

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 08-O-12904 (08-O-12999; 08-O-
)	13014; 08-O-13581; 08-O-13582;
LEE ALLEN McCOY,)	08-O-13583; 08-O-14042; 08-O-
)	14599); 09-O-11039 (Cons.)
Member No. 153631,)	
)	DECISION
A Member of the State Bar.)	
)	
)	

I. Introduction

In this contested disciplinary proceeding, respondent **Lee Allen McCoy** is charged with multiple acts of misconduct in nine client matters. This court finds, by clear and convincing evidence, that respondent is culpable of misconduct, including: (1) failing to perform competently; (2) failing to release client files; (3) failing to refund unearned fees (totaling \$33,929.53); (4) failing to respond to client inquiries; (5) failing to render accounts of client funds; (6) committing acts of moral turpitude; and (7) failing to cooperate in State Bar investigations.

Based upon the serious nature and extent of culpability, as well as the applicable mitigating and aggravating circumstances, the court recommends, among other things, that respondent be suspended from the practice of law for four years, that execution of suspension be stayed, that he be placed on probation for five years and that he be suspended for a minimum of

three years and that he remain suspended until he makes specified restitution and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

II. Pertinent Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on May 29, 2009. On June 26, 2009, the State Bar filed a second NDC. On August 17, 2009, the matters were consolidated. Respondent filed a response in the two NDCs on September 25, 2009. At the pretrial conference, which was held on November 23, 2009, respondent stipulated to all but one of the facts in the NDCs.¹ (Minute Order, filed November 23, 2009.)

A two day trial was held on December 17 and 18, 2009, on the issue of mitigation. The State Bar was represented by Deputy Trial Counsel (DTC) Ernest L. DeSha; respondent was represented by Theodore A. Cohen. On December 18, 2009, following closing arguments, the court took this matter under submission.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the evidence, the stipulation as to facts entered into by respondent at the November 23, 2009 pretrial conference, and testimony introduced at this proceeding.

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 28, 1991, and has been a member of the State Bar of California since that time.

¹ As to count 1 of the NDC, in case No. 08-O-12904, respondent denied the allegation that he stated to his client, Alexis Lipnicki, that the writ that he would file on her behalf was “invincible.” Thus, respondent did not stipulate as to that fact.

B. First Notice of Disciplinary Charges

1 Case No. 08-O-12904 (Lipnicki)

In September 2007, Alexis Lipnicki (Lipnicki) was arrested for driving under the influence of alcohol (DUI). At the time of her arrest, Lipnicki's blood alcohol content (BAC) was about .014. Despite the low BAC, the police took Lipnicki's license. Lipnicki, subsequently, hired respondent to get her license back and to represent her in a civil action against the California Department of Motor Vehicles (DMV). Respondent told Lipnicki that he had a writ that he would file in Superior Court against the DMV, which would force the DMV to return her license. Lipnicki paid respondent \$3,000 as an advance legal fee and also paid \$600 in costs.

In November 2007, respondent's suggested that Lipnicki apply for a hardship license from DMV, which she did. The application was denied in or about January 2008.

Between January 2008 and May 15, 2008, Lipnicki and/or her parents called respondent's office more than eight times. Each time that they called, a message was left inquiring about the status of the writ and requesting that respondent return the call. Respondent never returned the Lipnickis' calls.

Respondent provided no services of any value to Lipnicki.

On May 15, 2008, Lipnicki and her father sent a letter to respondent by e-mail, fax, and mail, informing him that they were terminating respondent's services and demanding a refund of their advance fees and costs. Respondent received the letter, but did not reply.

On September 3, 2008, Lipnicki hired David Finer (Finer) to represent her. Finer sent a letter to respondent, via e-mail and regular mail, demanding that respondent refund Lipnicki's advance fees and costs. The letter also included a demand for the return of Lipnicki's file.

Respondent received the letter. Respondent never responded to Finer's letter. To date, respondent has not refunded Lipnicki's advance fees or costs or returned her file.

On May 30, 2008, the State Bar opened an investigation, case No. 08-O-12904, pursuant to a complaint from Lipnicki. Thereafter, on August 28, 2008, and September 22, 2008, a State Bar investigator wrote to respondent regarding the allegations in the Lipnicki matter (case No. 08-O-12904). The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in case No. 08-O-12904.

The investigator's letters were placed in sealed envelopes that were correctly addressed to respondent at his State Bar of California membership address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters. Respondent never responded to the investigator's letters; nor did he otherwise communicate with the investigator.

Count 1: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))²

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

By not filing a writ against the DMV on Lipinicki's behalf, respondent intentionally, recklessly or repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

Count 2: Failure to Return Client File (Rules of Prof. Conduct, Rule 3-700(D)(1))

Rule 3-700(D)(1) requires an attorney whose employment has terminated to promptly release to a client, at the client's request, all the client papers and property.

² References to the rules are to the Rules of Professional Conduct, unless otherwise stated.

Alexis Lipnicki terminated respondent's employment on May 15, 2008. By failing to return her file when requested by Lipnicki's new attorney, respondent failed to promptly release to his client, upon termination of his employment, all of the client's papers and property, in willful violation of rule 3-700(D)(1).

Count 3: Failure to Return Unearned Fees (Rules of Prof. Conduct, Rule 3-700(D)(2))

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund unearned fees.

Respondent provided no services of value to Lipnicki. As a result, respondent did not earn any of the advance fees paid to him and owes Lipnicki a refund of the entire amount of the advance legal fees and costs that she paid him (\$3,600). To date, respondent has failed to make any refund to Lipnicki.

By failing to refund upon termination from employment, all of the fees advanced to him by Lipnicki, respondent, failed to refund promptly \$3,600 or any part of a fee paid in advance that had not been earned in willful violation of rule 3-700(D)(2).

Count 4: Failure to Respond to Client Inquiries (Bus. & Prof. Code, § 6068, Subd.

(m))³

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

By failing to return any of Lipnicki's phone calls, between January and May 2008, and by failing to respond to Lipnicki's letter of May 2008, respondent failed to respond promptly to

³ References to sections are to the provisions of the Business and Professions Code.

reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Count 5: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

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

By failing to provide a written response to the allegations in the Lipnicki matter (case No. 08-O-12904) as requested in the investigator's letters of August 28 and September 22, 2008, or otherwise cooperate and participate in the investigation of the Lipnicki matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

2. Case No. 08-O-12999 (Castillo)

On September 11, 2005, Ben Castillo (Castillo) was arrested for driving under the influence of alcohol (DUI). At the time of his arrest, Castillo surrendered his driver's license to the police. Castillo asked the California Department of Motor Vehicles (DMV) for an administrative hearing. His request resulted in a stay of his license suspension.

On January 19, 2006, the DMV held a hearing and rejected Castillo's defenses to the DUI charge. As a result, the DMV re-imposed the suspension of Castillo's driver's license. The effective date of the suspension was January 28, 2006.

In January 2006, Castillo hired respondent to represent him in a civil action against the DMV. Castillo paid respondent \$3,531 as an advance legal fee. Respondent agreed to file a Petition for a Writ of Mandate against the DMV on Castillo's behalf. Once the writ was filed, respondent was required to schedule and attend a hearing on the writ. Respondent told Castillo that he would file the writ in a few days.

On January 31, 2006, respondent filed the writ on Castillo's behalf, in Ventura County Superior Court, case No. CIV238796. Respondent, however, took no further action on the writ and failed to provide any other legal services to Castillo.

On April 14, 2006, the DMV sent a letter to respondent regarding the writ he had filed. The DMV asked respondent to inform it when the writ was set for hearing. Respondent received the letter, but did not reply or take any action on the writ.

On June 20, 2006, the DMV sent a second letter to respondent regarding the writ. The DMV asked respondent if he was pursuing the writ and to inform it of the status of the writ. Respondent received the letter, but did not reply or take any action on the writ.

On August 1, 2006, Castillo called respondent's office to get an update on his case. Respondent's office staff told Castillo not to worry, but gave him no information about the status of the writ. Castillo left a message asking respondent to return his call. On April 23, 2007, the DMV sent a third letter to respondent regarding the writ. The DMV informed respondent that if the writ was not set for a hearing within two weeks, it would forward the file to the Attorney General to prepare a motion to dismiss. The DMV also informed respondent that it would seek sanctions and costs, if it was required to file a motion to dismiss. Respondent received the letter, but did not reply or take any action on the writ.

At the end of January 2008, Castillo received notice from the DMV that his license was going to be re-suspended, effective March 17, 2008.

Respondent did not provide any services of value to Castillo.

On February 18, 2008, Castillo called respondent and spoke to him on the phone about his case. Castillo told respondent that he had hired a new attorney and that he wanted respondent to refund the fees that he had paid to respondent. Respondent told Castillo that he would prepare

an accounting and refund Castillo's unearned fees. But, respondent never prepared an accounting; nor did he refund Castillo's unearned fees.

On March 31, 2008, Castillo sent a letter to respondent, in which he asked respondent for a refund of his fees. Although respondent received Castillo's letter, he never responded to it.

On June 11, 2008, the State Bar opened an investigation, case No. 08-O-12999, pursuant to a complaint from Castillo. Thereafter, on September 3, 2008, and September 22, 2008, a State Bar investigator wrote to respondent regarding the allegations in the Castillo matter (case No. 08-O-12999). The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in case No. 08-O-12999.

The investigator's letters were placed in sealed envelopes that were correctly addressed to respondent at his State Bar of California membership address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters. Respondent never responded to the investigator's letters; nor did he otherwise communicate with the investigator.

Count 6: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))

There is no clear and convincing evidence that supports the State Bar's allegation that by "not responding to the attorney general's motion and by allowing the writ to be dismissed on the attorney general's unopposed motion," respondent failed to perform legal services with competence. Nowhere does the NDC allege that the attorney general filed a motion or that the writ that respondent filed on behalf of Castillo was dismissed. Nor did respondent so stipulate.

However, the evidence is clear and convincing that by not responding to any of the DMV's letters, not scheduling a hearing on the writ that he had filed on behalf of Castillo, and

failing to taking any action on the writ (other than having filed it), respondent intentionally, recklessly or repeatedly failed to perform legal services with competence in willful violation of rule 3-100(A).

Count 7: Failure to Return Unearned Fees (Rules of Prof. Conduct, Rule 3-700(D)(2))

Here there is no clear and convincing evidence that supports the State Bar's allegation that respondent failed to return costs to Castillo. The NDC alleges that Castillo "paid [r]espondent \$3,531 as an advance legal fee." There is no allegation relating to Castillo advancing funds for costs.

But, the evidence is clear and convincing that respondent provided no services of value to Castillo. Thus, respondent did not earn any of the advance fee paid to him.

By failing to return, upon termination from employment, all or any part of the \$3,531 legal fee advanced to him, respondent willfully failed to promptly refund any part of a fee paid in advance that had not been earned, in willful violation of rule 3-700(D)(2).

Count 8: Failure to Render Accounts of Client Funds (Rules of Prof. Conduct, Rule 4-100 (B)(3))

Respondent is charged with a violation of rule 4-100(B)(3), which provides that a member must maintain complete records of all funds, securities and properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them.

The court finds by clear and convincing evidence that respondent is culpable of violating rule 4-100(B)(3). By failing to provide an accounting to Castillo, respondent failed to render appropriate accounts to a client regarding all funds coming into respondent's possession.

Count 9: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

By failing to provide a written response to the allegations in the Castillo matter (case No. 08-O-12999) as requested in the investigator's letters of September 3, 2008 and September 22, 2008, or otherwise cooperate and participate in the investigation of the Castillo matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

3. Case No. 08-O-13014 (Nelson)

On May 14, 2008, David Nelson (Nelson) hired respondent to represent Nelson's son, Richard, in a driving under the influence of alcohol (DUI) matter. Nelson paid respondent \$2,650 as an advance legal fee. Nelson also informed respondent that Richard's case was scheduled for a hearing on June 5, 2008.

As the June 5, 2008 court date approached, Nelson called respondent almost every day. Each time that he called, Nelson left a message on respondent's answering machine in which he asked respondent to return his call. Respondent never returned any of Nelson's calls. On June 5, 2008, respondent failed to appear in court. The court continued Richard's case until June 18, 2008.

From June 5, 2008, through June 11, 2008, Nelson called respondent each day. Each time that he called, Nelson left a message on respondent's answering machine asking respondent to return his call. Respondent never returned any of Nelson's calls.

On June 11, 2008, respondent sent an e-mail to Nelson, apologizing for being "so out of touch" and admitting that he had not obtained a copy of the police report as of that date. On June 12, 2008, Nelson sent an e-mail to respondent, asking respondent to call him. Respondent received the e-mail, but never called Nelson.

On June 18, 2008, Nelson sent an e-mail and a letter to respondent, terminating respondent's services on behalf of Richard and demanding that respondent return the entire fee he had been advanced for Richard's representation. Respondent received the letter and the e-mail. Respondent never responded to Nelson's letter or e-mails and never returned the advance fee.

Respondent provided no legal services of any value to Richard.

On July 8, 2008, the State Bar opened an investigation, case No. 08-O-13014, pursuant to a complaint from Nelson. Thereafter, on August 21, 2008, and September 5, 2008, a State Bar investigator wrote to respondent regarding the allegations in the Nelson matter (case No. 08-O-13014). The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in case No. 08-O-13014.

The investigator's letters were placed in sealed envelopes that were correctly addressed to respondent at his State Bar of California membership address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters. Respondent never responded to the investigator's letters; nor did he otherwise communicate with the investigator.

Count 10: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))

Respondent recklessly and repeatedly failed to perform competent legal services in willful violation of rule 3-110(A) by failing to appear in court for the June 5, 2008 hearing in Richard's case, failing to obtain discovery, i.e., the police report in Richard's case, and failing to provide any legal services to Richard that were of any value.

Count 11: Failure to Return Unearned Fees (Rules of Prof. Conduct, Rule 3-700(D)(2))

Respondent never provided any legal services of value in Richard's case and thus has never earned any part of the \$2,650 advance legal fee he received from Nelson for the representation of Nelson's son, Richard. Thus, as of the date respondent's employment was terminated, respondent owed Nelson and Richard a refund of \$2,650. By failing to make a refund to Nelson and Richard, respondent failed to refund promptly any part of an attorney fee paid in advance that had not been earned in willful violation of rule 3-700(D)(2).

Count 12: Failure to Respond to Client Inquiries (Bus. & Prof. Code, § 6068, Subd. (m))

As Richard's June 5, 2008 hearing date neared, Nelson called respondent and left messages almost every day, asking respondent to return his calls prior to the hearing date. Nelson also left daily messages for respondent between June 5 and June 11, 2008, which contained a request for respondent to return Nelson's calls.

Nelson, however, was not respondent's client. Here, there is no clear and convincing evidence that the client, Richard, gave authorization to respondent to discuss his case with Nelson. Thus, there is no clear and convincing evidence that respondent violated section 6068, subdivision (m) by failing to respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services.

Count 13: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

By failing to provide a written response to the allegations in the Nelson matter (case No. 08-O-13014) as requested in the investigator's letters of August 21, 2008 and September 5, 2008, or otherwise cooperate and participate in the investigation of the Nelson matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

4. Case No. 08-O-13581 (Roesler)

On June 6, 2008, Jean Roesler (Roesler) hired respondent to represent her daughter, Rebecca Roesler (Rebecca), in a public intoxication matter. Roesler and Rebecca (the Roeslers) paid respondent \$3,000 as an advance legal fee via the PayPal money transfer service. PayPal charged the Roeslers \$90 for the money transfer. The Roeslers informed respondent that Rebecca's case was scheduled for a hearing on June 30, 2008. They also informed respondent that Rebecca was not able to attend the June 30, 2008 hearing because she would be out of state. Respondent said that he would attend the hearing.

On July 1, 2008, the district attorney's office (DA) sent a letter to Rebecca, informing her that the court date on her public intoxication matter had been rescheduled and that the new hearing date was July 16, 2008. Roesler called the DA and learned that her daughter's court date had been changed because the DA had lost Rebecca's file. Roesler also learned that respondent had failed to appear in court on June 30, 2008.

Between July 1, 2008 and July 14, 2008, the Roeslers called respondent's office on multiple occasions. Each time they called, the Roeslers left a message informing respondent of the new court date and asking respondent to return their call. Respondent never returned any of the Roeslers' calls. On July 7, 2008, the Roeslers sent an urgent e-mail to respondent informing him that they had been trying to reach him and telling him about the July 16, 2008 court date. They asked respondent to contact them as soon as possible. Respondent received the e-mail.

On July 14, 2008, the Roeslers obtained new counsel to represent Rebecca. On July 16, 2008, Rebecca's new attorneys, went to court on her behalf and informed the Roeslers that respondent was not in court. Later in the day, respondent sent an e-mail to the Roeslers informing them that he had been to court that day, but did not see Rebecca's case on the calendar. He said that he would return to court the following day and represent her. The

Roeslers, however, knew that respondent was not telling the truth, because their new counsel had been in court on July 16, 2008 and had represented Rebecca on that day.

Late in the day on July 16, 2008, the Roeslers sent an e-mail to respondent informing him that they had retained new counsel for Rebecca. They told him that Rebecca did have a hearing earlier that day, and that she was represented by her new counsel at that hearing. The Roeslers noted that respondent performed no services of any value to Rebecca and demanded a refund of the fees that they had advanced to respondent in their entirety. Although respondent received the e-mail, he never responded to it; nor did he refund the Roeslers' advance legal fees.

On August 2, 2008, Jean Roesler sent a letter to respondent at his membership records address demanding that he refund \$3,090 to the Roeslers. Respondent received the letter. Respondent never responded to Roesler's letter and never returned the advance fees.

Respondent provided no services of any value to Rebecca.

On August 25, 2008, the State Bar opened an investigation, case No. 08-O-13581, pursuant to a complaint from Nelson. Thereafter, on October 15, 2008, and October 30, 2008, a State Bar investigator wrote to respondent regarding the allegations in the Roesler matter (case No. 08-O-13581). The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in case No. 08-O-13581.

The investigator's letters were placed in sealed envelopes that were correctly addressed to respondent at his State Bar of California membership address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters. Respondent never responded to the investigator's letters; nor did he otherwise communicate with the investigator.

Count 14: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))

By failing to appear in court for the July 16, 2008 court date in Rebecca Roesler's public intoxication matter and failing to provide any legal services on behalf of Rebecca Roesler, respondent recklessly and repeatedly failed to perform competent legal services in willful violation of rule 3-110(A).

Count 15: Failure to Return Unearned Fees (Rules of Prof. Conduct, Rule 3-700(D)(2))

Respondent never provided any legal services of value to Rebecca Roesler. Thus, he never earned any part of the advance legal fee that he received from the Roeslers for the representation of Rebecca. As a result, respondent owes them a refund of the entire \$3,000 advance legal fee he received.

By failing to refund at the time of his termination from employment, the advance fee he received from the Roeslers, respondent failed to refund promptly \$3,000 or any part of an attorney fee paid in advance that had not been earned in willful violation of rule 3-700(D)(2).

Count 16: Failure to Respond to Client Inquiries (Bus. & Prof. Code, § 6068, Subd. (m))

By not returning any of the multiple phone messages that the Rebecca left for him between July 1 and July 14, 2008, in which she requested that he return her calls and by failing to respond to the Roeslers' July 7, 2008 urgent e-mail, informing him that they had been trying to reach him and asking that he contact them as soon as possible, respondent failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Count 17: Misrepresentation and Moral Turpitude (Bus. & Prof. Code, § 6106)

By falsely stating that he went to court on July 16, 2008, and that Rebecca's case was not on the court calendar that day, when respondent did not go to court and, in fact, Rebecca's case

was on calendar and heard that day, respondent committed an act involving moral turpitude, dishonesty or corruption in willful violation of section 6106.

Count 18: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

By failing to provide a written response to the allegations in the Roesler matter (case No. 08-O-13581) as requested in the investigator's letters of October 15, 2008 and October 30, 2008, or otherwise cooperate and participate in the investigation of the Roesler matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

5. Case No. 08-O-13582 (Winbush)

On November 13, 2007, the California Department of Motor Vehicles (DMV) suspended Michael Winbush's (Winsbush) driver's license after he was stopped for a DUI. On December 7, 2007, Winbush hired respondent to file a petition for a writ of mandate in civil court to contest the DMV suspension. Respondent agreed to file a writ of mandate against the DMV within a few days on Winbush's behalf. Winbush paid respondent \$4,000 as an advance legal fee. Respondent told Winbush that the filing deadline for the writ was January 16, 2008.

On December 12 and December 14, 2007, Winbush sent 33 pages of documents and pictures to respondent, which were to assist him with the writ. During the first week of January 2008, Winbush called respondent's office to ask about the status of his case. He was told by respondent's staff that respondent was looking into his case. During the first week of February 2008, Winbush left a message on respondent's cell phone asking respondent to return his call and to update him on the status of his case.

On March 17, 2008, respondent returned Winbush's call. Respondent told Winbush that a DMV writ case generally takes about five months to complete. During the second week of April 2008, Winbush called respondent's office many times and left several messages for

respondent, asking respondent to return his calls. Respondent never returned Winbush's calls. Some of the times, when Winbush called, he was unable to leave a message, because respondent's "mailbox" was full.

On May 15, 2008, Winbush drove 100 miles to Santa Barbara, intending to personally visit respondent in his office. No one answered the door at respondent's office. On May 16, 2008, Winbush returned to respondent's office and spoke to respondent. Respondent told Winbush that he had not gotten around to his case. It was apparent to Winbush that respondent knew nothing about his case. Respondent's assistant told Winbush that his case had a filing deadline of May 28, 2008. Respondent's assistant promised that she would call Winbush when his case was filed.

On June 3, 2008, after hearing nothing from respondent, Winbush began calling respondent's office to inquire about his case. Winbush called respondent's office several times. Each time that he called Winbush left a message informing respondent that he wanted some information on his case and requesting that respondent return his call. Respondent never returned Winbush's calls.

On July 7, 2008, Winbush contacted the Los Angeles Superior Court and learned that no writ had been filed on his behalf. Respondent provided no services of any value to Winbush. Thereafter, on August 13, 2008, Winbush sent a letter to respondent expressing his displeasure with respondent and demanding a refund of the entire \$4,000 that he had paid to respondent as an advance legal fee. Respondent received the letter. But, respondent never refunded Winbush's advance legal fees.

On August 28, 2008, the State Bar opened an investigation, case No. 08-O-13582, pursuant to a complaint from Winbush. Thereafter, on October 15, 2008, and October 30, 2008, a State Bar investigator wrote to respondent regarding the allegations in the Winbush matter

(case No. 08-O-13582). The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in case No. 08-O-13582.

The investigator's letters were placed in sealed envelopes that were correctly addressed to respondent at his State Bar of California membership address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters. Respondent never responded to the investigator's letters; nor did he otherwise communicate with the investigator.

Count 19: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))

By not filing a writ in Winbush's DUI case, respondent recklessly and repeatedly failed to perform competent legal services in willful violation of rule 3-110(A).

Count 20: Failure to Return Unearned Fees (Rules of Prof. Conduct, Rule 3-700(D)(2))

Respondent provided no services of value to Winbush. Thus, respondent never earned any part of the advance legal fee paid to him.

As of August, 13, 2008, the date when his employment was terminated, respondent owed Winbush the entire \$4,000 legal fee that Winbush had advanced to him. Respondent, however, has never refunded the advance legal fee he received from Winbush. By failing to refund, upon termination from employment, the advance fee he received from Winbush, respondent failed to refund promptly \$4,000 or any part of an attorney fee paid in advance that had not been earned in willful violation of rule 3-700(D)(2).

Count 21: Failure to Respond to Client Inquiries (Bus. & Prof. Code, § 6068, Subd. (m))

During the second week of April 2008, Winbush called respondent's office many times and left several messages for respondent, requesting that respondent return the calls. Respondent never returned any of those calls. Starting June 3, 2008, after having heard nothing from respondent regarding whether a May 28, 2008 filing deadline had been met, Winbush again began calling respondent's office to inquire about his case. Winbush called several times and each time left a message informing respondent that he wanted information on his case and requesting a return call from respondent. Respondent never returned any of the calls that Winbush made starting June 3, 2008.

By not returning any of the calls Winbush made inquiring about the status of his case during the second week of April and by never returning any of the several calls that Winbush made starting on June 3, 2008, respondent failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Count 22: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

By failing to provide a written response to the allegations in the Winbush matter (case No. 08-O-13582) as requested in the investigator's letters of October 15, 2008 and October 30, 2008, or otherwise cooperate and participate in the investigation of the Winbush matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

6. Case No. 08-O-13583 (Olewiler)

In 2006, Greg Olewiler (Olewiler) was stopped and cited for driving under the influence of alcohol (DUI). On January 19, 2007, the misdemeanor DUI charges against Olewiler were dismissed. However, the California Department of Motor Vehicles (DMV) notified Olewiler

that it was going to suspend his driver's license for four months beginning on or about April 8, 2007; and, the suspension would be ordered to last until on or about August 8, 2007.

DMV did suspend Olewiler's license beginning on April 8, 2007. On his own, without any assistance from respondent, Olewiler located and attended classes that gave him limited driving privileges (to and from work) during the period of suspension.

On April 10, 2007, Olewiler hired respondent to file a petition for a writ of mandate in civil court to contest the DMV suspension, and to file an application for a stay of the DMV suspension. Respondent agreed to file the motions within a few days. Olewiler paid respondent \$3,531 as an advance legal fee. On April 17, 2007, Olewiler learned that respondent had not filed the writ or the stay on his behalf.

Beginning April 17, 2007 and continuing through July 2, 2007, Olewiler called respondent's office at least twenty-one times. Each time that he called, Olewiler left a message asking respondent to call him back. Respondent never returned Olewiler's calls.

On May 1, 2007, respondent filed a petition for a writ of mandate in the superior court. But, respondent never sought to set a hearing date on the writ; nor did respondent take any other action on the writ. The filing of the writ provided no benefit to Olewiler. His suspension continued unabated.

On July 20, 2007, respondent filed the application for a stay of Olewiler's suspension.⁴ The court stayed the final thirteen days of Olewiler's suspension on July 27, 2007.⁵

⁴ At this point, Olewiler's four-month suspension had been in effect for more than three months; and, Olewiler's driving privileges were due to be reinstated in about twenty days.

⁵ Paragraph 148 of the NDC states that on "July 27, 2008," the court stayed the final 13 days of Olewiler's suspension. It is apparent, in light of the dates set forth in paragraphs 141 and 147 of the NDC, that the "July 27, 2008" date contains a typographical error. The date on which the court stayed the suspension clearly should have been July 27, 2007. As the error is a clerical in nature, the court finds it to be de minimis.

Almost a year later, on May 29, 2008, the DMV filed a motion to dissolve the stay. Respondent never filed an opposition to the DMV's motion. And July 3, 2008, the court granted the DMV's motion and dissolved the stay. On July 24, 2008, the DMV sent a letter to Olewiler informing him that the suspension of his driving privileges would be re-imposed from July 29 2008 through August 12, 2008. During this period of suspension, the DMV did not allow Olewiler to drive to and from work.

After July 24, 2008, Olewiler tried to contact respondent, so that respondent could modify the suspension by allowing Olewiler to drive to and from work. But, respondent never responded to any of Olewiler's calls.

Respondent provided no services of any value to Olewiler.

On September 16, 2008, the State Bar opened an investigation, case No. 08-O-13583, pursuant to a complaint from Olewiler. Thereafter, on October 15, 2008, and October 30, 2008, a State Bar investigator wrote to respondent regarding the allegations in the Olewiler matter (case No. 08-O-13583). The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in case No. 08-O-13583.

The investigator's letters were placed in sealed envelopes that were correctly addressed to respondent at his State Bar of California membership address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters. Respondent never responded to the investigator's letters; nor did he otherwise communicate with the investigator.

Count 23: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))

By not requesting a hearing date on the writ, not filing a motion to stay Olewiler's suspension for over three months, by not filing an opposition to the DMV's motion to dissolve the stay, and by taking no steps to obtain limited driving privileges for Olewiler after the stay was lifted and the suspension re-imposed in 2008, respondent recklessly and repeatedly failed to perform competent legal services in willful violation of rule 3-110(A).

Count 24: Failure to Return Unearned Fees (Rules of Prof. Conduct, Rule 3-700(D)(2))

Respondent stipulated and the court finds that respondent performed no services of any value to Olewiler, did not earn any of the advance fees paid to him, and owes Olewiler a full refund of the \$3,531 advance fee. Thus, respondent failed to refund promptly any part of an attorney fee paid in advance that had not been earned in willful violation of rule 3-700(D)(2).

Count 25: Failure to Respond to Client Inquiries (Bus. & Prof. Code, § 6068, Subd. (m))

By failing to return any of the 21 calls Olewiler made to him between April 17 and July 2, 2007, and by failing to return Olewiler's calls made after July 24, 2008, respondent failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Count 26: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

By failing to provide a written response to the allegations in the Olewiler matter (case No. 08-O-13583) as requested in the investigator's letters of October 15, 2008 and October 30, 2008, or otherwise cooperate and participate in the investigation of the Olewiler matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

7. Case No. 08-O-14042 (Crepps-Denny)

On October 7, 2007, Vicky Crepps-Denny (Crepps-Denny) was cited for causing a fatal automobile accident. On February 4, 2008, the California Department of Motor Vehicles (DMV) notified Crepps-Denny that it was suspending her driving privileges effective March 8, 2008, because she had caused or contributed to a fatal accident. Crepps-Denny requested a hearing on her suspension.

In April 2008, Crepps-Denny represented herself in a DMV hearing. On April 24, 2008, the DMV notified Crepps-Denny that a review of the evidence presented at the hearing showed that she caused, or contributed to, a fatal accident and her license remained suspended. She was also notified that she had the right to seek review of the DMV decision. On April 25, 2008, Crepps-Denny requested a review of the hearing decision. Although she acknowledged her fault in the accident, Crepps-Denny believed that the other driver was impaired by drugs and that the other driver's impairment was a contributing factor to the accident. Crepps-Denny tried to get evidence of the other driver's impairment admitted at the DMV hearing in April 2008, but was unsuccessful.

On June 26, 2008, Crepps-Denny hired respondent to file a petition for a writ of mandate to reinstate her driving privileges. She paid respondent \$5,717.53. Respondent told her that it would take two to three weeks to obtain her records from the DMV and to get a hearing before the court.

From June 26, 2008 through August 1, 2008, Crepps-Denny repeatedly called respondent to inquire about the status of her case. Each time that she called, Crepps-Denny left a message asking respondent to return her call. Respondent never returned Crepps-Denny's calls.

On August 1, 2008, the DMV contacted Crepps-Denny and informed her that she would have an interview with the DMV on August 29, 2008⁶ From August 1, 2008, through August 29, 2008, Crepps-Denny repeatedly called respondent to ask for legal advice about the interview and to ask if respondent would attend the interview. Each time that she called, Crepps-Denny left a message asking respondent to return her call. Respondent never returned Crepps-Denny's calls.

On August 29, 2008, Crepps-Denny went to the DMV interview. Respondent was at the interview. Respondent told Crepps-Denny that he had not yet ordered her file from the DMV; nor had he begun working on her case. Respondent did not present to the DMV any evidence of impairment by the other driver. On August 29, 2008, respondent told Crepps-Denny that he would start working on her case and that she would have a court hearing within two to three weeks.

On September 2, 2008, the DMV sent a notice of its findings and decision to Crepps-Denny. It informed her that her driver's license remained suspended, because she caused or contributed to a fatal accident. It notified her that she had the right to seek court review of the DMV decision.

Respondent did not file anything on Crepps-Denny's behalf; nor did he take any action that was of benefit or value to her. Respondent has not returned the \$5,717.53 fee she advanced to him.

On October 6, 2008, Crepps-Denny sent a letter to respondent demanding that he refund her legal fees. Respondent received the letter.

On October 8, 2008, the State Bar opened an investigation, case No. 08-O-14042, pursuant to a complaint from Crepps-Denny. Thereafter, on November 20, 2008, and December

⁶ This interview was scheduled because, on April 25, 2008, Crepps-Denny had requested review of the hearing officer's adverse decision. Respondent had no part in scheduling or requesting the hearing.

9, 2008, a State Bar investigator wrote to respondent regarding the allegations in the Crepps-Denny matter (case No. 08-O-14042). The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in case No. 08-O-14042.

The investigator's letters were placed in sealed envelopes that were correctly addressed to respondent at his State Bar of California membership address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters. Respondent never responded to the investigator's letters; nor did he otherwise communicate with the investigator.

Count 27: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))

The only evidence before the court regarding the other driver, who was involved in the Crepps-Denny auto accident, is Crepps-Denny's belief that the other driver was impaired by drugs at the time of the accident. As there no evidence before this court to show that there exists any evidence of the other driver's impairment, other than Crepps-Denny's belief, this court is unable to find by clear and convincing evidence that respondent's failure to get evidence of the other driver's impairment involved a failure to perform.

But, by failing to order Crepps-Denny's DMV file and failing to have begun working on Crepps-Denny's case, prior to the August 29, 2008 DMV interview and by never having filed a writ of mandate on behalf of Crepps-Denny or taken any action of benefit on Crepps-Denny's behalf, respondent recklessly and repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

Count 28: Failure to Return Unearned Fees (Rules of Prof. Conduct, Rule 3-700(D)(2))

Respondent provided no services of value to Crepps-Denny and did not earn any part of the \$5,717.53 advance legal fee that Crepps-Denny had paid to him. Respondent stipulated that he has never taken action that has been of any benefit to Crepps-Denny and did not return the advance fees he received from Crepps-Denny.

By failing to refund the \$5,717.53 advance legal fee, or any part thereof, respondent failed to refund promptly any part of an attorney fee paid in advance that had not been earned in willful violation of rule 3-700(D)(2).

Count 29: Failure to Respond to Client Inquiries (Bus. & Prof. Code, § 6068, Subd. (m))

By never returning any of Crepps-Denny's phone calls, made from June 26 through August 1, 2008, and by never returning any of her calls made between August 1 and August 29, 2008, respondent failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Count 30: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

By failing to provide a written response to the allegations in the Crepps-Denny matter (case No. 08-O-14042) as requested in the investigator's letters of November 20, 2008 and December 9, 2008, or otherwise cooperate and participate in the investigation of the Crepps-Denny matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

8. Case No. 08-O-14599 (Anderson)

On October 2, 2007, Patricia Anderson (Anderson) was stopped and cited for driving under the influence of alcohol (DUI). On January 25, 2008, Anderson pled guilty to DUI and was sentenced to seven days in jail, among other things. In March 2008, the California

Department of Motor Vehicles (DMV) notified Anderson that it was suspending her driving privileges.

On March 24, 2008, Anderson hired respondent to file a Petition for a writ of mandate in superior court in an attempt to get her driving privileges reinstated. Anderson paid respondent \$4,600 as an advance legal fee for his services.

From April 2, 2008, through May 15, 2008, Anderson repeatedly called respondent to inquire about the status of her case. Each time that she called, Anderson left a message asking respondent to return her call. Respondent never returned Anderson's calls. On May 15, 2008, Anderson sent an e-mail to respondent asking him about the status of her case. Respondent never replied to Anderson's e-mail.

In June 2008, Anderson called respondent and spoke to him. He told her that he had not filed anything on her behalf and promised that he would file the writ on her behalf, provided that she did not terminate his services. Anderson agreed to keep respondent as her attorney and relied on his statement that he would promptly file the writ.

From June 2008 through September 19, 2008, Anderson repeatedly called respondent to inquire about the status of her case. Each time that she called, Anderson left a message asking respondent to return her call. Respondent never returned Anderson's calls. As of September 19, 2008, respondent had not filed the writ or anything else on Anderson's behalf. Respondent provided no services of any value to Anderson.

Finally, on September 19, 2008, Anderson sent a certified letter to respondent terminating his services and demanding that he refund her entire legal fee. Respondent received the letter. To date, respondent has not replied to Anderson; nor has he filed anything on Anderson's behalf. Moreover, respondent has not taken any action that has been of any benefit to Anderson or returned the advance fee she paid him.

On November 12, 2008, the State Bar opened an investigation, case No. 08-O-14599, pursuant to a complaint from Anderson. Thereafter, on December 22, 2008, and January 7, 2008, a State Bar investigator wrote to respondent regarding the allegations in the Anderson (case No. 08-O-14599). The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in case No. 08-O-14599.

The investigator's letters were placed in sealed envelopes that were correctly addressed to respondent at his State Bar of California membership address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters. Respondent never responded to the investigator's letters; nor did he otherwise communicate with the investigator.

Count 31: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))

By not filing a writ of mandate or anything else on Anderson's behalf and by not taking any action that was of value to her, respondent recklessly and repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

Count 32: Failure to Return Unearned Fees (Rules of Prof. Conduct, Rule 3-700(D)(2))

Respondent provided no services of value to Anderson. As a result, respondent did not earn any part of the advance fee paid to him and owes Anderson a refund of the entire \$4,600 fee he received.

As of September 19, 2008, the date that his employment was terminated, respondent owed Anderson a refund of \$4,600. Respondent, however, has never refunded any part of the legal fee he received from Anderson. By failing to refund, upon termination from employment,

the advance fee he received from Anderson, respondent failed to refund promptly \$4,600 or any part of an attorney fee paid in advance that had not been earned in willful violation of rule 3-700(D)(2).

Count 33: Failure to Respond to Client Inquiries (Bus. & Prof. Code, § 6068, Subd. (m))

By never returning any of Anderson's phone calls, made from April 2 through May 15, 2008, never returning any of her calls made from June 2008 through September 19, 2008, and never replying to her May 15, 2008 e-mail, respondent failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Count 34: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

By failing to provide a written response to the allegations in the Anderson matter (case No. 08-O-14599) as requested in the investigator's letters of December 22, 2008, and January 7, 2009, or otherwise cooperate and participate in the investigation of the Anderson matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

C. Second Notice of Disciplinary Charges

1 Case No. 09-O-11039 (Lazzaro)

On September 25, 2008, Anton Lazzaro (Lazzaro) hired respondent to represent him in a civil action against the DMV, after the California Department of Motor Vehicles (DMV) suspended Lazzaro's driver's license for a "per se" violation of the laws prohibiting driving while under the influence of alcohol. Lazzaro paid respondent \$3,300 as an advance fee for his legal services. Respondent agreed to file an action in civil court on Lazzaro's behalf.

On October 16, 2008, respondent told Lazzaro that he had filed an action in civil court on Lazzaro's behalf. Then, in November 2008, respondent told Lazzaro that his case would be

heard in December 2008 or January 2009 at the latest. Lazzaro contacted the Orange County Court and learned that respondent had never filed anything on his behalf.

Respondent provided no services of value to Lazzaro.

During December 2008 and throughout January 8, 2009, Lazzaro called respondent on numerous occasions. Each time that he called, Lazzaro left a message asking for an update on the status of his case and asking respondent to call him back. Respondent never returned Lazzaro's calls.

On January 8, 2009, Lazzaro called respondent. Respondent answered the phone. Lazzaro asked for an update on his case. Respondent told Lazzaro that he would look into his case and call him the next day. The next day, Lazzaro called respondent and left a message asking for an update on the status of his case. He also asked respondent to call him back. To date, respondent has never returned Lazzaro's call.

On February 4, 2009, the State Bar opened an investigation, case No. 09-O-11039, pursuant to a complaint from Lazzaro. Thereafter, on April 2, 2009, and April 21, 2009, a State Bar investigator wrote to respondent regarding the allegations in the Lazzaro (case No. 09-O-11039). The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in case No. 09-O-11039.

The investigator's letters were placed in sealed envelopes that were correctly addressed to respondent at his State Bar of California membership address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters. Respondent never responded to the investigator's letters; nor did he otherwise communicate with the investigator.

Count 1: Failure to Perform Competently (Rules of Prof. Conduct, Rule 3-110(A))

By failing to file documents or anything else in civil court on behalf of Lazzaro, after agreeing to file a civil action against the DMV on Lazzaro's behalf, respondent recklessly and repeatedly failed to perform competent legal services in willful violation of rule 3-110(A)

Count 2: Failure to Return Unearned Fees (Rules of Prof. Conduct, Rule 3-700(D)(2))

Respondent did not earn any part of the \$3,300 advance legal fee that Lazzaro had paid to him on September 25, 2008. Respondent stipulated and the court finds that respondent performed no services of any value to Lazzaro, did not earn any part of the advance fee paid to him, and owes Lazzaro a full refund. Thus, respondent failed to refund promptly any part of an attorney fee paid in advance that had not been earned in willful violation of rule 3-700(D)(2).

Count 3: Failure to Respond to Client Inquiries (Bus. & Prof. Code, § 6068, Subd. (m))

By not returning any of the phone messages that Lazzaro left for him in December 2008 and through January 8, 2009, and by not responding to Lazzaro's January 9, 2009 phone message asking for an update on the status of his case and a return call, respondent failed to respond promptly to reasonable status inquiries of a client in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Count 4: Misrepresentation and Moral Turpitude (Bus. & Prof. Code, § 6106)

When respondent told Lazzaro that he had filed a civil action on his behalf, respondent knew or should have known that no action had been filed. And when respondent told Lazzaro that his case would be heard in December 2008 or January 2009, respondent knew or should have known that Lazzaro's case had not been filed and that there would be no hearing. By telling Lazzaro that he had filed a civil action on his behalf, when, in fact, respondent had not filed anything in civil court on Lazzaro's behalf, and when respondent told Lazzaro that his case

would be heard in December 2008 or January 2009, respondent committed an act involving moral turpitude, dishonesty or corruption in willful violation of section 6106.

Count 5: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

By failing to provide a written response to the allegations in the Lazzaro matter (case No. 09-O-11039) as requested in the investigator's letters of April 2, 2009, and April 21, 2009, or otherwise cooperate and participate in the investigation of the Lazzaro matter, respondent failed to cooperate in a disciplinary investigation in willful violation of section 6068, subdivision (i).

IV. Mitigation and Aggravation

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(b) and (e).)⁷

A. Mitigation

Respondent was suffering from extreme emotional difficulties at the time of his misconduct, based on the extensive testimony of psychotherapist Charles Unger and respondent. (Std. 1.2(e)(iv).) The State Bar did not provide any evidence to refute their testimony.

Respondent, who became aware that he had alcohol dependency issues in the 1990s, stopped drinking in the 1994. He remained sober for six years. He formally joined Alcoholics Anonymous (AA) in 2001. In 2005, respondent received a phone call informing him his mother had been diagnosed with brain cancer. She died two weeks later. After his mother died, respondent began a downward spiral into a deep depression. In 2006, respondent's father was diagnosed with cancer and died 15 months later in 2007. After his parents died, respondent turned to alcohol and drugs, relapsing into addiction. Respondent's grief and depression were overwhelming to the extent that he never opened his mail, was afraid to answer the phone, and

⁷ All further references to standards are to this source.

was unable to work. Thus, respondent suffered severe emotional difficulties during the time of the misconduct in these consolidated matters. (*Read v. State Bar* (1991) 53 Cal.3d 394, 424-425 [Severe emotional problems which can be related to the misconduct at issue can be considered to have a mitigating effect]; std. 1.2(e)(iv).)

Dr. Charles Unger, a psychotherapist and certified grief and recovery expert, testified that he treated respondent from June 2008 through December 2008. Dr. Unger testified that respondent suffered a great deal from losses, which he handled by turning to alcohol. Initially, throughout his parents' illnesses and after their deaths, respondent did not want to face things. Thus, he did not return phone calls or letters; and, thereby, failed to cooperate with the State Bar. According to Dr. Unger such behavior is consistent with alcoholism and depression. However, in 2008, respondent became motivated to get his life together. The last time he used drugs was October 2009.

Respondent has taken appropriate measures to regain his sobriety and to address his depression. He contacted the Lawyer Assistance Program (LAP) in September 2009, and, thereafter, enrolled in the LAP. Respondent entered the Sober Living House, where he has curfews, undergoes random drug testing, and attends five AA meetings per week. As part of the LAP he sees a psychotherapist.

Respondent displayed candor and cooperation during this disciplinary proceeding by stipulating to all, but one, of the facts alleged in the two NDCs that were filed in this matter and by admitting culpability. Respondent is entitled to significant mitigation for entering into the extensive stipulation of facts and admitting culpability. (Std. 1.2(e)(v).)

Respondent presented six character witnesses, including attorneys and judges, who testified credibly as to his good character. (Std. 1.2(e)(vi).) The witnesses laudably praised respondent as fair, ethical, honest, intelligent and compassionate. They testified to his high level

of professionalism and competency. All of the witnesses, except for one,⁸ were aware of the full extent of respondent's misconduct. The judges testified that prior to his downhill spiral around 2005 and 2006, respondent was always prompt, prepared, and demonstrated outstanding competency. Several of the witnesses, including the judges, testified that they found respondent's misconduct to be totally out-of-character.

Professor Stanislau Pulle, Dean of Southern California Institute of Law, where respondent taught, testified that respondent was timely and participated in all faculty meetings. He had once been voted professor of the year. Respondent was a mentor and highly regarded by students. Despite the NDCs, Professor Pulle views respondent as a capable lawyer. Another witness, a community leader, testified as to respondent's pro bono work for the Alano Club of Santa Barbara, an organization that helps people with alcohol and drug problems to resume a drug free life. Respondent became a member of the board of the Alano Club and became the treasurer of that organization. The witness described respondent as a leader, who would do whatever task was put in front of him.

Respondent's character witnesses represent a wide range of references in the legal and general communities, who are aware of the full extent of the charges against respondent. Because attorneys have a "strong interest in maintaining the honest administration of justice" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319), "[t]estimony of members of the bar . . . is entitled to great consideration." (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.)

Accordingly, the court finds that the witnesses represent an extraordinary demonstration of respondent's good character attested to by a wide range of references in the legal and general

⁸ The court has discounted the testimony of the one witness, Judge Ochoa, who testified that he was unaware of respondent's circumstances.

communities. Thus, the court gives respondent substantial mitigating credit for his good character testimony.

Respondent testified that he spent about a year working with Hospitals and Institutions, a group of alcoholics that takes meetings to places where people are confined, such as jails and psychiatric hospitals. Eventually, as noted, *ante*, respondent joined the board of the Alano Club and ultimately became its treasurer. In 2003, he taught criminal law and appellate procedure at Southern California Institute of Law. He also taught courses to the police department and developed standards for highway safety. Additionally, respondent taught continuing education classes for the State Bar. Respondent's pro bono and community work also merit some weight in mitigation.

Respondent has shown remorse and willingness to accept responsibility for his acts of misconduct. (Std. 1.2(e)(vii).) He has taken objective steps to overcome his substance abuse and to avoid future misconduct by voluntarily entering the Sober Living House and committing to a rehabilitation program (LAP). In his testimony, respondent has owned up to his misdeeds. He testified that he feels terrible about having taken his clients' money without doing the work. He understands he must pay back the money. Such conduct demonstrates remorse and recognition of his wrongdoing.

B. Aggravation

The record establishes three factors in aggravation by clear and convincing evidence. (Std. 1.2(b).)

Respondent has one prior record of discipline. (Std. 1.2(b)(i).) In his previous disciplinary matter, respondent stipulated to, among other things, a one-year stayed suspension and two-year probation with conditions, for violating Business and Professions Code section 6068, subdivision (a) by holding himself out as practicing or entitled to practice law between

September and October 2001, when he was not an active member of the State Bar. No aggravating circumstances were involved. In mitigation there was no harm to any client; respondent displayed candor and/or cooperation to the State Bar during the disciplinary investigation; and respondent promptly took objective steps to atone for any consequences of his wrongdoing. (Supreme Court case No. 110690; State Bar Court case No. 01-O-05412.)

The current misconduct by respondent evidences multiple acts of misconduct. (Std. 1.2(b)(ii).) His misconduct included failure to competently perform legal services, failure to release client files, failure to return unearned fees, failure to respond to client inquiries, failure to provide accounts of client funds, acts of moral turpitude, and failure to cooperate in State Bar investigations.

Respondent's misconduct significantly harmed his client, the public or the administration of justice. (Std. 1.2(b)(iv).) Respondent abandoned clients and failed to return their fees, which totaled \$33,929.53. Client Alexis Lipnicki had to hire an attorney, David Finer, to help her obtain a refund of the unearned fees she paid respondent and the return of her file.

V. Discussion

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as “the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.”

The standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 2.2(b), 2.3, 2.4(b), 2.6, and 2.10 apply in this matter.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) But, as the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

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.

Standard 2.2(b) provides that culpability of a member of commingling or the commission of another violation of rule 4-100, which do not result in the willful misappropriation of entrusted funds or property, must result in at least a three-month actual suspension, irrespective of mitigating circumstances.

Standard 2.4(b) provides that culpability of a member’s willful failure to perform services and willful failure to communicate with a client must result in reproof or suspension, depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

Finally, standard 2.10 provides that culpability of other provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.

Although the State Bar urges the court to disbar respondent, it argued, in the alternative that if the court did not find disbarment appropriate, that a three-year actual suspension is warranted. Respondent contends that an actual suspension of three years is appropriate.

The Supreme Court in *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074 imposed a two-year actual suspension on an attorney who had abandoned four clients, failed to return unearned fees, failed to communicate with three clients, made misrepresentations to a client regarding her case status, and failed to cooperate with the State Bar. The attorney had also defaulted in the disciplinary proceeding.

In the instant matter, unlike *Bledsoe*, respondent participated in this proceeding. But, respondent abandoned nine clients and failed to return unearned fees of \$33,929.53 to those clients. Such misconduct reflects a blatant disregard of professional responsibilities.

In *Pineda v. State Bar* (1989) 49 Cal.3d 753, the State Bar issued a notice to show cause charging the attorney with abandoning his clients, misrepresenting the status of their cases and failing to return unearned fees. The parties then agreed to a stipulation of facts and discipline, which recommended that Pineda be placed on probation for five years and be actually suspended for the first year of his probation. The stipulated facts revealed that in seven client matters, over a period of eight years, Pineda accepted funds from his clients, failed to perform the services for which he was retained, refused to communicate with his clients or respond to their inquiries, and did not return any advance fees. When the Supreme Court informed Pineda that it was considering more severe discipline than that to which the parties had stipulated, Pineda petitioned for review. On review, the California Supreme Court ordered that attorney Pineda be suspended from the practice of law for five years, stayed execution of the suspension, and ordered Pineda placed on probation for five years with conditions, including that Pineda be actually suspended from the practice of law for the first two years of the probationary period.

The Supreme Court determined that although Pineda's misconduct merited more than a one-year actual suspension, given the mitigating circumstances, a two-year actual suspension combined with a five-year period of supervised probation would adequately protect the public, without unduly punishing the attorney. (*Id.* at 760.)

Among the mitigating circumstances that militated against disbarment was Pineda's willingness to accept punishment, as evidenced by his decision to stipulate to the relevant facts. Second, Pineda demonstrated remorse for his wrongful conduct and a determination to rehabilitate himself. Finally, some of Pineda's wrongful conduct occurred during a period of personal and professional problems.

Respondent's misconduct and the mitigating circumstances surrounding that misconduct are much like Pineda's. Respondent stipulated to all, but one, of the facts alleged in the NDCs that were filed in this matter. He demonstrated remorse for his misconduct and determined to rehabilitate himself by entering the LAP and engaging in therapy. And, like Pineda, some of respondent's conduct occurred during a period of extreme emotional difficulty and family problems.

Here, respondent's client abandonments must weigh heavily in assessing the appropriate level of discipline. Respondent has not returned any portion of the unearned fees to his clients. But, as discussed, he accepts responsibility for his misconduct and expresses remorse for his behavior. Respondent has shown that he is determined to be fully rehabilitated and is anxious to resume a productive professional life as an attorney, as evidenced by his entering the Sober Living House, committing to the LAP, and engaging in ongoing mental health treatment. The fact that respondent understands his professional responsibilities and has a proper attitude towards his prior misconduct is evidence of rehabilitation. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 317.)

In recommending discipline, the “paramount concern is protection of the public, the courts and the integrity of the legal profession.” (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) After balancing all relevant factors, including the underlying misconduct, the aggravating circumstances and the compelling mitigating factors, the court concludes that while disbarment would be unduly harsh, a lengthy period of actual suspension would be commensurate with the gravity of respondent’s misconduct. Accordingly, the court recommends that a three-year actual suspension is proper and necessary for the protection of the public, the courts and the legal profession.

VI. Recommendations

A. Recommended Discipline

Accordingly, the court hereby recommends that respondent **Lee Allen McCoy** be suspended from the practice of law in California for four years, that execution of that period of suspension be stayed, and that respondent be placed on probation for five years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for a minimum of the first three years and he will remain suspended until the following requirements are satisfied:
 - i. He makes restitution to **Alexis Lipnicki** in the amount of \$3,600 plus 10% interest per year from May 15, 2008 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Alexis Lipnicki, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar’s Office of Probation in Los Angeles;

- ii. He makes restitution to **Ben Castillo** in the amount of \$3,531 plus 10% interest per year from February 18, 2008 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Ben Castillo, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;
- iii. He makes restitution to **Richard and David Nelson** in the amount of \$2,650 plus 10% interest per year from June 18, 2008 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Richard and David Nelson, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;
- iv. He makes restitution to **Rebecca and Jean Roesler** in the amount of \$3,000 plus 10% interest per year from July 16, 2008 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Rebecca and Jean Roesler, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;
- v. He makes restitution to **Michael Winbush** in the amount of \$4,000 plus 10% interest per year from August 13, 2008 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Michael Winbush, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;

- vi. He makes restitution to **Greg Olewiler** in the amount of \$3,531 plus 10% interest per year from April 10, 2007 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Greg Olewiler, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;
- vii. He makes restitution to **Vicky Crepps-Denny** in the amount of \$5,717.53 plus 10% interest per year from October 6, 2008 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Vicky Crepps-Denny, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;
- viii. He makes restitution to **Patricia Anderson** in the amount of \$4,600 plus 10% interest per year from September 19, 2008 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Patricia Anderson, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles;
- ix. He makes restitution to **Anton Lazzaro** in the amount of \$3,300 plus 10% interest per year from September 25, 2008 (or reimburses the Client Security Fund, to the extent of any payment from the fund to Anton Lazzaro, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles; and

- x. Lee Allen McCoy must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)
2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct.
3. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.
4. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions attached to the reproof. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the probation period, respondent must promptly meet with the probation deputy as directed and upon request.
5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are

directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.

6. Respondent must participate in the Lawyer Assistance Program (LAP) for a five-year period as part of his probation requirements.

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

7. Respondent must abstain from use of any alcoholic beverages, and must not use or possess any narcotics, dangerous or restricted drugs, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription.
8. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1.
9. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session.

Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201).

10. The period of probation must commence on the effective date of the order of the Supreme Court imposing discipline in this matter. At the expiration of the period of probation, if respondent has complied with all the conditions of probation, the four-year period of stayed suspension will be satisfied and that suspension will be terminated.

B. Multistate Professional Responsibility Exam

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination during the period of his suspension and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

C. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter. Willful failure to do so may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.⁹

⁹ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

D. Costs

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

Dated: March _____, 2010

PAT McELROY
Judge of the State Bar Court