excess bill was an unacceptable surprise for a client who has been repeatedly requesting that an accounting be provided.⁴

Respondent’s conduct constituted a willful violation by him of Rule 4-100(B)(3).

Case No. 08-O-10508 (Munda-Vuozzo Matter)

On January 27, 2007, Anne Munda-Vuozzo employed Respondent to represent her in a family law matter. On that date, she paid him \$10,000 in advanced fees and \$2,500 in costs. Respondent did not deposit any of the \$12,500 into his client trust account.

On January 27, 2007, Munda-Vuozzo and Respondent executed a substitution of attorney in San Diego Superior Court case no. D493640. Respondent filed it on February 2, 2007.

⁴ This conclusion is further supported by the terms of Respondent’s fee agreement itself. In it he contractually committed himself to “notify client whenever the full amount of any deposit has been applied to attorney’s fees incurred by client.” This he failed completely to do.

Approximately two weeks later, on February 9, 2007, Munda-Vuozzo notified Respondent that she was terminating his services and replacing him with another attorney.

On February 14, 2007, a hearing was convened in Munda-Vuozzo's matter for modification of child support. Respondent, as well as the new attorney (Jeffrey Fritz), appeared for Munda-Vuozzo. The attorney for petitioner, Mark Vuozzo, raised a possible conflict with the law offices of Fritz. The court continued the hearing to February 28, 2007, and ordered Munda-Vuozzo to file a substitution of attorney, replacing Respondent with Fritz, prior to February 28, 2007.

On February 21, 2007, Respondent signed the substitution of attorney replacing him with Fritz.

On April 27, 2007, attorney David Askey wrote to Respondent on behalf of Munda-Vuozzo, demanding an accounting and a refund of unearned fees. Respondent received the letter but did not respond to it.⁵

On June 26, 2007, Munda-Vuozzo wrote a letter to Respondent, again demanding that he refund the monies that she previously had advanced to him. In it she indicated that she would complain to the State Bar if he did not comply by July 2, 2007. Munda-Vuozzo sent this letter by registered mail, return receipt requested. A receipt was signed on June 27, 2007, by Anthony Haro of his firm. Respondent received this letter. His testimony that he did not is not credible and lacks candor.

Following Respondent's receipt of Munda-Vuozzo's June 26 letter, the two of them talked regarding the situation. In this conversation, Respondent agreed to refund all of the previously advanced \$12,500, by making four monthly installment payments of \$3,125 each. The first of those payments was made by Respondent on July 22, 2007. The last was due on October 20, 2007.

⁵ Respondent's testimony that he did not receive this letter is not credible.

The second \$3,125 payment was due on August 20, 2007. On August 27, a week after the payment was due, Respondent wrote and subsequently forwarded to Munda-Vuozzo a check for only \$1,000. She then wrote to him on September 11, complaining of the inadequate payment and demanding that all fees be refunded. Although Munda-Vuozzo indicated in her letter that she was not going to cash the \$1,000 check, it is possible that she went ahead and did so.⁶

On the same day, September 11, Respondent wrote a letter to Munda-Vuozzo and forwarded to her another check for \$1,000. His letter read, “Anne, As I stated to you, I am very tight right now financially and am looking to borrow monies to pay you quicker. I have included \$1,000 today. Thank you in advance for your courtesy and cooperation.”

When Munda-Vuozzo tried to deposit the check (check no. 165) sent by Respondent with this letter, it bounced. The check had been written on a closed account at Washington Mutual Bank.⁷ Munda-Vuozzo was charged a service fee by her bank because of the returned check. Respondent testified that he wrote this check by accident, mistaking it for a check on his open account at Washington Mutual. When he realized his mistake, he called Munda-Vuozzo to tell her not to cash the check. Munda-Vuozzo did not receive this call, but did indicate at one point in her testimony that she may have received a replacement check.⁸

⁶ At some point during the period between July and October 2007, Munda-Vuozzo cashed a check for \$1,000 from Respondent. Whether the check she cashed was this one in August, or a “replacement” check sent in September, is unclear. (See fn. 8 below, p. 17.)

⁷ The earlier \$1,000 check was written by Respondent on his account at Union Bank.

⁸ Munda-Vuozzo’s memory regarding these events was consistently very poor. She repeatedly testified on direct that she did not remember events, and she frequently had to have her memory refreshed by documents authored at the time of the underlying events. She also repeatedly testified that she had no contact with Respondent during this period of time even though it is clear from the documentary evidence that such was not the case. As a result, the fact that she did not remember Respondent’s calling her about the bad check is viewed by the court as having little significance. More significant is her testimony at one point that she seemed to recall receiving a replacement check. Ironically, Respondent (who also repeatedly stated that his memory of the past events was poor) also had a poor memory of whether he had issued a replacement check. Because Respondent is entitled to the benefit of the doubt on such issues, the court resolves these issues in his favor.

On September 21, 2007, Respondent sent a check for \$3,125 to Munda-Vuozzo. This check was on Respondent's open account at Washington Mutual. This check was cashed without incident by Munda-Vuozzo. Accompanying the check was a letter from Respondent, stating simply, "Anne, As promised."

On September 29, Munda-Vuozzo wrote Respondent to confirm her receipt of the September 27 check and to make clear her expectation that the remaining balance was due on October 20, 2007. Although the certified letter was properly addressed to Respondent, it was returned as undelivered.

It was stipulated by the parties that Respondent made payments to Munda-Vuozzo totaling \$7,250, consisting of two payments of \$3,125 and one payment of \$1,000. Respondent then stopped making any further payments to Munda-Vuozzo. He did not provide her at the time with any accounting or any other explanation for his failure to continue making the refund payments that he had previously promised. As a result, Munda-Vuozzo complained to the State Bar.

On August 21, 2008, eighteen months after being terminated, Respondent sent an invoice to Munda-Vuozzo, stating for the first time that she still owed him \$4,640. This invoice recorded Respondent's refund payments totaling \$7,250, but purported to charge her for itemized work on the case totaling \$8,390. The bill also included a charge of \$1,500 for costs. Munda-Vuozzo testified that she "giggled" at the bill when she read it and did not pay it.

Count 8 – Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

As previously noted, rule 3-700(D)(2) requires a member whose employment has terminated to refund promptly any part of a fee paid in advance that has not been earned.

Although the fee agreement signed by Munda-Vuozzo included a provision stating that the fees advanced were non-refundable and were paid as a true retainer, such a provision is unenforceable where the member is terminated early in the relationship and no specific time was

worked or set aside for the benefit of the client. (*In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635.) As was previously explained in *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944:

Even though the fee was designated in the contract as a "True Retainer Fee," we look beyond this characterization to determine the obligations of the parties. (*In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923 [characterization of a "non-refundable retaining fee" not determinative]; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757 [fee not a true retainer because no provision to set aside available blocks of time].) Respondent's engagement agreement did not define the term "True Retainer Fee" and it did not expressly state that the fee was due and payable regardless of whether any professional services were actually rendered. Moreover, although the contract stated it was for "Purchase of Availability," it did not require that respondent make "any particular provision to allot or set aside blocks of time specifically devoted to pursuing these clients' claims. . . ." (*In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. at p. 757.) The contract also did not set forth a specific period of time when respondent was obligated to turn away other business in order to proceed with the Le matter. (*Ibid.*) To the contrary, respondent testified he had as many as 600-700 client matters in a year.

Generally, an engagement agreement between a client and an attorney is construed as a reasonable client would construe it. (Rest.3d Law Governing Lawyers § 38, com. d; see also *Lane v. Wilkins* (1964) 229 Cal.App.2d 315, 323 [in construing contracts between attorneys and clients concerning compensation, construction should be adopted that is most favorable to the client as to the intent of the parties].) Moreover, "it is well established that any ambiguities in attorney-client fee agreements are construed in the client's favor and against the attorney." (*In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668, 676; see also *S.E.C. v. Interlink Data Network of Los Angeles, Inc.* (9th Cir. 1996) 77 F.3d 1201, 1205.) Le testified that she understood that the fee she paid to respondent was an advance against his future services for obtaining asylum for Ly. The hearing judge found Le's testimony credible. We give great deference to this credibility determination. (Rules Proc. of State Bar, rule 305(a); *Franklin v. State Bar* (1986) 41 Cal.3d 700, 780.)

Moreover, the language of the contract supports Le's testimony. It expressly provided that respondent would "represent Tran Truc Ly, in the case of: INS Asylum." Given the urgency and seriousness of the situation, we do not believe a reasonable client would have understood that her payment of \$ 5,800 merely assured her of respondent's "availability" and did not include respondent's actual performance of services. Furthermore, Le could not read the contract and instead reasonably relied on Luu's "step by step" description of the services respondent would provide. Le's repeated phone calls (numbering in excess of 20), also are consistent with her expectation that respondent would take affirmative steps to rectify Ly's illegal status in a timely manner." (4 Cal. State Bar Ct. Rptr. at 950-951.)

The same factors causing the court in *Brockway* to disregard the "True Retainer" language of the fee agreement are also overwhelmingly present in the instant action. The

payments made by Munda-Vuozzo were clearly and reasonably viewed by her as being merely an advance payment toward future incurred fees.

Similarly, the court's analysis of the "non-refundable" language and its potential effect in *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, makes clear that such language is an unconscionable fee provision under the circumstances of this case. Enforcement of the non-refundable language would place an inappropriate restriction on the ability of Munda-Vuozzo to terminate her attorney. As a result, because there were fees and costs advanced by Munda-Vuozzo had not been earned at the time the relationship with Respondent was ended, Respondent had obligations both to provide an accounting and to promptly return all unearned fees.

Respondent was discharged by Munda-Vuozzo approximately two weeks after his retention. He had not earned all of the fees and costs that had been advanced previously by his client. Apparently recognizing the inappropriateness of seeking to rely on the non-refundable language of the fee agreement, Respondent reached an agreement with his client in July 2007 to refund to her over the next four months all of the advanced fees and costs. That agreement, however, took place many months after Respondent had been terminated and long after the demand had been made for an accounting and a refund of all unearned fees. Then, after agreeing to make the refund of unearned fees and costs, Respondent failed to comply with that agreement.

Respondent had a duty to refund promptly unearned fees. His actions in failing to do so constitute a willful violation by him of his obligations under Rule 3-700(D)(2).

Count 9 - Rule 4-100(A) [Failure to Deposit Client Funds in Trust Account]

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in an identifiable bank account which is properly labeled as a client trust account.

On January 27, 2007, when Munda-Vuozzo employed Respondent to represent her in a family law matter, she paid him \$2,500 in advanced costs. While the fee agreement indicated the

client “will be charged” a flat fee of \$1,250 for certain specified items and additional charges, it lists other costs that may be billed. The agreement states that the client is paying \$1,000 “to cover all the aforementioned costs.” Then the agreement states that “Client has given to attorney \$2,500.00 towards such costs.” Under such circumstances, the payment of advanced costs needed to be deposited and maintained in Respondent’s client trust account.⁹ Respondent has stipulated that he did not deposit any of the \$2,500 into his client trust account. Such conduct by Respondent constituted a willful violation by him of his duties under rule 4-100(A).

Count 10 – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

As previously noted, rule 4-100(B)(3) requires a member to render appropriate accounts to the client regarding client funds.¹⁰ Munda-Vuozzo advanced \$12,500 to Respondent for advanced fees and costs and then sought an accounting after terminating him approximately two weeks into the employment. Despite a formal request for an accounting on April 27, 2007 by Mr. Askey, the attorney hired by the client to seek a refund and accounting from Respondent, Respondent failed to provide any accounting until sending a demonstrably inaccurate and inaccurate bill in August 2008, more than a year later. Such conduct by Respondent constituted a willful violation by him of rule 4-100(B)(3).

Count 11 – Rule 4-200(A) [Unconscionable Fee]

Rule 4-200(A) of the California Rules of Professional Conduct prohibits a member from charging an unconscionable fee. Among the possible factors to be considered in determining the conscionability of a fee are the following:

- (1) The amount of the fee in proportion to the value of the services performed;
- (2) The relative sophistication of the member and the client;

⁹ Indeed, the Munda-Vuozzo agreement actually included a \$100 fee for bookkeeping costs “to administer the client trust funds.”

¹⁰ The Munda-Vuozzo fee agreement also provided that Respondent would “send periodic statements describing the services rendered, the charges therefor, and costs expended.”

- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member;
- (5) The amount involved and the results obtained;
- (6) The time limitations imposed by the client or by the circumstances;
- (7) The nature and length of the professional relationship with the client;
- (8) The experience, reputation, and ability of the member or members performing the services;
- (9) Whether the fee is fixed or contingent;
- (10) The time and labor required; and
- (11) The informed consent of the client to the fee. (Rule 4-200(B).)

The State Bar contends that Respondent's action in preparing and seeking to collect the charges included in his August 2008 bill constituted the charging of an unconscionable fee. This court agrees.

The bill sent by Respondent in August 2008 was unreasonable in numerous respects. It included hourly charges for court filing fees, bookkeeping, and initial file set up purportedly incurred on the second day of Respondent's retention. At trial Respondent acknowledged that these charges were in error and said that the charge made no sense. Similarly, the bill included a flat fee charge for \$1,500 costs, with no indication that any costs were actually incurred by Respondent during the two-week representation. Respondent acknowledged at trial that this charge was also in error. Additionally, the bill included duplicate charges for work purportedly performed on February 7. Finally, and most significantly, the bulk of the charges were for work purportedly performed by Respondent after he had been terminated by Munda-Vuozzo. There was no justification for Respondent to be performing significant research in the case after he had been notified by his client that he had been replaced by another attorney and after a morning hearing where the replacement attorney appeared as counsel for the client.

The bill is unreasonable for a number of reasons. Respondent's fee agreement required him to provide periodic reports to his client of his time and disbursements. For Respondent to generate his first bill 18 months after he had been terminated is inconsistent with that contractual commitment to the client. Further, the bill failed to accurately record Respondent's actual activities on the file during the two-week period before he was terminated. Conspicuously absent from the bill is any record of the many telephone calls between Respondent and his client during his retention. Respondent and his client both agreed that there were telephone conversations between them during that two-week period. Respondent was entitled to bill for those calls under the fee agreement. The fact that no such calls were recorded in the bill is a strong indication that the bill was not a compilation of contemporaneous timesheets, but rather an ex post facto effort by Respondent to justify refusing to refund his unearned fees.

At trial Respondent acknowledged his inability to vouch for the integrity of the bill. After testifying that there were mistakes in the bill, he stated that he had neither participated in the preparation of the bill, nor reviewed it before it was sent to Munda-Vuozzo for payment. Such distancing by Respondent from the bill does not insulate him from his responsibility for seeking to charge an unconscionable fee. His actions constitute a willful violation of rule 4-200(A).

Count 12– Section 6106 [Moral Turpitude-NSF Check]

The State Bar contends in this count that Respondent was guilty of an act of moral turpitude, dishonesty or corruption in issuing on September 11, 2007, the check on a closed account.

The knowing issuance of a check drawn on insufficient funds is a proper basis for finding a violation of section 6106. (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 315.) "An attorney's practice of issuing checks which he knows will not be honored violates "the fundamental rule of ethics--that of common honesty--without which the profession

is worse than valueless in the place it holds in the administration of justice.'" (*Alkow v. State Bar* (1952) 38 Cal.2d 257, 264, quoting *Tatlow v. State Bar* (1936) 5 Cal.2d 520, 524.) Such conduct involves moral turpitude. (*In the Matter of Heiser, supra*, 1 Cal. State Bar Ct. Rptr. at p. 54.) Nevertheless, we have noted that a justifiable and reasonable belief that a check will be honored is a defense to this charge. (*In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 411." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420.)

Respondent testified that he wrote the check on the closed account completely by accident. He indicated that the check on the old closed account was virtually identical to those on his newer, open account and that he had mistakenly used a loose check for the old account that happened to remain in his desk drawer. When he realized after mailing the check to Munda-Vuozzo that he had made the mistake, he called her and told her not to deposit the check. Whether she had already deposited the check or elected to ignore his advice is uncertain. What is clear is that she deposited the check and that it was subsequently returned by the bank.

The evidence is neither clear nor convincing that Respondent's act in sending the check to Munda-Vuozzo was one of moral turpitude. There is no direct evidence that Respondent was actually aware that he was issuing a check on a closed account, and his testimony that his use of the wrong check was accidental was credible and convincing. There is also no evidence that this one time accident reflected an attitude of indifference or a pattern of gross negligence in his handling of the account. Instead, a comparison of the perfectly valid \$3,125 check that Respondent sent to Munda-Vuozzo in late September with the September 11 check makes clear that the checks on the two Washington Mutual accounts are, in fact, nearly identical.

A good faith, one-time accidental act, unaccompanied by any evidence of intentional misconduct or gross negligence, is not the basis for a finding here of an act of moral turpitude or a willful violation of section 6106. This count is dismissed with prejudice.

Case No. 07-O-10750 (Bracken Matter)

Beth Bracken hired Respondent in April 2006, to represent her in a family law matter. At the time Bracken hired Respondent, she provided to him all of the documentation in her possession from the file of her prior family law attorney, as well as additional documents in her possession. Among the documents Bracken gave to Respondent were the results of online research Bracken had conducted in order to provide evidence of her husband's employment.

On June 23, 2006, Bracken sent Respondent a certified letter and an e-mail message terminating his representation. In the communications Bracken requested that Respondent make the records of her entire case immediately available for return. She also demanded that Respondent return all of the fees that she had previously paid to him and pay for the cost of her retaining a new family law attorney to handle the case. The letter stated that Bracken would sign a substitution of attorneys once she had found a new attorney to handle the case.

Respondent received Bracken's communication. In response, on June 27, 2006, Respondent sent an e-mail to Bracken in which he asked her "What is this all about" and "Please call me tomorrow."

On September 5, 2007, Bracken again wrote to Respondent, complaining that she had previously requested the return of her files and she had not yet received anything. This letter was sent certified but was returned undelivered. At some unknown time thereafter, Bracken complained to the State Bar.

Up to this time Respondent understood that he was still representing Bracken and was waiting to hear that she had found another attorney so that she could sign a substitution of attorneys. He explained that fact to the State Bar representative who contacted him.

At the beginning of 2008, Bracken had a conversation with a representative of the State Bar, who told her that Respondent was still holding her file because she had not yet signed a substitution of attorneys. Bracken, at some point time thereafter, contacted Respondent's office

and made arrangements to go to his office on April 14, 2008, to sign a substitution of attorneys and pick up her file. Respondent, in turn, gave instructions to his staff to make a copy of the file and to provide the original file to Bracken when she arrived.

On April 14, 2008, Bracken went to Respondent's office. Respondent was not present when she arrived. The file was not ready to be provided to her, as the staff was still making copies of the documents and placing them in a box. After some minor delay while the process was being completed, Bracken was given what she understood to be her entire file. She signed a receipt signifying that she had received her file. She testified that she did not go through the file in Respondent's office because she wanted to be there for as little time as possible.

Within a few weeks thereafter, Bracken looked through the box and realized that there were materials (especially photographs and the results of some prior online searches) which were not included in the returned file. Rather than contact Respondent's office about the situation, Bracken subsequently contacted the State Bar. The State Bar then contacted Respondent about the situation. Respondent and his staff then conducted a search of their files to see if any additional file materials remained in their office. On doing so, they discovered a manila envelope containing the omitted additional materials. Respondent then mailed these materials to Bracken, who acknowledges receiving them. Bracken could not state the precise number of pages that were subsequently returned to her but estimated the volume as being in the range of 20-200 pages.

Count 1 – Rule 3-700(D)(1) [Failure to Release File]

Rule 3-700(D) (1) provides: "A member whose employment has ended shall: (1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client's papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports,

and other items reasonably necessary to the client's representation, whether the client has paid for them or not [.]”

The NDC alleges that Respondent violated rule 3-700 by failing to provide the complete file in April: “Bracken substituted into her own representation on or about April 14, 2008, and concurrently retrieved her file papers from respondent's staff. Although Bracken had provided respondent with documents evidencing her husband's employment when she hired Respondent in 2006, the documents were missing from the file Respondent provided on April 14, 2008. By withholding the records of Bracken's husband employment from the documents Respondent provided when he returned her file at the time of his termination, Respondent wilfully failed to promptly release to Bracken, at her request, all of Bracken's papers and property.” There is no allegation in the NDC that Respondent violated rule 3-700(D)(3) by virtue of his not delivering the file to Bracken before April 14, 2008, or by waiting to do so until she had signed a substitution of attorneys.

Respondent had an obligation to deliver promptly to Bracken the file materials she had requested. Respondent sought to comply with that duty by delegating the matter to his staff. He testified that he had given instructions to his client to provide Bracken with her complete file and that he believed they had done so. Respondent, however, was not present to supervise the work of his staff in gathering and returning the file. Nor did he review what was being returned to Bracken to verify that it was complete. Respondent readily agrees that the file received by Bracken on April 14, 2008, was incomplete.

Respondent was responsible for the reasonable supervision of his staff. (*Spindell v. State Bar* (1975) 13 Cal.3d 253, 259-260.) It is true that "Attorneys cannot be held responsible for every detail of office operations." (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795; accord, *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857.) However, where an attorney delegates the performance of ethical obligations to staff, their failure to perform is attributable to the attorney,

absent a demonstration by the attorney that he/she exercised reasonable supervision over that staff. (*In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 520-521.) Respondent made no such showing here.

Such a record warrants a conclusion that Respondent violated his duty under rule 3-700(D)(1). This court so finds.

Case No. 07-O-11492 (Rood/Portantino Matter)

In 2006, Michael Rood and Michael Portantino (Rood/Portantino) were a same-sex couple who wished to adopt a child. They were concerned that their status would pose difficulties for them in doing so. In investigating their options, they learned that international adoption agencies charged \$40,000 to locate a child and handle the adoption. They then sought out other options.

Respondent had an active practice of locating birth parents who wanted to have an expected child placed for adoption and then matching the child with clients wanting to adopt. He would place ads in newspapers, making his services known to potential donor and adopting parents. When prospective donor parents would contact him, he would go through a process of screening and education of the parents as an initial step to seeking to place the child with a client wishing to adopt. He would also go through a comparable process with the prospective adopting client.

In October 2006, Rood/Portantino became aware of Respondent's services. Portantino discussed with Respondent the possibility of Rood/Portantino going through Respondent to secure and adopt a child. Respondent provided to them a description of his services, which included the statement that he handled most adoptions on a "flat-fee basis depending on the services to be rendered."

On November 10, 2006, Respondent contacted Rood/Portantino to tell them that he had just been contacted by a woman, already in labor in Temecula, who wanted to put her child up

for adoption. Respondent had previously spoken to this woman (“Birth mom”), and she had now decided to go through him to have her child placed. Respondent had discussed with her the possibility of having her child adopted by a same-sex couple, and the Birth mom had no opposition to such a placement. Respondent then contacted Rood/Portantino and arranged to meet with them during the week-end to move forward quickly with the situation.

According to Michael Rood, he and Portantino met with Respondent at Respondent’s office in LaJolla on Sunday, November 12. The meeting lasted between 90 minutes and two hours. During the discussions, Respondent presented to Rood/Portantino his fee agreement and went over its terms. He told them that he charged a fixed fee for his services, that the fee needed to be paid in advance, and that the fee was non-refundable and not dependent on whether the adoption of the particular child was eventually successful.

The retainer agreement provided by Respondent to Rood/Portantino described the retention as hiring Respondent “to advise, aid and represent [Rood/Portantino] with regard to independent adoption.” It stated that the fee for Respondent’s services included a “\$550.00 fee requisite to retain law firm” and “a fee of \$17,500.00 for representation of Clients in an independent adoption to be paid upon Client’s [sic] statement of intent to proceed in a specific adoption situation for services that have been and will be rendered by Attorney” [emphasis added]. These services were described in the agreement as, “Screening birth parents, assessing situation, administrating [sic] client trust expenses, facilitating adoption, coordinating service providers and release of baby from hospital, and advising clients prior to birth and placement in written and verbal communications; and for services that have been rendered Clients preparatory to a legal proceeding, including preparation of paternity waiver or consents and preparing documents to terminate the parental rights of an alleged or presumed birth father, and for ongoing counsel and representation throughout the proceeding whether filed in California or another state; fee also includes in-depth meeting with birth mother, assessment of her adoption

plan, screening of birth mother to determine her commitment to an adoption plan, obtaining background information of birth parents, including health and ancestry, arranging for professional pre and post natal counseling for birth parents, referrals to support resources for birth mother, assistance with labor and delivery.” The agreement then included the following statement, “Fees are for services rendered and are not contingent on a successful placement or adoption. The retainer paid is not refundable and is deemed earned when paid. The funds may be deposited into the attorney’s general account.” Finally, the fee agreement was explicit in stating that it did not include the cost of litigation or guardianship proceedings. Instead, it provided, “Additional fees will be due Attorney in instances of association of counsel and/or representation of clients in cases of litigation, guardianship, dependency appearance.”

In addition to the above fees, the fee agreement included an additional requirement that Rood/Portantino pay an additional \$1,000 toward costs. This provision read:

“ADDITIONAL CHARGES are assessed for court filing fees, messenger and expedited delivery services, certified copies of document*, service of process. File setup, local telephone, photocopy, and postage costs will be charged per case as a flat fee of \$750.00. In cases involving long distance phone charges to either birth parents, counsel, and/or Clients, an additional \$250.00 will be charged. A fee of \$150.00 for bookkeeping costs will also be charged to administer the client trust funds. Returned checks, money orders or certified checks will be charged \$20.00 per bank charge for same. *It is the responsibility of Clients to provide Attorney with certified copies of their own marriage and dissolution documents or arrange for Attorney to obtain copies at additional charge. Therefore, Clients have paid the sum of \$1000.00 to cover all aforementioned costs.”

Rood and Portantino signed the retainer agreement after having an opportunity to go over it. At the time they signed the retainer agreement, Rood and Portantino paid Respondent a total

of \$19,050. At trial, Rood testified that Respondent's fee seemed like a reasonable price.

Respondent did not deposit any of the \$19,050 into his client trust account.

At the Sunday meeting, Respondent told Rood/Portantino that the Birth mom had tested positive for marijuana usage, but that there was no indication that this had affected the child (a daughter, who had been born on November 10). Respondent discussed the history of his prior contact with the Birth mom; told them that she had so far failed date to fill out the profile that he had previously provided to her; asked them to fill out the profiles required of them; and made arrangements for them to go to the hospital in Temecula to take physical custody of the child with the Birth mom's approval. Finally, Respondent had Rood/Portantino execute a Consent to Dual Representation. This document was also executed by the Birth mom. It allowed Respondent to represent both sides in the transaction, possibly avoiding the need for Rood/Portantino having to pay funds for the Birth mom to retain independent counsel.

On November 12, 2006, Rood and Portantino went to the Temecula hospital. By the time they got there the Birth mom had already left the facility. She had, however, already signed and left behind a document releasing her daughter to Respondent for the purpose of placing the baby girl with Rood/Portantino. By virtue of this document, Rood/Portantino were then authorized to take custody of the little girl, now given by them the name Samantha.

At the time they took custody of the infant, Portantino signed a Health and Facility Minor Release Report prepared by Respondent which advised Rood and Portantino, "If the child is released for Independent Adoption and an adoption petition is not filed within thirty days, the California Department of Social Services will begin an investigation to determine if foster care licensing law is being violated." In order for the adoption petition to be filed, it was necessary for the Birth mom to fill out certain papers. Rather than do so, however, she left the hospital and eventually disappeared. She was contacted on various occasions by Respondent and the independent adoption services provider (who is a social worker required to participate in

representing the mother). While the Birth mom never indicated any intent to take back her daughter or to object to the adoption by Rood/Portantino, she also never signed the required documents.

After the 30 days had elapsed without any adoption papers being filed, a routine inquiry was made by the state about the situation to see whether the child was being held over the objection of the birth parents. The adoption service provider, Respondent, and his office were all telling Rood/Portantino of the difficulties in getting the Birth mom to sign the requisite papers and Respondent explained that it might eventually become necessary to file for guardianship of Samantha. Respondent recommended holding off doing so, in order to increase the prospects of prevailing in any such petition. Rood, however, became uncomfortable with the situation and unhappy with Respondent, and decided to terminate the relationship in mid-January. At the time that Rood communicated this decision to Respondent, Rood also demanded that the entire fee be returned by Respondent. Respondent did not return any of the \$19,050 to Rood or Portantino.

Rood/Portantino then went to another attorney, Leigh Kretzschmar, who started the process of having Rood and Portantino be named guardians for the Samantha.

In early March, Respondent talked with the Birth mom, who again indicated her willingness to go forward with having her daughter be adopted by Rood/Portantino. When Respondent called Rood/Portantino to tell them of the development, they did not return his call. Thereafter, on March 14, 2007, Respondent sent Kretzschmar a letter in which he discussed the recent contact with the birth mother.

In April, 2007, Rood and Portantino split up as a couple. Rood wanted to keep Samantha but Portantino insisted that Rood needed to find a new lawyer since Kretzschmar had represented both of them and, hence, “had a conflict.” Rood went to a new attorney, who subsequently assisted him in successfully obtaining a guardianship for Samantha. Rood, although not a lawyer, then acted in pro per to complete the adoption.

Count 2 – Rule 3-700(D)(2) [Failure to Refund Advanced Unearned Fees]

As previously noted, rule 3-700(D)(2) requires a member whose employment has terminated to promptly refund any part of a fee paid in advance that has not been earned. The State Bar here contends that Respondent violated rule 3-700(D)(2) by not returning any portion of the money that he had previously been paid as fees.

In order for Respondent to be found culpable of willfully violating rule 3-700(D)(2), there must be clear and convincing evidence that there were unearned fees that were not returned. The State Bar failed to make any such showing.

Respondent was successful in identifying a baby for his clients to adopt, doing the necessary things required to convince the birth parent to turn over physical custody of the child to these specific clients, and then going through the steps to allow his clients legally to take and retain possession of the Samantha such that they were in an eventual position to obtain both a guardianship and an eventual adoption of her. The contract made clear that he was entitled to a non-refundable fee for his work, much of which took place before the agreement was executed.

Having effectively gotten the real benefit of this bargain by getting physical and legal custody of Samantha, Rood/Portantino sought to cut off Respondent's right to keep his fee by terminating the contract at a time that it became obvious that a guardianship action would be required. The agreement did not require Respondent to handle such a guardianship petition. They then demanded that Respondent refund his entire fee.

Whether gauged by the fee agreement itself, or by concepts of quantum meruit, there has been no showing that Respondent did not earn the fees that he received. Instead, it is clear from the evidence that Respondent and his office spent considerable time and energy in identifying and securing the child for Rood/Portantino and then perfecting the critical preliminary steps that ultimately allowed Rood to do so. Respondent also spent considerable time dealing with the admittedly "tenacious" demands of his clients. The court emphasizes that Respondent was not

obligated under his agreement to handle the guardianship process, which is what the replacement attorneys did. When that guardianship process was completed, Rood, a non-attorney, was able to handle the remaining aspects of the adoption himself.

This count is dismissed with prejudice.

Count 3 – Section 6106 [Moral Turpitude]

In this count, the State Bar alleges, “By failing to return any the [sic] portion of the \$1,000 Rood and Portantino paid for costs and expenses, Respondent retained an excessive and unreasonable amount of compensation and thereby, wilfully committed an act involving moral turpitude, dishonesty, or corruption.” There is no count in the NDC merely alleging that Respondent violated his duty to return client funds. Nor does the NDC include any allegation based on Respondent’s failure to deposit this payment of costs into Respondent’s client trust account.

Moral turpitude has been defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Fahey* (1973) 8 Cal. 3d 842, 849, citing *In re Craig* (1938) 12 Cal.2d 93, 97; *Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 73; *In re Boyd* (1957) 48 Cal.2d 69, 70.) The paramount purpose of the moral turpitude standard is not to punish practitioners but to protect the public, the courts and the profession against unsuitable practitioners. “To hold that an act of a practitioner constitutes moral turpitude is to characterize him as unsuitable to practice law." (*In re Higbie* (1972) 6 Cal.3d 562, 570.)

Respondent and his clients entered into a fee agreement that included flat fee costs for file setup, local telephone, photocopy, postage costs (\$750), and long distance phone charges (\$250). In *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851-852, this court held that such lump sum or flat fee arrangements are “permissible in any particular

case if it does not result in an unreasonable amount of compensation and if the client has given informed consent to the arrangement.” While the court there indicated that members should not try to profit on in-house costs, it also indicated that attorneys and law firms may bill to the client “the reasonable cost the firm itself incurs for these items, but no more. ‘Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead [such as the salary of the photocopy machine operator] should pass ethical muster.’”

In *Kroft*, the review department reversed a hearing department finding that a flat fee cost arrangement constituted an unconscionable fee and involved moral turpitude, concluding that there was no evidence that the charge there was unreasonable or that the member had failed to disclose the lump sum cost procedure to the client. That same conclusion applies here. There was direct evidence that Respondent’s office here incurred costs and performed the tasks of file set-up, local and long distance telephone calls, photocopying, and postage as a result of this client. Given Respondent’s entitlement to add to the direct cost of such efforts a reasonable allocation of the office overhead for those activities, this court does not find that the evidence is either clear or convincing that the \$1,000 flat fee charge was unreasonable or unconscionable, let alone an act of moral turpitude.

The State Bar, in its post-trial brief, suggests that the burden was on Respondent to prove that the flat fee for costs was reasonable and not an act of moral turpitude. That position, however, is contrary to the review department’s express conclusion in *Kroff* (Id. at p. 852) and the basic tenets of these disciplinary proceedings. (*In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, 455, fn. 2, citing *Arden v. State Bar* (1987) 43 Cal.3d 713, 725 [“In any disciplinary case, the State Bar has the burden of proving culpability by clear and convincing evidence.”]; *In the Matter of Blecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122 [to defeat misappropriation charge, respondent does not have the burden of proof to provide documentary evidence that work had been done].)

This count is dismissed with prejudice.

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

In this count, the State Bar alleges that Respondent violated rule 4-100(B)(3) by “not providing Rood and Portantino an accounting of the fees they paid him, upon termination, or at any [time] after they demanded a refund of the advanced and unearned fees[.]” This court agrees.

Rule 4-100(B)(3) requires a member to “maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them[.]” Rood/Portantino paid fees of \$18,500 and advance costs of \$1,000 at the outset of the retention. When they terminated the relationship, they demanded first a return of all fees and, at one point, a return of unearned fees. Respondent failed to respond at all regarding his claimed entitlement to keep the fees until after the State Bar became involved.

Respondent had a duty to provide an accounting to his clients with regard to the status of the funds they had previously paid to him, especially given their demand that he return those funds. That is particularly true with regard to the \$1,000 advanced costs. Although the fee agreement says that a flat fee “will be charged” for certain items, no bill had yet been sent to the clients. Since the language of the fee agreement suggests that the \$1,000 was paid as an advance against more than just the flat fee costs, the clients were entitled to be told by Respondent how he had handled their funds.

The same is true with regard to the advanced fees. To the extent that Respondent was claiming that he was entitled to retain the fees based on the language of the agreement, the clients were entitled to be told that. In turn, to the extent that he was contending that he was entitled to all of the proceeds on a quantum meruit theory, they were entitled to an accounting of the factual justification for that claim.

An attorney's duty to provide an accounting of how the client's funds have been handled is never satisfied by silence. Such silence here by Respondent constitutes a willful violation by him of his duties under rule 4-100(B)(3).

Case No. 07-O-14309 (Gruneisen Matter)

On February 17, 2005, Diane Gruneisen employed Respondent to represent her in a marital dissolution. At the time of the retention, she and Respondent entered into a fee agreement containing the following language regarding costs:

“Costs are assessed for court filing fees, messenger and expedited delivery services, certified copies of documents, service of process[,] service of papers, witness fees, delivery charges, deposition and transcript costs, photocopy, interpreters and investigators' fees. Local/ long distance telephone, photocopy, facsimile, postage costs, and file setup will be charged per case at a flat fee of 2,750. Any authorized extraordinary photocopying projects will be charged separately to client. In cases involving long distance phone charges to counsel and/or Clients, an additional \$150 will be charged, or more if Clients are so advised. A fee of \$100 in bookkeeping costs will also be charged to administer the client trust funds. Returned checks, money orders or certified checks will be charged \$50.00 per bank charge for same. Therefore, Clients shall pay the sum of \$2,500 to cover all aforementioned costs. Client has given to attorney \$2,500 towards said costs.”

Later in the fee agreement, the contract provided, “Attorney will send you periodic statements describing the services rendered, the charges therefor and costs expended.”

Gruneisen paid Respondent the specified \$2,500 in advanced costs, together with \$10,000 as advanced fees. Respondent did not place the \$2,500 into his client trust account.

On May 10, 2005, Gruneisen terminated Respondent. Thereafter, Gruneisen received a bill from Respondent, dated June 10, 2005, which showed costs totaling \$850 were being billed. These costs included \$750 for the “Initial File Setup Fee” and \$100 for the “Basic minimum bookkeeping costs per retainer.”

Count 7¹¹ - Rule 4-100(A) [Failure to Deposit Client Funds in Trust Account]

¹¹ As previously noted, the State Bar agreed during the trial to have dismissed with prejudice Counts 5, 6, 8, and 9 of this case.

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in an identifiable bank account which is properly labeled as a client trust account and that no funds belonging to an attorney or law firm shall be deposited in such an account or otherwise commingled with such funds.” As set forth above, Respondent received \$2,500 from Gruneisen as an advance toward costs that would be billed in the future, including the \$100 bookkeeping fee for administering the client trust account and any fee for the initial file set-up. Although Respondent had not yet incurred or billed for any of those costs, he did not deposit the cost advance into a client trust account when he received it, but instead deposited it into his own account.

Respondent now contends that he was immediately entitled to keep all of the advanced costs based on language in the fee agreement stating: “Local/ long distance telephone, photocopy, facsimile, postage costs, and file setup “will be charged per case at a flat fee of 2,750; ...A fee of \$100 in bookkeeping costs will also be charged to administer the client trust funds. ... Therefore, Clients shall pay the sum of \$2,500 to cover all aforementioned costs. Client has given to attorney \$2,500 towards said costs.” He contends that the \$2,500 was a fixed fee cost agreement, entitling him to retain all of the \$2,500 as soon as it was received.

Respondent’s contention is contrary to the language of the fee agreement and belied by his own conduct in how he billed the costs. The fee agreement consistently refers to the specified costs as ones that “will be charged”, not one that “have been charged.” It refers to costs, such as court filing fees, being “assessed” in the future. Having identified the possibility of certain future costs, the \$2,500 was “given to attorney ... towards said costs.” Moreover, if all of the charges identified in the paragraph were covered by the advance \$2,500 payment, there would be no reason to break out the specific amount being charged for each such item in the future, such as the charge of \$50 per returned check.

The inaccuracy of Respondent's contention is also made apparent in the June 10 bill, where he noted the prior payment of \$12,500 (including the \$2,500 cost advance) but charged as costs only \$850 for the initial file setup and the bookkeeping fee. Under Respondent's theory, the costs billed should have read \$2,500, not \$850.¹²

Respondent had a duty to place into his client trust account the \$2,500 that had been advanced by Gruneisen toward future charges for costs. His failure to do so constituted a willful violation by him of his duties under rule 4-100(A).

Case No. 09-O-13027 (Violation of Probation Conditions)

On August 17, 2007, the Supreme Court issued an order imposing discipline on Respondent in case no. S153636 ("Disciplinary Order"). In the Disciplinary Order, the court ordered that Respondent be suspended for one year, but stayed that suspension, and placed Respondent on two years' probation subject to the conditions of probation recommended by the hearing department in its Order Approving Stipulation in State Bar Court case no. 05-O-03676. On or about September 16, 2007, the Discipline Order became effective.

On September 12, 2007, even before the Supreme Court's order was effective, Cheryl Chisholm (Chisholm) of the State Bar's Office of Probation sent a letter to Respondent, outlining for him his duties and deadlines under the order and providing him with the forms to complete in order to comply with the order. She again emailed and mailed the letter to Respondent on November 26, 2007.

Pursuant to the Disciplinary Order, the conditions of probation required Respondent to submit proof of six hours of MCLE-approved courses in law office management, attorney client relations and/or general legal ethics by March 16, 2008. This deadline was specifically noted in

¹² There should also have been no charge for bookkeeping on the client trust fund, since there were no funds (under Respondent's theory) ever required to be placed in such a trust fund.

Chisholm's letter. Respondent did not submit proof of having completed six hours of MCLE approved courses in the designated topics by the March 16 deadline.

On March 20, 2008, Chisholm faxed a letter to Respondent, telling him that his proof of having completed the six hours of MCLE in the designated subjects was past due and asking him to submit his proof immediately. While on March 21, 2008, he did send in evidence that he had taken some MCLE classes, his submittal was both late and it did not show proof that he had taken the requisite number of required classes.

The Disciplinary Order also required Respondent to file quarterly reports to the Office of Probation commencing April 10, 2008, and including July 10, 2008, October 10, 2008, January 10, 2009, April 10, 2009, July 10, 2009, and October 10, 2009. Respondent sought to comply with his obligation to file the January 10, 2008 quarterly report on a timely basis by faxing a copy of his report on January 10, 2008. From that point on, however, his efforts at timely compliance were generally delinquent. He filed the April 10, 2008 quarterly report late, on April 29, 2008. He did not file the subsequent reports of October 10, 2008, January 10, 2009, April 10, 2009, and July 10, 2009, until October 22, 2009, and then only after the instant disciplinary action had been filed against him.

Before these charges were filed, Respondent mailed correspondence to the State Bar claiming that he had previously forwarded the original quarterly reports to the State Bar on a timely basis. He repeated that contention during his testimony during the trial. Those statements by Respondent were lacked candor and were demonstrably untrue. While Respondent testified that he had sent the original signed quarterly statements to the State Bar before October (keeping for himself only copies of the signed documents), the documents sent by Respondent to the State

Bar in October 2009 were not copies, but were instead the original signed reports, including original signatures and handwritten dates.¹³ (Exh. 108.)

Count 1 - Section 6068(k) [Failure to Comply With Conditions of Probation]

Section 6068(k) of the Business and Professions Code provides that it is the duty of an attorney to “comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.” As discussed above, Respondent willfully failed to comply with both the requirement that he provide proof of compliance with the MCLE requirement before March 16, 2008¹⁴, and the quarterly reporting requirements of the disciplinary probation ordered by the Supreme Court in August 2007. Such failure by him constitute a willful violation by him of section 6068(k).

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)¹⁵ The court finds aggravating circumstances as set forth below:

Prior Discipline

Respondent has been disciplined on three prior occasions.

¹³ For example, the Quarterly Report for January 10, 2009, forwarded by Respondent in October, includes both an original signature and handwritten date of December 31, 2008, both written in blue ink. The same document also includes a second original signature and date (October 21, 2009) handwritten by Respondent in blue ink at the time he sent the document to the State Bar in October. Hence there can be no question that this signed quarterly report was not sent by Respondent to the State Bar until October 2009. Respondent’s contention to the contrary was not made in good faith.

¹⁴ The court does not conclude that Respondent failed to take the 6 hours of MCLE classes before the specified date. Respondent presented evidence to the State Bar and to this court that he had taken far more than 6 hours of MCLE training during the requisite period. The State Bar failed to present clear and convincing evidence that those programs did not include a cumulative total of 6 hours of education regarding law office management, attorney client relations and/or general legal ethics. Further, the position previously asserted by the Office of Probation before charges were filed, that the courses taken by Respondent included during the requisite six months included only 1.5 hours of qualifying legal ethics, was demonstrably incorrect and disregarded the fact that the range of qualifying courses extended well beyond classes on legal ethics.

¹⁵ All further references to standard(s) are to this source.

In Case No. 02-O-12289, *et al*, Respondent was publicly reprovved, effective May 27, 2004, for violations of rules 3-110(A) [two counts], and rule 6103.

In Case No. 02-O-13022, *et al*, Respondent was privately reprovved on November 8, 2004, for violations of rules 3-100(A) and 3-700(D)(2). According to a prior stipulation executed by the State Bar and Respondent, this subsequent private reprovval “concerned misconduct that occurred concurrent with the misconduct in the public reprovval matter, and it was determined that had the misconduct therein been known at the time of the public reprovval disposition, there would not have been an increase in the level of discipline.”

In Case No. 05-O-03676, as noted above, Respondent was ordered suspended for one year (stayed) and placed on probation for two years. That discipline resulted from a violation of section 6068(m), arising out of Respondent’s failure to adequately explain to the client the “flat fee in-lieu-of-costs provision” provision in his fee agreement.

Respondent’s prior record of discipline is a serious aggravating circumstance. (Std. 1.2(b)(i).)

Multiple Acts of Misconduct

Respondent has been found culpable of 14 counts of misconduct in the present proceeding, including misconduct involving five clients and violations of the conditions of probation ordered by the Supreme Court. The existence of such multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

Significant Harm

Respondent’s misconduct significantly harmed his clients. (Std. 1.2(b)(iv).) He failed to return unearned fees to Munda-Vuozzo. Further, both she and Higgins were required to spend money on other attorneys because of Respondent’s misconduct. (Std. 1.2(b)(iv).)

The court declines the State Bar’s request that it find significant harm to Rood based on Rood’s retention of other attorneys to handle the guardianship proceedings. Under the explicit

terms of the Respondent's fee agreement signed by Rood, Respondent had no obligation to handle such a proceeding and he would have been entitled to an additional fee if he did. Hence, there is no clear and convincing evidence that Rood suffered any harm as a result of his decision to hire either of the two subsequent attorneys.

Lack of Insight and Remorse

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He remains defiant and has no insight regarding his unethical behavior. "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

Lack of Candor and Cooperation with State Bar

Under standard 1.2(b)(vi), lack of candor toward the State Bar during disciplinary investigation or proceedings is an aggravating circumstance. The same is true with regard to a member's lack of cooperation in the disciplinary process. (See, e.g., *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 189 [use of obstructive tactics during the disciplinary proceedings].) Attorneys are under a duty to be cooperative with the State Bar. (Bus. & Prof. Code, § 6068 (i).)

During the period of Respondent's probation, Respondent intentionally misrepresented to a representative of the Office of Probation that he had previously sent original quarterly reports on a timely basis to that representative's predecessor. That testimony was known to be untrue by Respondent at the time he made it.

Further, during the course of this proceeding, Respondent has used obstructive tactics to seek to avoid and/or delay the disciplinary process. He refused to attend his deposition when it was properly noticed, requiring the State Bar to file a motion to compel. Then, after this court

ordered him to participate in that deposition, he willfully violated that order, resulting in the State Bar and this court being required to prepare and address a subsequent motion. During the course of his efforts to avoid that deposition, he returned mail addressed to him by the State Bar and then misled them with statements that his mail was not being delivered for reasons unknown to him.

Such conduct by Respondent is a serious aggravating factor. "[F]raudulent and contrived misrepresentations to the State Bar may perhaps constitute a greater offense than misappropriation." (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.)

Lack of Candor before this Court

Presenting intentionally misleading testimony before the State Bar Court is regarded as a serious factor in aggravation. (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 709-710.) Such acts as fabricating evidence and testifying to its genuineness at a hearing are considered particularly egregious. (*Borre v. State Bar* (1991) 52 Cal.3d 1047, 1053.)

Respondent has presented misleading statements under oath to this court on several instances, both before and during the trial of this matter. He filed with this court during the discovery process a statement under oath that he had not received in the mail a motion filed by the State Bar and stating that he did not know why he had not. At trial, it was developed by DTC Lawrence, with clear and convincing evidence, that Respondent had actually received the document in the mail, but declined to accept it by handwriting the word "Return" on the envelope and mailing it back to the State Bar.

Further, during the course of this trial, Respondent reiterated under oath his knowingly false contention, previously made to the Office of Probation, that he had sent original and timely quarterly reports to the Office of Probation.

Such dishonesty with this court is a very serious aggravating circumstance.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds mitigating circumstances as set forth below.

Cooperation

After Respondent was represented by attorney Russo, he entered into a stipulation of facts. This cooperation, however, is negated by the many instances of non-cooperation in the proceeding by Respondent prior to the involvement of Russo, especially when he was acting in pro per.

Character Evidence

Respondent presented good character testimony from two attorneys, one of whom was unaware of the charges currently pending against Respondent. That attorney, however, testified that Respondent provides considerable assistance to the family law bar by frequently assisting other practitioners pro bono when they would seek assistance over the internet. Respondent also testified to some of his efforts to educate and aid family law practitioners.

Respondent is entitled to some, but not significant, mitigation credit for this limited good character evidence. (Std. 1.2(e)(vi).) But the mitigating value is diminished because of limited number of character witnesses and by the general lack of apparent knowledge of these two witnesses regarding Respondent's wrongdoing or his prior record of discipline.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys.

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to

preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” [Citations.]” (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.)

Standard 1.7(b) provides that when an attorney has two prior records of discipline, the degree of discipline in the current proceeding is to be disbarment unless the most compelling mitigating circumstances clearly predominate. Notwithstanding its unequivocal language to the contrary, disbarment is not mandated under standard 1.7(b) even if there are no compelling mitigating circumstances that predominate in a case. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507, citing *Arm v. State Bar* (1990) 50 Cal.3d 763, 778-779, 781.) That is because the ultimate disposition of the charges varies according to the proof. (*In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121, 125.) Nonetheless, standard 1.7(b) is not an empty guideline to be ignored. It is a statement to all, especially previously disciplined members, that all members must take to heart the need to know and abide by the ethical guidelines and that there will be increasingly severe consequences for those who continue to ignore that obligation.

With regard to the other applicable standards, Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. The following are standards to be considered in that regard.

Standard 2.3 provides: “Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to 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.” Acts of moral turpitude by an attorney are grounds for suspension or disbarment even if no harm results. (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 220.)

Standard 2.7 provides: “Culpability of a member of a wilful violation of that portion of rule 4-200, Rules of Professional Conduct re entering into an agreement for, charging or collecting an unconscionable fee for legal services shall result in at least a six-month actual suspension from the practice of law, irrespective of mitigating circumstances.”

Standard 2.2(b) provides: “Culpability of a member of commingling of entrusted funds or property with personal property or the commission of another violation of rule 4-100, Rules of Professional Conduct, none of which offenses result in the wilful misappropriation of entrusted funds or property shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances.”

Standard 2.6 provides that culpability of unauthorized practice of law will result in suspension or disbarment, depending on the gravity of the offense or the harm to the client.

Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar*

(1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.) In looking to the many factors relevant to determining the appropriate discipline to recommend in this matter, this court is most mindful of what level of discipline is necessary here to protect the public and the profession from future misconduct by Respondent. This will be the fourth time that he has been disciplined in the last six years. Even if one merges into one the two disciplines resulting in reproof, the picture is nonetheless highly disturbing. In this matter his misconduct included failing to comply with the conditions of his recent probation and thirteen additional counts of misconduct affecting five different clients. The nature of his misconduct involving clients was not insignificant. It included unconscionable bills, the unauthorized practice of the law, illegal fees, failure to return unearned fees, failing to put client funds into a client trust account, and moral turpitude.

This court's concern that Respondent will continue to be a danger to both the public and the profession is increased, not lessened, by Respondent's attitude and conduct during this disciplinary proceeding. At the end of the trial, Respondent continued to assert that he had done nothing wrong. Worse, his demonstrated willingness to mislead the State Bar, to obstruct the disciplinary process, to disregard the orders of both this and the Supreme Court, and to lie under oath to this court to avoid responsibility for his misconduct, makes clear that the three prior orders of discipline have not served any significant rehabilitative function.

This court previously reached a decision to recommend that Respondent be given the benefit of the doubt and be allowed to practice after his third discipline, notwithstanding the dictates of Standard 1.7. Respondent has now amply demonstrated that he was not worthy of that trust.

It is the conclusion of this court that the profession and the public can only be safeguarded by removing Respondent from the list of those allowed to practice law in this state. It is the recommendation of this court that he be disbarred.

RECOMMENDED DISCIPLINE

Disbarment

The court recommends that respondent **Steven Robert Liss** be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

It is further recommended that Respondent make restitution to the following individual within 30 days following the effective date of the Supreme Court order in this matter or within 30 days following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 291): to Anne Munda-Vuozzo in the amount of \$5,250.00 plus 10% interest per annum from October 20, 2007 (or to the Client Security Fund to the extent of any payment from the fund to Ruttan, plus interest and costs, in accordance with Business and Professions Code section 6140.5).

Rule 9.20

The court further 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.

Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that they be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Steven Robert Liss** be involuntarily enrolled as an inactive member of the State Bar

of California effective three calendar days after service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).¹⁶

Dated: March _____, 2010

DONALD F. MILES
Judge of the State Bar Court

¹⁶ Only active members of the State Bar may lawfully practice law in California. (Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice of law, or to even hold himself or herself out as entitled to practice law. (Bus. & Prof. Code, § 6126, subd. (b).) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)