PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

December 17, 2007

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	**Case No. 01-O-05066**
	)	
MARK B. SCOTT,	)	**OPINION ON REVIEW**
	)	**MODIFIED PURSUANT TO ORDER**
A Member of the State Bar.	)	**FILED DECEMBER 17, 2007**
	)	

A hearing judge found respondent, Mark B. Scott, culpable of professional misconduct in three client matters, characterizing his behavior as a "cavalier attitude in entering into fee agreements that were unconscionable or adverse to his clients' interests." She accordingly recommended, inter alia, that respondent be suspended from the practice of law for two years, that execution of suspension be stayed, and that he be placed on probation for two years with conditions, including an actual suspension of one year from the practice of law.

Respondent admits to trust account violations under Rules of Professional Conduct, rule 4-100(A) and rule 4-100(B)(3).[1] However, he is appealing the hearing judge's remaining culpability findings. Respondent further challenges the discipline recommendation of the hearing judge as too severe, contending that his misconduct warrants no more than a three-month actual suspension.

The State Bar asks us to adopt all of the hearing judge's factual findings and all but one of her culpability determinations, challenging only her dismissal of one charge of moral turpitude. The State Bar also takes issue with the discipline recommended by the hearing judge and is seeking disbarment.

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[1]All further references to "rule" or "rules" are to the current Rules of Professional Conduct, unless expressly noted.

Upon our de novo review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we find less culpability but more aggravation than the hearing judge. Ultimately, we recommend, inter alia, that respondent be actually suspended for six months.

I. PROCEDURAL HISTORY

Respondent was admitted on June 24, 1971, and has no prior record of misconduct. On December 30, 2003, the State Bar filed a Notice of Disciplinary Charges (NDC) against respondent, alleging 38 counts of misconduct involving three clients. On February 16, 2005, the parties filed a stipulation as to undisputed facts (Stipulation). An eight-day trial was held between the dates of February 17, 2005, and May 18, 2005. Respondent was represented by counsel and acted as co-counsel. On March 9, 2005, during the trial, the State Bar filed an amended 24-count NDC, eliminating 14 counts against respondent.[2] The matter was submitted on June 28, 2005, after the parties filed closing trial briefs. The hearing judge filed her decision on September 25, 2005, finding culpability for ten counts of misconduct and dismissing 14 counts in addition to those she had previously dismissed.[3] Both parties sought reconsideration and respondent also sought to reopen the record, which requests were denied on November 14, 2005. This appeal by both parties follows.

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[2]After the State Bar filed its amended NDC, the hearing judge dismissed the following counts: Count 4 (rule 3-110(A)); Count 6 (rule 3-400(A)); Count 14 (Bus. & Prof. Code, § 6068, subd. (i)) (all further references to "section" or "sections" are to the Bus. & Prof. Code, unless otherwise indicated); Count 15 (rule 4-200(A)); Count 16 (rule 4-100(A)); Count 19 (§ 6106); Count 24 (rule 3-400(A)); Count 26 (rule 3-310(C)); Count 27 (§ 6068, subd. (i)); Count 29 (rule 4-200(A)); Count 33 (rule 3-310(B)(2)); Count 34 (rule 3-400(A); Count 37 (§ 6106); and Count 38 (§ 6068, subd. (i)). Upon our de novo review, we agree with the dismissal of these 14 counts and do not discuss them further.

[3]The hearing judge did not find culpability on the following counts: Count 2 (rule 3-310(B)(4)); Count 3 (rule 2-200(A)); Count 5 (rule 3-510(A)(2)); Count 8 (§ 6106); Count 11 (§ 6106); Count 17 (rule 4-100(B)(3)); Count 18 (rule 3-700(D)(2)); Count 22 (§ 6106); Count 25 (§ 6068, subd. (m)); Count 28 (§ 6106); Count 30 (rule 4-100(A)); Count 31 (§ 6106); Count 32 (§ 6106); and Count 36 (rule 4-100(A)).

II. THE HARVEY MATTER (Case No. 01-0-05066)

A. Factual Background

In 1991, Daniel Harvey purchased a medical expense reimbursement policy from Principal Mutual Life Insurance Company (Principal). On July 3, 1994, Mr. Harvey, who was then 38 years old, was in a motorcycle accident that resulted in catastrophic injuries requiring extensive medical care and hospitalization.

Deborah Harvey, Daniel Harvey's wife, presented a claim to Principal, which Principal initially paid. About five weeks after his hospitalization began, Mr. Harvey suffered a seizure that caused a severe brain injury, leaving him seriously disabled. After spending six months in an acute care hospital, in early January 1995, Mr. Harvey was moved to a rehabilitation facility, Neurobehavioral Cognitive Services (NCS), in Davis, California. Principal wrote to Ms. Harvey on January 20, 1995, advising that Mr. Harvey's care at NCS was covered for only 120 days because NCS was a skilled nursing facility and not a hospital. The cost of care at NCS was about $800 per day, which Principal agreed to pay until May 1, 1995.

Mrs. Harvey initially hired Kim Clark, Esq., to handle her insurance coverage claims against Principal, but at Clark's suggestion, she hired respondent to represent her because of his experience with insurance coverage matters.[4]

1. Initial Fee Agreement

Mrs. Harvey met with respondent and entered into a fee agreement, dated February 28, 1995 (Initial Fee Agreement). During the following two years, there were four successive fee agreements, all of which modified the terms of the Initial Fee Agreement.[5]

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[4]Even though Mrs. Harvey terminated Clark prior to retaining respondent, respondent eventually hired Clark to assist him with the Harvey matter because of Clark's familiarity with the underlying facts of the case.

[5]The other four agreements, which we discuss in detail *post*, were signed by Mrs. Harvey on May 30, 1995, October 15, 1996, January 23, 1997, and March 21, 1997, respectively. Respondent disputes the State Bar's characterization of these as separate "agreements," arguing that some of the documents were mere modifications, clarifications or restatements of the Initial

The Initial Fee Agreement defined the scope of respondent's representation of the Harveys as the prosecution of a claim or litigation against Principal arising out of its decision to terminate and deny benefits to Mr. Harvey under the health insurance policy. It further provided that respondent would be "primarily responsible for handling the litigation." Respondent offered to represent the Harveys for an hourly fee,[6] but since they did not have the ability to pay on that basis, they agreed to use a contingency fee, which would be based on "the gross recovery of the claims against [Principal]."

The agreement specified that the contingency fee would be computed according to the following formula: "(1) if the litigation is resolved at any time prior to 30 days before trial or binding arbitration, 33 1/3 percent of the gross recovery, including any punitive damages (but exclusive of costs awarded) obtained by means of settlement, judgement, or award; or (2) if the claim is resolved at any time during the last 30 days before trial or binding arbitration, 40 percent of the gross recovery . . . obtained by settlement, judgement or award."

The Initial Fee Agreement further provided that "[t]he contingency fee will constitute a lien against any settlement or recovery from the Litigation." Finally, the agreement provided that, if the Harveys were unable to pay costs, respondent would do so and would be reimbursed from the Harveys' portion of the recovery.

In March or April 1995, before respondent commenced a lawsuit against Principal, he succeeded in persuading the insurance company to continue payment for Mr. Harvey's care at NCS until a medical determination could be obtained as to whether Mr. Harvey needed acute hospitalization (which was covered under the policy) or long-term care at NCS (which Principal claimed was not covered).

Fee Agreement. For our purposes, it is of no import how the various documents are characterized. It is the substance of the various agreements, rather than their form, that we address herein.

[6]The agreement stated that respondent's hourly fee was $250 and further provided for "services performed by other attorneys" at the rate of $150 per hour.

2. Second Agreement

After respondent obtained Principal's agreement to continue coverage of NCS costs, he sent a letter to Mrs. Harvey, dated May 30, 1995 (Second Agreement), which, according to respondent, was "intended to clarify any possible ambiguity" in the Initial Fee Agreement as to the definition of "gross recovery." Respondent characterized the Second Agreement as a "modification letter," although he advised Mrs. Harvey that the terms of the Initial Fee Agreement were not altered by the letter.[7]

Indeed, the Second Agreement did materially modify the Initial Fee Agreement. Specifically, the Second Agreement expanded the definition of "gross recovery" to include Principal's voluntary agreement to continue to pay NCS while the insurance company conducted its evaluation of Mr. Harvey's medical needs. The Second Agreement stated "the Company's agreement constitutes a financial recovery or benefit to Dan" to which the contingency fee applied. The Second Agreement also changed the point in time when respondent's contingency fee accrued by expressly providing that his fee had been "earned" as of March or April 1995. Under the Initial Fee Agreement, respondent's right to his fee accrued only after respondent had obtained a recovery "by means of settlement, judgement, or award."[8] Mrs. Harvey testified that at the time she signed the Initial Fee Agreement, she understood that respondent's fee would come from a lump sum recovery obtained after litigation had commenced. Respondent also testified that his expectation at the time he entered into the Initial Fee Agreement was that "I would collect [the contingency fee] at the end."

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[7]Mrs. Harvey testified that when she consulted her former attorney, Mr. Clark, about whether she should agree to the modifications to the Initial Fee Agreement, he gave her the same advice.

[8]Although the Second Agreement provided that the contingency fee had been "earned based upon [Principal's agreement to continue payment]," respondent agreed to defer payment of his fee until after a recovery was obtained from mediation, arbitration or litigation because "it would be best for [Principal] to continue to pay NCS the full amount for Dan's care . . ."

Mrs. Harvey signed the Second Agreement below the words "Acknowledged and Agreed." However, she testified that she was confused about the need for a modification to the Initial Fee Agreement and she thought at the time that "this would be double dipping fee wise." Mrs. Harvey also testified that she was emotionally overwrought with worry about her husband's future when she signed the Second Agreement, and she felt pressured by respondent, who repeatedly told her she had "no choice" but to sign the document. Mrs. Harvey's correspondence to respondent on June 1, 1996, corroborates her testimony about her emotional state and the fact that she did not understand the modification to the definition of "recovery" at the time she signed the Second Agreement. According to her June 1 correspondence, it was not until one year after she signed the Second Agreement, and then only after respondent had given her "many explanations," that she finally was able to "understand the concept of 'recovery' and how that works into the fee agreement addendum that we have."

3. Commencement of *Harvey I* Lawsuit

On June 26, 1995, Principal wrote to respondent advising him that its medical review confirmed that NCS provided the "appropriate program to treat [Mr. Harvey's] needs." Principal further advised that it intended to terminate benefits as of July 13, 1995, which precipitated the filing of a lawsuit by respondent on behalf of the Harveys on July 10, 1995, in the United States District Court for the Northern District of California (*Harvey I*). The complaint against Principal sought, among other things, injunctive and declaratory relief and civil damages as the result of Principal's alleged bad faith in denying lifetime benefits to Mr. Harvey. On July 10, 1995, the U.S. District Court issued a Temporary Restraining Order, and on July 20, 1995, Principal stipulated to a preliminary injunction requiring it to continue to make medical payments to NCS, without prejudice to seek to dissolve the preliminary injunction in the future.

On August 3, 1995, Mrs. Harvey paid respondent $7,500 to cover some of the costs of the lawsuit. Respondent did not place that money in a client trust account. However, his billing

statement of September 30, 1995, reflected receipt of the $7,500 and indicated that it was applied to past-due costs, with a credit of $3,918.66 to be applied against future costs.

4. Interim Settlement and Third Agreement

Once the preliminary injunction was in place, Mrs. Harvey, respondent and Principal participated in a mediation to explore the possibility of an interim settlement that would allow them sufficient time to assess Mr. Harvey's future medical needs. After several months, the parties entered into an interim settlement agreement dated October 17, 1996 (Interim Settlement Agreement), providing that Principal would pay $120,000 as a lump sum to cover four months of home care (which Mrs. Harvey wanted so she could better assess her husband's medical needs), plus $80,000 for respondent's legal fees. Principal also agreed to pay an additional $10,000 for ambulance expenses. In exchange, the Harveys agreed to dissolve the preliminary injunction and not to file any benefits claims with Principal for the following four months. They also relinquished all claims, including a claim of bad faith by Principal, for all prior acts leading to the Interim Settlement Agreement, but they did not waive any claims under the policy for Mr. Harvey's future heath care.

Respondent and Mrs. Harvey signed a third fee agreement, dated October 10, 1996 (Third Agreement), acknowledging the interim settlement with Principal. The Third Agreement carried forward the definition of "gross recovery" as expanded by the Second Agreement and further expanded the definition by providing "for a contingency fee equal to one-third of *all amounts paid* by Principal Mutual as a result of the prosecution of the action." (Italics added.) It specifically provided that respondent's contingency fee accrued monthly as the benefits were paid to Mr. Harvey.[9] The Third Agreement computed the "total recovery to date to [be] approximately $600,000," including approximately $400,000 in benefits paid as the result of the

[9]Respondent again offered to postpone payment until Mrs. Harvey received a lump-sum recovery.

preliminary injunction plus the $210,000 obtained as the result of the Interim Settlement Agreement.

The Third Agreement further provided: "the balance of the attorney's fee not paid from the interim settlement under the terms of the [Initial] Fee Agreement will continue to be a lien against any future lump-sum or other recovery of benefits and that such balance will be a lien and be paid as provided under the [Initial] Fee Agreement from any future settlement, mediation, arbitration, or litigation." However, "[b]ecause payment at this time of the full contingency fee would not provide you with the $120,000 you have informed me you need to care for Dan for the next four months, I have agreed to release the attorney's fee lien so that you will have that amount."

Mrs. Harvey was appointed as guardian ad litem for Mr. Harvey by the U.S. District Court on October 22, 1996.[10] On the same date, the court approved the Interim Settlement Agreement, and ordered dismissal of the *Harvey I* lawsuit and payment of $120,000 for Mr. Harvey's medical expenses and $80,000 to respondent for fees and costs.

On October 25, 1996, respondent negotiated Principal's check for $200,000 and deposited it into Westamerica Bank account No. 506341817, a client trust account ("CTA"). On October 30, 1996, respondent paid Mrs. Harvey $120,000 by cashier's check. Respondent failed to promptly withdraw his fees of $80,000 from the account. Instead, he withdrew funds on a piecemeal basis between October and December 1996, as follows:

Amount	*Date (1996)*
$22,000	October 25
$30,000	October 29
$ 2,000	October 31
$ 3,500	November 1
$ 1,000	November 5
$ 3,000	November 8
$ 500	November 12

[10]Mrs. Harvey was appointed conservator of the person and estate of Mr. Harvey by the Marin County Superior Court on December 3, 1996.

$ 4.43	November 12
$ 1,500	November 15
$ 500	November 15
$ 195	November 15
$ 1,600	November 19
$ 500	November 22
$ 3,000	November 27
$ 1,500	December 4

Total $80,779.43

5. Fourth Agreement

Mr. Harvey's home care was not successful, and therefore, in accordance with the terms of the Interim Settlement Agreement, Mrs. Harvey submitted a new claim to Principal on December 31, 1996, for Mr. Harvey's care at a newly selected provider, Brookhaven Hospital, a neuropsychiatric facility in Tulsa, Oklahoma. The cost of care at Brookhaven was $1,295 a day.

On January 10, 1997, respondent presented Mrs. Harvey with yet another agreement (Fourth Agreement). The Fourth Agreement expressly acknowledged that the Initial Fee Agreement had "been modified on a couple of occasions. Accordingly [respondent] thought it best for us to restate the terms of [the] agreement. . . ." The Fourth Agreement again expanded the basis for respondent's contingency fee to include "any future lump-sum or other recovery of benefits for [Mr. Harvey]" plus the gross recovery of "any parties who may become involved in any subsequent litigation against Principal . . . ."

On January 24, 1997, less than two weeks after Mr. Harvey entered Brookhaven, Principal notified Mrs. Harvey that it was terminating Mr. Harvey's insurance policy and all similar policies in effect nationwide, effective July 19, 1997. Principal notified Mrs. Harvey in February 1997 that in spite of the nationwide cancellation of its medical reimbursement policy, it was willing to continue to pay for Mr. Harvey's medical care at Brookhaven.

6. Fifth Agreement

Respondent concluded that a second lawsuit was necessary because of the uncertainty presented by Principal's nationwide policy cancellation and its continued unwillingness to accept

Mrs. Harvey's claim for lifetime medical benefits. So two months after signing the Fourth Agreement, respondent prepared a fifth fee agreement, dated and signed on March 20, 1997 (Fifth Agreement).[11] The Fifth Agreement was far more extensive and specific than the previous four agreements, especially with respect to the definition of gross recovery and the accrual of the contingency fee. The Fifth Agreement thus provided:

> "under the facts of this case and given the Policy involved, it is likely that the recovery against Principal Mutual will be limited to the recovery of benefits paid or to be paid for Daniel's current and future medical expenses at Brookhaven Hospital or subsequent facility. . . . Accordingly, the contingency fee must be paid from the recovery of monthly benefits, first as they are paid by Principal Mutual or any other party and, second, from the recovery at the conclusion of the Litigation from any settlement, award, and/or judgment, which would include the future monthly payments of benefits and any lump sum."

The Fifth Agreement also specifically addressed Brookhaven's charges:

> "As you know, Brookhaven Hospital's per diem charge for Daniel's care is $1,295. Brookhaven has . . . agreed to accept $933 as partial payment toward its $1,295 per diem charge for Daniel's care (approximately $28,000 per month) and to defer payment of the balance of $362 per diem (approximately $11,000 per month) so that monthly [insurance] payments can be made in that amount in partial payment of the attorney's fee in connection with the 1995 Litigation and this Litigation."[12]

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[11]The Fourth Agreement in fact contemplated the need for further litigation: "I look forward to working with you, as conservator for Daniel Harvey, in connection with the continuation of Daniel's claims against [Principal]. . . . [T]he upcoming mediation and any subsequent litigation are a continuation of the claim under the [Initial Fee Agreement]."

[12]On March 21, 1997, Mrs. Harvey and Brookhaven Hospital entered into a side agreement, which memorialized the financial arrangement described in the Fifth Agreement.

When respondent presented the Fifth Agreement to Mrs. Harvey, she recognized the consequences of signing the agreement, and that the fee structure was intended "to funnel my husband's medical benefits money to [respondent]" in order to fund the litigation. Mrs. Harvey further testified she understood that the fee arrangement was intended to "light a fire under [Principal] to make them come to the [settlement] agreement." However, Mrs. Harvey also testified that respondent again pressured her: "[I]t took about 6 weeks to convince me that I had no choice [but to sign the Fifth Agreement]."

On March 21, 1997, the Marin County Probate Court approved Mrs. Harvey's petition to confirm the Fifth Agreement. Respondent informed the court that Mrs. Harvey was entering into a side agreement with Brookhaven allowing one-third of Principal's medical payments to be diverted to himself as fees, but he did not advise the court that there had been four previous fee agreements with the Harveys. A quarrel ensued between Principal and respondent, with Principal resisting making medical payments directly to respondent and respondent arguing that Mrs. Harvey had the right under the policy to direct payment of the benefits to him.[13] This vigorous tug-of-war caused a delay in payment to Brookhaven, which then considered discharging Mr. Harvey for non-payment. On May 7, 1997, Principal commenced payment directly to Brookhaven, retroactive to February 1997. It continued to cover the costs of Mr. Harvey's care until June 1999.

On August 8, 1997, respondent filed a complaint for injunctive relief and damages against Principal in the United States District Court for the Northern District (*Harvey II*). Shortly thereafter, in September 1997, Mrs. Harvey terminated respondent's employment. She later hired attorney Gary Calder. After Principal filed a motion for summary adjudication of the

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[13]Mr. Ergo testified in the hearing below that the Principal policy provided that the insured (Mr. Harvey) would be paid the benefits directly and it was the insured's responsibility to pay the medical provider. He further testified that Mrs. Harvey was free to disburse the medical benefit payments as she saw fit. Principal later took the position that under the policy it could pay Brookhaven directly because it was a preferred provider.

issues, the parties agreed to settle for a lump sum payment of $2,000,000 on June 24, 1999. Mrs. Harvey brought her husband home in June 1999, where he died approximately three weeks later after suffering a seizure.

7. Kim Clark, Esq.

Mrs. Harvey testified that respondent did not obtain her written consent or authorization to charge for telephone conversations and correspondence he had with Mr. Clark. The Initial Fee Agreement and subsequent fee agreements with Mrs. Harvey expressly provided that respondent would be "primarily responsible for handling the litigation." However, the various fee agreements also expressly provided that there may be "services performed by other attorneys," which would be billed at the rate of $150 per hour. Although respondent documented the time spent corresponding with and talking to Mr. Clark in his billing worksheets, he did not separately charge Mrs. Harvey for Clark's time, and there was no double payment of fees by Mrs. Harvey. Clark ultimately received no attorney fees from respondent.

A creditor/client relationship was established between respondent and Clark by written agreement, signed on or about April 29, 1996, whereby Clark paid respondent $5,000 to prosecute the Lucich litigation, which was unrelated to the *Harvey* cases. This agreement further provided that "[a]ll time expended [by respondent] shall be billed but no amount shall be paid from any source other than any contingency fees that Kim Clark may receive from the prosecution of the litigation entitled Sullivan v. Lay or Harvey v. Principal Insurance Company. The purpose of this agreement is that Kim Clark shall have no further out-of-pocket expenses for attorney fees in the Lucich litigation through trial." The agreement also stated that respondent "agrees that [Clark] owes $0 on all other amounts, no costs, fees. . .and [respondent] owes [Clark] $0 on all prior loans."

Mrs. Harvey testified that she was unaware that Clark was a creditor and client of respondent, which she believed precluded Clark from giving her objective advice about respondent's management of the *Harvey* litigations.

8. Client Billing Worksheets

Respondent testified that he prepared client billing worksheets for internal use only in order to keep track of his time spent on the *Harvey* cases and that he sent the first set of worksheets to Mrs. Harvey for informational purposes and not as an invoice. Mrs. Harvey corroborated this testimony. A second set of billing worksheets was not sent to Mrs. Harvey. But respondent testified that he submitted these worksheets in January of 2000 in the arbitration of his fee claim against Mrs. Harvey to establish that he had spent a "substantial amount of time on this matter, without substantial compensation."[14]

These internal worksheets contained numerous errors and questionable entries. For example, from October 3 through October 23, 1996, respondent posted 96 hours for preparing and revising the Interim Settlement Agreement with Principal. Yet, Mrs. Harvey signed the Settlement Agreement on October 15. Almost 30 hours of the 96 hours were posted *after* October 15. On January 27, 1997, according to respondent's worksheets, he spent 25.8 hours in a single day working on the mediation with Principal on behalf of Mrs. Harvey. The worksheets also itemized costs, which included a payment of $17,021.50 to Dr. Stephen Raffle when, in fact, respondent never paid Dr. Raffle. Respondent attributed the errors to computer glitches.

9. Petition to Authorize Payment of Attorney Fees

On January 13, 2000, respondent filed a verified petition for attorney fees in the Marin County Superior Court, seeking an order directing Mrs. Harvey to pay the following fees and costs:

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[14]After hearing the above-quoted testimony, the hearing judge specifically asked respondent if he had submitted the billing worksheets in the arbitration matter and he answered in the affirmative. However, respondent recanted his testimony in his brief on appeal.

Date	*Settlement*	*Fees*	*Costs*	*Amount Received*
3/95 – 2/97	$ 650,000	$217,000	$50,000	($80,000)
2/97 – 6/99	$1,102,900	$367,000	$23,000	-0-
6/99	$2,000,000	$667,000		
Total	$3,752,900	$1,251,000	$73,000	($80,000)

Respondent thus sought attorney fees of $1,171,000 ($1,251,000 minus $80,000) plus costs of $73,000. The costs included the fees of his expert, Dr. Raffle, which were never paid. Respondent also did not include the $7,500 cost reimbursement he received from Mrs. Harvey. Additionally, he claimed interest in the amount of $162,100, for a total of $1,406,100. Mrs. Harvey never agreed to interest on the unpaid fees, nor did any of the five fee agreements provide for payment of interest. Respondent attested to the truth and accuracy of the petition under penalty of perjury.[15]

10. Fee Arbitration

Mrs. Harvey and respondent signed a stipulation for binding arbitration on February 21, 2000, thereby staying respondent's fee petition pending in Marin County Superior Court. In respondent's pre-arbitration brief, he asked to be compensated on the basis of quantum meruit, since he had been terminated by Mrs. Harvey in September 1997. Respondent computed the reasonable value of his services for the two *Harvey* cases based on his estimate of one-third of $3,200,000, which he claimed was the value of the "total benefit" to the Harveys. He therefore sought a fee of $1,037,000 (i.e., $1,1,67,000, less $80,000 received from interim settlement, less $50,000 fees for Mrs. Harvey's second attorney) plus interest from June 1999, the date of the final settlement. He asked that Mrs. Harvey pay his expert, Dr. Raffle, in excess of $38,000.

[15]In his petition and pre-arbitration brief, discussed below, respondent strongly suggested that Mrs. Harvey either intentionally or by gross negligence caused her husband's death.

A hearing was conducted in February, 2001, and the arbitrator rendered his findings in favor of Mrs. Harvey.[16] Respondent then discharged the arbitration judgment of $168,710.50 in bankruptcy, and also obtained a discharge of his liability for Dr. Raffle's fees.

B. Culpability

Count 1: Rule 4-200(A) – Unconscionable Fees

The State Bar alleges that respondent charged an unconscionable fee under rule 4-200(A), because his fee was based on Principal's reimbursement of necessary medical expenses and therefore respondent charged and collected "fees based on conflicted representation, [and] fees incurred by placing his own personal interests ahead of the interests of Mr. Harvey in sustaining his own life . . . ."[17]

The hearing judge agreed with the State Bar's position and, accordingly, found that respondent willfully violated rule 4-200(A). On appeal, respondent asserts that there is nothing inherently wrong or unconscionable about a contingency fee based upon the recovery of medical benefits. He argues, by analogy, that under the Medical Injury Compensation Relief Act (MICRA) (§ 6146), the Legislature has expressly authorized contingency fees based on a percentage of present and future medical expense reimbursements in medical malpractice actions. The MICRA analogy is particularly compelling because, by legislative mandate, an attorney is statutorily authorized to a contingency fee based *solely* on the recovery of actual

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[16]Section 6204, subdivision (e) provides that the award and determinations of the arbitrators shall not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding. However, respondent's conduct and testimony at the arbitration hearing and after the hearing are relevant to the charges of misconduct in this proceeding and are therefore admissible.

[17]Count 1 of the NDC also included a charge that the various fee agreements were illegal without alleging any facts to support a finding of illegality. The State Bar does not argue on appeal that the fee agreements were illegal. We adopt the finding of the hearing judge that there is no clear and convincing evidence of illegality.

economic losses, including medical cost reimbursements, once the non-economic losses exceed $250,000. (Civ. Code, § 3333.2. subd. (b).)

Moreover, contingency fees are favored as a matter of public policy and have been deemed to be beyond the reach of conflicts-of-interest rules because of the widely held belief that such fees promote access to the judicial system. (Cal. State Bar Form. Op. 1987-94.) We are therefore averse to find that contingency fees are inherently unconscionable merely because they are based on recovery of medical expense reimbursements. To conclude otherwise might foreclose the opportunity for individuals who have been denied medical benefits to obtain redress merely because they are unable to compensate an attorney on an hourly basis.

The fact that respondent's fee was based upon Mr. Harvey's *future* monthly benefits also does not render his fee inherently unconscionable. (See *Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 514-515 [approving payment of contingency fee from future recovery from an annuity as and when monthly payments received].) The Legislature has expressly authorized contingency fees from future medical cost reimbursements when received as periodic payments over the life of the victim. (§ 6146, subd. (b); see also Code Civ. Proc., § 667.7; see also Annot., Propriety and Effect of "Structured Settlements" Whereby Damages Are Paid in Installments over a Period of Time, and Attorneys' Fee Arrangements in Relation Thereto (1984) 31 A.L.R.4th 95 [comparing settlements where attorney fees are based on present value to settlements where attorney fees are a percentage of each payment at the time it is made].)

However, the above analysis does not end our inquiry as to whether respondent's fees were unconscionable. Indeed, we ultimately find that respondent violated rule 4-200(A) because of substantial overcharges that were not justified by the various fee agreements.[18] An attorney's attempt to charge or collect fees above those provided by the fee agreement may well be

[18]We also find that respondent's negotiations of the five fee contracts were surrounded by overreaching, but we address this conduct, *post*, in our analysis of Count 7 of the NDC as constituting acts of moral turpitude. We believe the provisions of section 6106 provide the most relevant underpinnings to our consideration of respondent's overreaching and self-dealing.

classified as unconscionable. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 855.)

We first observe that respondent charged part of his contingency fee based on medical payments for Mr. Harvey's care at NCS between April and July 1995, even though Principal agreed in January 1995 *before* Mrs. Harvey had retained respondent to continue the payments until May 1995, and then after respondent was hired, Principal voluntarily extended those benefits until mid-July 1995 in order to assess Mr. Harvey's medical needs. Respondent charged Mrs. Harvey a contingency fee of approximately $29,000 based on $87,500 in medical benefits that were paid from April to mid-July 1995, which was unconscionable since there was no consideration supporting his claim of attorney fees.

Moreover, in seeking authorization from the Marin County Probate Court for payment of his contingency fee, respondent overstated the value of the insurance benefits paid by Principal as the result of the TRO and preliminary injunction, claiming that from the date of the issuance of the injunction in mid-July 1995 until the parties reached their interim settlement in mid-October 1996, Mr. Harvey received $450,000 for his care at NCS. In fact, the benefits paid during this period were only $375,000. Respondent thus overstated the value of the medical payments by $75,000 and, concomitantly, he overstated his contingency fee by $25,000.

We further find that respondent's charge of interest in his fee petition filed in probate court in the amount of approximately $162,100 was unconscionable.[19] Respondent never advised Mrs. Harvey that he would charge interest, she never agreed to pay interest and there was no provision for an interest charge in any of the five fee agreements. Respondent here argues that he was entitled to the $162,000 as prejudgment interest pursuant to Civil Code

[19]Although respondent claimed interest at the rate of 10 percent on each of these unpaid amounts, it is unclear how he calculated the interest totaling $162,100 because the petition does not specify when the interest accrued.

section 3287.[20] Respondent is in error because under Civil Code section 3287, prejudgment interest may be recovered only if damages are vested as of a certain date and are certain or capable of being made certain as of that date.

Respondent sought payment of his fees in probate court and at arbitration on a quantum meruit basis under the authority of *Fracasse v. Brent* (1972) 6 Cal.3d 784, 790-791). "[A]n award in *quantum meruit* is uncertain until judgment." (*Fitzsimmons v. Jackson* (Bankr. 9th Cir. 1985) 51 B.R. 600, 612.) Moreover, "in an action in *quantum meruit* where there is an express contract but where the value of the services can only be established by evidence and is not susceptible of computation from the face of the contract or by reference to established market values, interest is not recoverable prior to judgment." (*Parker v. Maier Brewing Co.* (1960) 180 Cal.App.2d 630, 634.) Such is the case here. The value of respondent's services could not be computed from the face of the five retainer agreements because his fee, by its very nature, could only be determined *after* the happening of the contingency and confirmation of the fee by the probate court, which did not occur until August 8, 2001.

Finally, we find it unconscionable that respondent charged a contingency fee based upon the $80,000 in fees he obtained by virtue of the Interim Settlement Agreement. In essence, he charged a fee for recovering his fee. Although he later credited the $80,000 against the total fees he claimed were owing, this did not ameliorate the initial overcharge, which amounted to

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[20]This statute provides that: "(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. . . . [¶] (b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed."

$26,666.70 (i.e., one-third of $80,000). We thus conclude that respondent is culpable of violating rule 4-200(A) because of the various unjustified overcharges discussed above.[21]

Count 2: Rule 3-310(B) (4) – Avoiding the Representation of Adverse Interests

Rule 3-310(B)(4) prohibits an attorney from, inter alia, accepting or continuing representation of a client without written disclosure where the attorney has a financial interest in the subject matter of the representation. The hearing judge found that the various fee agreements satisfied the disclosure obligations of this rule and that Mrs. Harvey knew of his financial interest in the outcome. As we discuss below in Count 7, we find that respondent's disclosures were wholly inadequate. However, we do not find a violation of rule 3-310(B)(4) because we do not believe that the representation of a client on a contingency fee basis, whether or not the fee is based on recovery of medical benefits, constitutes a financial interest within the meaning of rule 3-310(B)(4). (See Cal. State Bar Form. Op. 1987-94 [contingency fees generally beyond the reach of conflicts-of-interest rules]; compare *Beery v. State Bar* (1987) 43 Cal.3d 802, 815 [where, in entering into business transaction with client, attorney concealed material facts from client].)[22] We therefore dismiss Count 2 with prejudice.

Count 3: Rule 2-200(A) – Division of Legal Fees

Rule 2-200(A) prohibits an attorney from dividing a fee for legal services with another lawyer who is not a partner of, associate of, or shareholder with the attorney. The hearing judge found there was no clear and convincing evidence that respondent violated rule 2-200(A), and we agree.

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[21]Although we find that respondent charged an unconscionable fee, we do not agree with the State Bar's allegation that respondent's fee was unconscionable because of "'block billing,' 'bulk billing,' or 'lumping' costs based on 'estimating lump sums' or charging flat fees." His contingency fee was based on a percentage of the recovery; it was not based on an hourly rate.

[22]But contingency fee agreements *renegotiated* at the time of settlement may be governed by rule 3-300. (See *In re Silverton* (2005) 36 Cal.4th 81, 93 & fn. 4; Cal. State Bar Form. Op. 1994-135.) The State Bar did not charge respondent with violating rule 3-300 and there is insufficient evidence to support a finding in aggravation of uncharged misconduct.

Respondent associated with Clark to assist him in the *Harvey* matter, but he documented his time spent corresponding and consulting with Clark, and there is no evidence that respondent divided any fees with or indeed paid any fees to Clark. The evidence offered by the State Bar does not contradict respondent's testimony that it was his intent to pay Clark based on the value of the services he provided and not based upon a percentage of any recovery in *Harvey*. The April 29, 1996, agreement between Clark and respondent does not fill the evidentiary gap because it concerned payment of *respondent's* legal fees for litigation matters unrelated to the *Harvey* litigation. Furthermore, the language of the April 29 agreement stating that the only source of payment to respondent would be "any contingency fees that Kim Clark may receive from the prosecution of the [*Harvey*] litigation" is vague and does not constitute clear and convincing evidence that respondent violated rule 2-200(A). We therefore dismiss Count 3 with prejudice.

Count 5: Rule 3-510(A)(2) – Failure to Communicate Settlement Offer

Rule 3-510(A)(2) provides that an attorney must promptly communicate to the client any written offer of settlement made to the client. The State Bar alleged that in April 1997, Principal extended a settlement offer to respondent that had a potential value of approximately $15 million and that respondent failed to advise Mrs. Harvey of the offer, instead unilaterally rejecting it.

As the hearing judge found, Mr. Ergo of Principal testified that there was no such settlement offer. Rather, the April 1997 letter confirmed an offer to continue to provide benefits to Mr. Harvey. Therefore, we adopt the decision of the hearing judge that respondent did not violate rule 3-510(A)(2) and we dismiss Count 5 with prejudice.

Count 7: Section 6106 – Moral Turpitude

The State Bar alleged in Count 7 that respondent violated section 6106 by engaging in self-dealing as the result of charging a contingency fee based on Mr. Harvey's medical benefits. We found, *ante*, that such a fee is not inherently unconscionable, nor is respondent culpable of

moral turpitude merely because he charged such a fee. Nonetheless, we agree that respondent is culpable of acts of moral turpitude as the result of self-dealing, but his misconduct is more properly characterized as the misuse of his superior knowledge and position of trust by repeatedly renegotiating the five fee contracts to the detriment of his unprotected client. Such conduct clearly constitutes moral turpitude. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837 [attorney who pressured client to agree to modifications of original fee agreement violated section 6106; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 244 [attorney culpable of violating section 6106 in part due to the attorney's acts of exploiting position of trust to the detriment of her vulnerable client].)

Although the scope of respondent's initial retention remained unchanged throughout his representation of the Harveys, he repeatedly modified the fee agreements to his own advantage in the face of unanticipated events, such as Principal's agreement prior to the filing of a lawsuit to extend the period of coverage for Mr. Harvey's care at NCS while his medical needs were evaluated.[23] Respondent thereupon modified the fee agreement to provide that his fee had been "earned" upon the occurrence of Principal's unanticipated actions. (The Initial Fee Agreement stated that he would be entitled to his fee when a recovery was obtained **"**by means of settlement, judgement, or award.") The four fee agreements were modified repeatedly after the occurrence of successive unforeseen events.[24]

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[23]The Initial Fee Agreement defined the scope of respondent's engagement as the pursuit of "claims against [Principal] arising out of its decision to terminate and deny benefits to Dan [Harvey] and to you under the health insurance policy that was issued to Dan ('the Claim' or 'the Litigation')." All of the fee agreements contemplated the pursuit of those claims against Principal.

[24]Respondent argues that his attorney fee would not change regardless of the language changes to the various agreements because the amount of his fee was "always" limited by the amount of the medical reimbursements paid by Principal. This argument ignores the fact that his contingency fee was not limited solely to the recovery of medical reimbursements, but also was based on the recovery of punitive damages, as well as recovery of damages for breach of the covenant of good faith and fair dealing, insurance bad faith, fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress. Indeed, respondent pursued all

The problem with this contractual metamorphosis was that neither Mrs. Harvey nor the courts fully understood the accretive nature of the changes to the various agreements, which ultimately resulted in respondent obtaining a *present* interest in *all* benefits paid by Principal. These included even those benefits paid on an interim or voluntary basis as well as those Principal had agreed to pay even before respondent was hired.[25] We note that in cases where moral turpitude has been found in connection with the charging of unconscionable fees, "there has usually been present some element of fraud or overreaching on the attorney's part, or failure on the attorney's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees. [Citations.]" (*Herrscher v. State Bar* (1935) 4 Cal.2d 399, 403; compare *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 998.) Such is the case here.

Mrs. Harvey testified that she often did not understand the need for the various contract modifications and only signed them after respondent pressured her. While Mrs. Harvey was an educated and reasonably experienced client, she was emotionally drained due to her tragic circumstances. Moreover, respondent failed to fully inform Mrs. Harvey of the consequences of the various revisions, thereby creating a false impression that there had been no material changes to their original agreement. During the entire period that respondent represented her and her husband, Mrs. Harvey testified she was subjected to a repeated "mantra" that she "had no choice" in signing the fee agreements.[26] The documentary evidence, particularly her written

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of these avenues of recovery on behalf of the Harveys. Moreover, he ultimately claimed he was entitled to a percentage of the two million dollars that Mrs. Harvey obtained in a settlement with Principal after respondent was discharged, even though the settlement funds were not applied to medical reimbursements for Mr. Harvey, who died shortly thereafter.

[25]Because of the non-disclosure of the circumstances surrounding the renegotiation of the various fee agreements, we reject respondent's argument that the approvals by the United States District Court and the Marin Superior Court afforded the fee agreements the imprimatur of reasonableness.

[26]We observe that not all of the changes to the contracts were exclusively for respondent's benefit.

communications, supports this testimony and also illustrates her emotional dependence on respondent.

Accordingly, we find under these circumstances that respondent's protracted fee re-negotiations constituted coercive conduct involving moral turpitude in violation of section 6106.[27]

Count 8: Section 6106 – Dishonesty

The State Bar alleges that respondent violated section 6106 by repeatedly billing Mrs. Harvey for the same activity and fabricating activities and costs in his billing statements. As we noted *ante*, these billing worksheets were rough drafts for respondent's internal office use. He did not bill Mrs. Harvey for any of the services described in the worksheets but sent them to her for general review of the nature of his activities. Therefore, we agree with the hearing judge that respondent did not violate section 6106 by clear and convincing evidence, and we dismiss Count 8 with prejudice.

Count 9: Rule 4-100(A) – Failure to Maintain Client Funds in Trust Account

Respondent admits that by failing to deposit into a trust account the $7,500 payment made by Mrs. Harvey to reimburse him for costs, he failed to preserve the identity of client funds, in willful violation of rule 4-100(A). This "rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23.)

We therefore find him culpable of the misconduct alleged in Count 9.

Count 10: Rule 4-100(B)(3) – Failure to Render Accounts

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds in his possession and render appropriate accounts to those clients. Respondent admits that

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[27]We agree with the hearing judge that there is not clear and convincing evidence of additional acts of moral turpitude on account of charging and collecting an illegal or unconscionable fee, fee-splitting with Clark, misrepresenting to Mrs. Harvey that he was an expert in insurance litigation, and making misrepresentations to the fee arbitrator and to a State Bar investigator about his fee arrangement with Clark, as alleged in Count 7 of the NDC.

his billing worksheets described costs incurred as costs advanced. Thus, by failing to render an appropriate accounting to Mrs. Harvey regarding the $7,500 in advance costs, he was culpable of willfully violating rule 4-100(B)(3).

Count 11: Section 6106 – Misappropriation

The State Bar alleges that respondent misappropriated Mrs. Harvey's $7,500 payment in willful violation of section 6106. However, there is no clear and convincing evidence that respondent misappropriated the funds since his billing worksheets noted the receipt of the funds, which were credited towards the expenses incurred and credited $3,918.66 to be applied to future costs. The hearing judge therefore correctly found that respondent's failure to deposit Mrs. Harvey's funds into a client trust account did not in and of itself warrant a conclusion that he misappropriated the $7,500. (Eg., *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.) We accordingly dismiss Count 11 with prejudice.

Count 12: Section 6106 – Moral Turpitude

The State Bar alleged in Count 12 that respondent willfully violated section 6106 by making numerous misrepresentations in his verified petition for attorneys fees filed with the probate court. The alleged misrepresentations included: 1) a claim that he had incurred reimbursable expenses of approximately $73,000; 2) an assertion that Principal continued to refuse payment for Mr. Harvey's care at Brookhaven after the insurance company agreed to do so; 3) an assertion that due to Principal's nonpayment, Brookhaven intended to discharge Mr. Harvey and send him to a state hospital for the insane; 4) an implication that Mrs. Harvey was the cause of her husband's death. The hearing judge found the misrepresentations in the petition were not proven by clear and convincing evidence. We disagree.

Respondent's own billing worksheets disclosed expenses totaling $22,543.69, approximately $17,000 of which were attributable to Dr. Raffle's fee, which was never paid.

Therefore, respondent overstated his expenses in the petition by about $70,000. By omission, respondent misrepresented the actions of Principal. He failed to disclose to the court that his own conduct in insisting that Principal pay the medical benefit directly to respondent rather than to Brookhaven was the reason for the nonpayment. Respondent also failed to disclose that he had instigated Brookhaven's threat to discharge Mr. Harvey as a scare tactic to prompt Principal's payment of the benefits to respondent. Finally, and perhaps most troubling, respondent strongly implied that Mrs. Harvey was the cause of her husband's death when he had no factual basis to make this assertion.

Respondent argues that he saw the mistakes in the petition with respect to the costs, and intended to rectify them at the subsequent arbitration, which he ultimately did. This argument overlooks his other misrepresentations in the petition and diminishes the importance of his duty to carefully review his petition for accuracy and completeness. This is particularly true here because the petition was verified and submitted to the court under penalty of perjury. The attestation of the truth and accuracy of the contents of the petition should put a reasonable person on notice to take care before affixing one's signature to the document.

We therefore conclude that respondent's misrepresentations in his petition filed in the probate court constitute acts of moral turpitude in violation of section 6106. (*In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 307; *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15.)[28]

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[28]The hearing judge incorrectly found moral turpitude under Count 12 on the basis of the inaccuracies in respondent's billing worksheets, which she maintained were submitted to the probate court in support of his fee claim. However, there is no evidence in the record that respondent in fact submitted the billing worksheets to the probate court. The record is also unclear as to whether the inaccurate worksheets were submitted to the arbitrator, although respondent testified below that he did submit them. (He recanted this testimony on appeal.) There is no other proof that the worksheets were submitted by respondent to the arbitrator. In any event, as discussed above, irrespective of the worksheets, we determine that respondent is culpable of moral turpitude as charged in the NDC due to the misrepresentations in his fee petition.

Count 13: Rule 4-100(A) – Commingling

Respondent admits that he did not promptly withdraw the $80,000 in attorney fees from his trust account. Instead, he withdrew the funds on 15 separate occasions from October through December 1996, in willful violation of rule 4-100(A). We therefore adopt the hearing judge's finding of culpability as charged in Count 13.

III. THE GILBERT MATTER (Case No. 02-0-12418)

A. Factual Background

On October 1, 1999, Anita Gilbert, President of A.G. & E. Associates, Inc. (A.G. & E.), executed a retainer agreement hiring respondent to represent her and A.G. & E. in two civil matters.[29] The agreement provided for an initial retainer of $20,000 to be applied against services respondent rendered prior to execution of the agreement,[30] and an additional retainer of $20,000 to be applied to the final bill. Gilbert paid the $40,000 retainer on October 4, 1999.

The agreement also authorized respondent to utilize the services of other attorneys. It stated: "I [respondent] reserve complete discretion in assigning work on the Litigation to any attorneys within or affiliated with the Firm. If it is appropriate, in order to keep expenses down, I shall utilize the services of other attorneys, paralegals, and law clerks to handle tasks appropriate to their skills." Because of the complexity of Gilbert's matters, respondent often consulted with Richard Leonard, a former law school classmate, and billed Gilbert for his time spent in those consultations. Although Leonard typically did not bill respondent for his advice, due to the frequency of respondent's calls on Gilbert's matters, Leonard informed respondent he would bill for his time. Leonard and respondent conferred on litigation strategy and various

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[29]These matters involved the Harrison Development LLC Operating Agreement with Joseph Imbelloni (the Harrison matter) and three separate lawsuits involving the estate of Gilbert's deceased business partner, Edward Jurczenia (the Jurczenia matters).

[30]Respondent began working on the civil matters in May 1999, without a written retainer agreement.

motions, pleadings, and discovery responses. Between March and August 2000, respondent incorporated Leonard's bills into the billing statements sent to Gilbert.

As one of Gilbert's matters progressed closer to trial, respondent asked Leonard to formally associate on the case so they could try it together. Leonard agreed to do so on the condition that he receive an advance of his projected fees. On September 16, 2000, respondent paid $75,000 to Leonard as an advance and included this amount in a billing statement to Gilbert, dated September 30, 2000. On October 4, 2000, Gilbert signed a separate retainer agreement with Leonard (Leonard Retainer), which provided that Leonard's fee would be billed at the rate of $325 per hour. Respondent also signed the Leonard Retainer and guaranteed the payment of Leonard's fee.[31] The Leonard Retainer authorized ten percent interest on monthly statements that were not paid within sixty days and further provided a lien against any recovery in the Jurczenia matters. The agreement stated that "in order to secure the payment of our fees and costs . . . you [Gilbert] agree to grant a lien . . . [including] all general, possessory or retaining liens, and all special or charging liens permitted by law. . . ."

The Leonard Retainer cautioned Gilbert to read the document carefully and to "discuss it directly with [respondent] and any other person whom you chose [sic] to advise you."

B. Culpability

Counts 17 and 18: Rule 4-100(B)(3) – Failure to Account and Rule 3-700(D)(2) – Failure to Refund Unearned Fees

The State Bar charged respondent with failing to properly account for the $40,000 retainer fee Gilbert paid to respondent, as well as failing to refund unearned fees. We agree with the hearing judge's conclusion that respondent was not culpable of violating rule 4-100(B)(3) since he applied $20,000 to his services performed in his October 31, 1999, billing

[31]The Leonard Retainer stated that respondent "has agreed to guaranty the payment of [Leonard's] fees." Also, above his signature, respondent acknowledged: "I, Mark B. Scott, hereby join in the retainer agreement, as modified, agree to be bound by it, and acknowledge my joint and several liability for the fees incurred [by Gilbert]."

statement to Gilbert and applied the remaining $20,000 to services performed in his June 30, 2000, billing statement. Because respondent documented in his June billing statement his application of the retainer toward the legal fees Gilbert incurred for his services, we also find no violation of rule 3-700(D)(2) as there were no unearned fees to return. We dismiss both charges with prejudice.

Count 20: Section 6106 – Moral Turpitude

The State Bar charged respondent with committing acts involving moral turpitude, alleging that he double-billed Gilbert for the same activity, falsified entries for work not performed and fabricated a pre-existing balance due. We agree with the hearing judge's conclusion that there was not clear and convincing evidence that respondent either concocted work on behalf of Gilbert or fabricated a pre-existing balance on a billing statement.[32] The discrepancies between respondent's bills and those of Gilbert's accountant are insufficient to establish intentional, fraudulent billing by respondent since those discrepancies could have been attributable to human error or to the fact that respondent and the accountant used different criteria to determine when an activity constituted a billable event. The State Bar's allegations with respect to a fabricated pre-existing balance simply are not supported by the record.

The hearing judge found that respondent's billing of 26.8 hours twice (for a total of 53.6 hours) in a billing statement to Gilbert dated January 31, 2000 (January Bill) constituted "gross carelessness and negligence in discharge of fiduciary duties . . . sufficient to sustain a conclusion

[32]The State Bar alleged that respondent fabricated a pre-existing balance of $7,948.50 on a billing statement to A.G. & E. dated November 30, 1999. To support this allegation, the State Bar provided a billing statement respondent sent to A.G. & E. dated November 30, 1999, in the Harrison matter which listed current charges of $8,095.25, a prior balance of $7,948.50 and a total balance of $16,043.75. The State Bar presented no other evidence, such as previous billing statements in the Harrison matter, to refute that the prior balance was properly carried over from one or more earlier billing statements.

of moral turpitude."[33] We disagree. The billed activities appeared in the January Bill as follows:

			Hours	*Amount*
01/18/00	MBS	Telecon Washington Mutual; telecon Major Legal; telecon Citibank; telecon Washington Mutual; reviewed local rules re status conference; reviewed and organized documents produced by Washington Mutual and Citibank for submittal to court	0.90	270.00
	MBS	Received and reviewed correspondence from C. Million-Ven; preparation of declaration	0.40	120.00
	MBS	Telecon Washington Mutual; telecon Major Legal; telecon Citibank; telecon Washington Mutual; reviewed local rules re status conference; reviewed and organized documents produced by Washington Mutual and Citibank for submittal to court	0.90	270.00
	MBS	Received and reviewed correspondence from C. Million-Ven; preparation of declaration	0.40	120.00
01/22/00	MBS	Preparation of brief	8.00	2,400.00
	MBS	Preparation of brief	8.00	2,400.00
01/23/00[34]	MBS	Preparation of brief	5.20	1,560.00
	MBS	Preparation of brief	5.20	1,560.00
01/24/00	MBS	Preparation of brief; telecon atty J. Stroffe; preparation of declaration; preparation of request for judicial notice; revisions to brief	7.30	2,190.00

[33]The State Bar also alleged respondent double-billed Gilbert on December 21, 22, and 27, 1999, for reviewing minutes of A.G. & E. meetings and for preparing and sending correspondence to an attorney on May 23, 2000. Although the hearing judge did not address these additional allegations in her decision, we conclude that there is not clear and convincing evidence that respondent's December statement included duplicative billing entries since the entries were similar but not identical. For example, in his billing statement dated January 31, 2000, in the Jurczenia matters, he indicated that he "reviewed AG&E minutes" on December 21, 1999, "reviewed minutes and documents sent by client" on December 22, 1999, and "Reviewed minutes sent by client" on December 27, 1999.

[34]The NDC did not include respondent's billed activities from this date.

	MBS	Preparation of brief; telecon atty J. Stroffe; preparation of declaration; preparation of request for judicial notice; revisions to brief	7.30	2,190.00
01/25/00	MBS	Telecon atty J. Stroffe's office; received and reviewed correspondence from atty J. Stroffe's office re hearing	0.20	60.00
	MBS	Telecon atty J. Stroffe's office; received and reviewed correspondence from atty J. Stroffe's office re hearing	0.20	60.00
01/26/00	MBS	Preparation of request for judicial notice; read and reviewed cases; revised request for judicial notice; preparation of declaration and reviewed documents in connection therewith; reviewed transcript from hearing; revisions to brief	4.80	1,440.00
01/26/00	MBS	Preparation of request for judicial notice; read and reviewed cases; revised request for judicial notice; preparation of declaration and reviewed documents in connection therewith; reviewed transcript from hearing; revisions to brief	4.80	1,440.00
		Total	53.6	16,080.00

Respondent contends that the duplicate billing entries were due to computer error. We observe that he made no effort to disguise the double entries in the January Bill, which were in tandem and identical.[35] Both respondent and his former secretary testified as to respondent's office procedures for preparing and sending out monthly billing statements using a software billing program. Respondent's secretary would input billing information provided by respondent and generate "pre-bills," which respondent would review and edit. After making corrections, his secretary would then generate a final billing statement that respondent would again check prior to mailing to a client. Following this procedure, respondent sent Gilbert at least twenty-nine separate billing statements between June 1999 and September 2000, none of which contained duplicate billing similar in magnitude to the January Bill.

[35]We also note that respondent's client, Gilbert, failed to notice the double-billing and paid the January Bill without objection. When the double-billing was brought to respondent's attention in October 2001 during a fee arbitration with Gilbert, he acknowledged the error and informed the arbitrator that Gilbert should be credited for the amount overbilled.

Respondent's isolated billing errors do not indicate that the system he used for billing clients constituted gross negligence. (*In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 721-723, 726-727 [attorney's repeated billing for an expert witness fee and subsequent failure to discover the error despite having an elaborate, well-working bookkeeping system in place did not constitute gross negligence].) Furthermore, the record does not demonstrate pervasive carelessness, habitual disregard of client interests, or deliberate wrongdoing on respondent's part. Neither does the record reveal grossly inadequate record-keeping practices (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 855-858), wholesale office mismanagement (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410-411) or a pervasive abdication of control over law office operation (*In the Matter of Steele* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 708, 714-715).

Respondent's explanation of the billing errors is plausible in the context of this record and supports a reasonable inference that there was no gross negligence. (See *Davidson v. State Bar* (1976) 17 Cal.3d 570, 574.) Accordingly, we reverse the hearing judge's culpability finding and dismiss Count 20 with prejudice.

Count 21: Rule 2-200(A) – Division of Legal Fees

As noted *ante*, respondent advanced Leonard $75,000 as a retainer and then charged Gilbert for Leonard's services before Gilbert entered into a separate retainer agreement with Leonard. On this basis, the hearing judge concluded that respondent shared fees with another attorney in violation of rule 2-200(A).[36] Again, we respectfully disagree. Although it is undisputed that Leonard was never a partner, associate or shareholder with respondent and

[36]According to this rule, "A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless: [¶] (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and [¶] (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200."

respondent did not obtain Gilbert's written consent to a division of legal fees, we find no consent was required because no division of fees occurred within the ambit of rule 2-200(A).

In *Chambers v. Kay* (2002) 29 Cal.4th 142, 154, the Supreme Court cited to State Bar Formal Opinion Number 1994-138 as follows: "[N]o division of fees occurs under rule 2-200 where the following three criteria are met: '(1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee.' [Citation.]" (*Id.* at p. 154, fn. omitted.)

On this record, we find these criteria are satisfied. Leonard was compensated at an hourly rate for work he performed on Gilbert's matters. Leonard billed respondent directly and expected to be paid whether or not Gilbert paid respondent's legal fees. Leonard billed respondent based on an hourly rate, independent of the hourly rate respondent charged Gilbert. Thus, the fees paid to Leonard were in no way tied to the amount of fees Gilbert paid respondent. Finally, there is no evidence Leonard expected to receive anything other than his hourly fee for work he performed. Given these circumstances, we reverse the hearing judge's culpability finding on this count and dismiss it with prejudice.

Count 22: Section 6106 – Moral Turpitude

We leave undisturbed the hearing judge's determination that respondent did not violate section 6106 as charged in Count 22. The State Bar alleged that respondent misrepresented the payment of $75,000 as advanced fees to Leonard. The testimonial and documentary evidence supports a finding that respondent sent two checks to Leonard in September 2000 totaling $75,000 as advanced fees. Therefore, we dismiss this count with prejudice.

Count 23: Rule 3-300 – Avoiding Interests Adverse to a Client

The State Bar alleged that respondent guaranteed Gilbert's payment of $75,000 to Leonard and thereby violated rule 3-300.[37] In actuality, respondent paid Leonard $75,000 as an advance against Leonard's projected fees on behalf of Gilbert. At the time respondent made this advance payment, the total amount of the fees had yet to be determined. Respondent, in turn, billed Gilbert for the advance. However, respondent was a guarantor of all future fees in excess of $75,000 owing to Leonard under the Leonard Retainer. (*Quality Wash Group V v. Hallak* (1996) 50 Cal.App.4th 1687, 1700; Civ. Code, § 2787 ["(a) surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another"].) The hearing judge found that as a guarantor of Leonard's fees, respondent had the right to sue Gilbert for nonpayment of the fees, and therefore he obtained an interest adverse to her within the meaning of rule 3-300.

Although we find culpability for a violation of rule 3-300, we do so on different grounds.[38] In the event Gilbert defaulted, she was bound to reimburse respondent to the extent that respondent satisfied Gilbert's obligation to pay Leonard's fee. (Civ. Code, § 2847.) Furthermore, as a guarantor, respondent was entitled to the benefit of every security for Gilbert's

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[37]The relevant provisions of this rule state: "A member shall not . . . acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless . . . : [¶] (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client . . . [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction . . . ."

[38]The right to sue a client for nonpayment of fees, or indeed for any breach, is inherent in *every* fee agreement for legal services. We do not believe rule 3-300 is so broad as to preclude the right to sue a client for breach of contract.

performance under the terms of the Leonard Retainer, which expressly included a charging lien[39] as to any recovery arising from the Jurczenia matters. (Civ. Code, §§ 2845 and 2849.)

Recently, the Supreme Court held that a charging lien is an adverse interest within the meaning of rule 3-300 and accordingly requires the client's informed written consent. (*Fletcher v. Davis*, *supra*, 33 Cal.4th 61, 67-69.) The court's rationale was that since a charging lien operates as a security interest in the proceeds of the litigation (*id.* at p. 67), it "could significantly *impair* the client's interest by delaying payment of the recovery or settlement proceeds until any disputes over the lien can be resolved." (*Id*. at pp. 68-69.)[40]

The decision of *Fletcher v. Davis, supra*, 33 Cal.4th 61, compels us to conclude that respondent's right to assert a charging lien as a guarantor of Leonard's fees under the Leonard Retainer is an adverse security interest within the meaning of rule 3-300. As such, respondent was bound to comply with the prophylactic requirements of rule 3-300. We have examined the record for evidence of respondent's compliance and find it wanting. For example, we find untenable respondent's argument that the cautionary language of the Leonard Retainer satisfies this requirement as to respondent.[41] Leonard's admonition was attributable to Leonard, not to respondent. Even if we were persuaded that respondent adopted Leonard's admonishment as his

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[39]"A "charging lien" is defined as "[a]n attorney's lien 'upon the fund or judgment which he has recovered for his compensation as attorney in recovering the fund or judgment . . . .' [Citation.]" (*Fletcher v. Davis* (2004) 33 Cal.4th 61, 66.)

[40]In reaching its conclusion, the court stated "We are presented here only with a lien to secure hourly fees and thus do not decide whether rule 3-300 applies to a contingency-fee arrangement coupled with a lien on the client's prospective recovery in the same proceeding. [Citation.]" (*Fletcher v. Davis, supra,* 33 Cal.4th at p. 70, fn. 3; see also Cal. State Bar Form. Op. 2006-170.) In the instant matter, the charging lien secured hourly fees.

[41]The Leonard Retainer stated: "Please read this letter carefully and, if you have any questions, discuss it with me [Leonard] before you sign and return a copy of this letter. Of course, you should also discuss it directly with [respondent] and any other person whom you chose [sic] to advise you."

own, it is still insufficient under the rule because it merely directed Gilbert to discuss the matter with respondent or any other person of her choice but failed to advise Gilbert of her right to seek the advice of an independent lawyer.

Moreover, the legal consequences of respondent's guaranty were not fully disclosed so as to ensure Gilbert's informed consent. Nowhere in the record do we find written disclosure to Gilbert that as guarantor, respondent obtained the right to assert a charging lien against any future settlement, giving him the power to impede settlement distribution without the necessity of filing a court proceeding. For these reasons, we conclude that respondent violated rule 3-300.

Count 25: Section 6068, subdivision (m) – Failure to Communicate

The State Bar alleged that respondent failed to promptly respond to Gilbert's reasonable status inquiries and failed to keep her reasonably informed of significant developments because respondent disregarded her request to be informed of any future litigation, failed to timely advise her of settlement offers, and failed to advise her of a discovery order imposing sanctions. The hearing judge did not find culpability on this count, concluding that there was not clear and convincing evidence that respondent committed any of the alleged acts. The State Bar does not challenge this conclusion on appeal. Based on our de novo review, we agree with the decision of the hearing judge and dismiss this count with prejudice.

Count 28: Section 6106 – Moral Turpitude

The State Bar alleged that respondent committed acts of moral turpitude by: splitting fees with Leonard; demanding a lien on Gilbert's property to secure his legal fees; misrepresenting that he did not demand a lien on Gilbert's property; disregarding Gilbert's request to notify her if he intended to pursue future legal action against her; making false, disparaging, or misleading statements about Gilbert in his filings in a subsequent fee arbitration; using Leonard's pleading paper for filings with the fee arbitrator when not professionally associated with Leonard's firm; and engaging in self-dealing. The court did not find culpability

on this count and concluded that the allegations were not proved by clear and convincing evidence, did not rise to the level of moral turpitude, or were duplicative. On appeal, the State Bar does not challenge the hearing judge's determination on this count. We adopt the hearing judge's conclusion and therefore dismiss this count with prejudice.

IV. THE ZIMMAN MATTER (Case No. 02-0-15554)

A. Factual Background

In May 1997, David Zimman hired respondent to represent him in two matters: one involving an account under the Uniform Transfer to Minors Act and the other a malpractice claim against the attorney who simultaneously represented Zimman and his former spouse during their marital dissolution. Respondent requested an advance from Zimman in February1998 to pay for expert fees or other future expenses. Zimman provided a check in the amount of $2,500 and wrote "experts" in the memo section. Respondent testified that he contacted Zimman when he received the check and explained that he did not need money for experts at that time but instead intended to apply the advance against an outstanding fee balance, which Zimman authorized him to do. He thereafter deposited Zimman's check into a non-trust account. In a billing statement dated February 28, 1998, respondent noted the application of the $2,500 against fees previously incurred. Zimman testified that he could not recall any conversation with respondent regarding the $2,500 check.

At some time prior to May 1998, Zimman signed a promissory note for $28,000 in favor of respondent for legal bills Zimman owed him. Respondent testified, and Zimman did not refute, that the promissory note was not secured by a deed of trust. On May 25, 1998, Zimman wrote a letter to respondent stating "now that you have my check for $28,000.00 you will not enforce the note that I gave you to have the $28,000 paid to you out of escrow for the sale of . . . [the] Cottage property." Respondent apparently tore up the promissory note after receiving the $28,000 payment from Zimman. Respondent testified that he was unsure whether he prepared

the note or whether it was a "stationery store note." Neither the promissory note nor any escrow instructions were made part of the record. Thus, we have no evidence of the actual terms of the promissory note nor of any specific escrow instructions authorizing payment of the note with proceeds from the sale of the Cottage property.[42] Respondent did not advise Zimman of his right to seek advice from an independent lawyer regarding the promissory note.

B. Culpability

Count 30: Rule 4-100(A) – Preserving the Identity of Client Funds

The State Bar alleged that respondent violated rule 4-100(A) by failing to deposit Zimman's $2,500 payment into an identifiable trust account. Since respondent applied the funds to an outstanding bill, the hearing judge determined that the money had already been earned and did not need to be deposited into a trust account. The State Bar does not challenge the hearing judge's culpability determination on this count. After our de novo review, we conclude that these allegations were not proved by clear and convincing evidence and dismiss this count with prejudice.

Count 31: Section 6106 – Moral Turpitude - Misappropriation

The State Bar alleged that respondent misappropriated Zimman's $2,500 payment. We agree with the hearing judge's finding that respondent properly credited the funds to Zimman's account in February 1998, and as such, did not misappropriate the funds. We therefore dismiss this count with prejudice.

Count 32: Section 6106 – Moral Turpitude

As in the Gilbert matter, the State Bar also alleged that respondent doubled-billed and fabricated entries in Zimman's billing statements. On appeal, the State Bar does not challenge

[42]Although the hearing judge found that respondent asked Zimman to sign a non-interest-bearing promissory note to be tendered with instructions to an unnamed title company, we find no evidence in the record stating that the note did not require payment of interest or that it was to be tendered to a title company with instructions.

the hearing judge's finding that there was not clear and convincing evidence of moral turpitude. We agree, and dismiss this count with prejudice.

Count 35: Rule 3-300 – Avoiding Interests Adverse to a Client

The State Bar alleged that respondent violated rule 3-300, and the hearing judge agreed because responded obtained an adverse interest by virtue of the $28,000 promissory note and failed to properly advise Zimman in writing of his right to seek the advice of an independent lawyer of his choice.

On appeal, respondent argues that the unsecured promissory note did not give him a present interest in Zimman's property sufficient to trigger rule 3-300. The State Bar, on the other hand, contends the unsecured promissory note had the same effect as a confession of judgment because it gave respondent extrajudicial access to Zimman's property in that it "evidently contained provisions sufficient to allow respondent to collect his funds out of escrow."

On this record, we are unable to draw such a conclusion because, as we noted *ante*, neither the promissory note nor any escrow instructions were made part of the record. We thus have no evidence of the actual terms of the promissory note or of any specific escrow instructions. Moreover, in contrast to a promissory note secured by a deed of trust with a power of sale, the Supreme Court further signaled the propriety of using an unsecured promissory note to collect legal fees in *Hawk v. State Bar* (1988) 45 Cal.3d 589, 600-601: "An unsecured promissory note . . . gives an attorney only a right to proceed against the client's assets in a contested judicial proceeding at which the client may dispute the indebtedness. The note allows the attorney to obtain a judgment, and to seek to enforce the judgment against the client's assets, if any. It does not give the attorney a *present* interest in the client's property which the attorney can summarily realize."

This record established only that Zimman gave respondent an unsecured promissory note in lieu of payment of legal fees. This is insufficient to establish culpability under rule 3-300, and we therefore dismiss this count with prejudice.

Count 36: Rule 4-100(A) – Commingling

We leave undisturbed the hearing judge's finding that the State Bar did not introduce evidence to support the allegations of this count. We therefore dismiss this count with prejudice.

V. DISCIPLINE DISCUSSION

A. Mitigation

Respondent was admitted to the practice of law in California on June 24, 1971. His misconduct began in May 1995 and continued to October 2000. The hearing judge gave respondent's 24 years of discipline-free practice strong mitigative weight, and so do we. (Std. 1.2(e)(i);[43] *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [over ten years of practice before first act of misconduct given significant weight]; *Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with an unblemished record is highly significant mitigation].)

The hearing judge properly accorded little mitigative weight to respondent's emotional difficulties stemming from his marital discord and child custody dispute. Although he testified that this contributed to his neglect of the business aspect of his practice, respondent provided no expert testimony establishing that his emotional strain was directly responsible for his misconduct. (Std. 1.2(e)(iv); see, e.g., *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 686, 688 [evidence in mitigation not entitled to significant weight where expert testimony failed to clearly establish that severe emotional stress directly affected attorney's judgment leading to acts of theft.)

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[43]This and all other references to standards are, unless otherwise noted, to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

We agree with the hearing judge's finding that respondent's pretrial stipulation as to facts and culpability saved the parties and the court's time and resources. However, because of the scope of the stipulation, we afford this conduct more extensive mitigating weight than did the hearing judge. (Std. 1.2(e)(v); see *Pineda v. State Bar* (1989) 49 Cal.3d 753, 760.)

Respondent offered seven character witnesses (five attorneys and two non-attorneys) consisting of friends, work colleagues, and a former employer. Three of the witnesses had known respondent for a considerable period of time, ranging from 20 to more than 40 years. Although they were aware of the charges against respondent, each attested to his excellent lawyering skills, honesty, integrity, dedication to clients, trustworthiness, diligence and hard work. For example, Peter Callahan, a founding member of the law firm of Callahan, McKeown and Willis, testified that respondent was assigned complete responsibility for managing the firm's San Francisco office, including financial operations and supervision of associates. Another witness, Joan Trimble, testified that respondent's mentorship contributed significantly to her development as an attorney because he is a quality teacher with excellent writing skills who is creative and "always thinking outside the box." These witnesses and the other witnesses spoke highly of respondent's good character. We give such favorable character testimony from employers and attorneys considerable weight in mitigation under standard 1.2(e)(vi).[44] (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.)

Respondent testified that he coached youth basketball between 1994 and 1998 and served on the Sausalito Planning Commission from 1989 to 1991. Since these activities occurred many years ago, the hearing judge accorded limited mitigation to respondent's pro

[44]We find meritless the State Bar's contentions that the character witnesses did not constitute a broad range of references (see, e.g., *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591-592 [significant mitigative weight accorded to only three character witnesses consisting of two attorneys and a retired fire chief]) or were not aware of the full extent of respondent's alleged misconduct.

bono work. We agree. (See *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 284.)

The hearing judge found in mitigation that respondent accepted responsibility for his misconduct with respect to his trust account violations (std.1.2(e)(vii)), but she discounted this mitigative evidence because of respondent's continued denial that a contingency fee based upon future medical payments was unconscionable. In light of our prior analysis of such contingency fees, we do not consider respondent's unwillingness to acknowledge that his position was wrong as evidence of truculence. (Cf. *In re Morse, supra,* 11 Cal.4th at p. 209.) On the other hand, any mitigative weight accorded to respondent's acceptance of responsibility for his trust account violations is more than offset by aggravating evidence demonstrating his lack of understanding of the nature of his fiduciary duties owed to Mrs. Harvey as well as his lack of recognition of the harm he caused to her, which we discuss *post*.

The hearing judge gave some weight in mitigation to the fact that more than six years had passed since respondent's acts of professional misconduct. (Std. 1.2(e)(viii).) The State Bar correctly points out that respondent provided no evidence to show that he had not committed subsequent misconduct or that no additional charges have been filed against him since the trial in this matter. In the absence of clear and convincing evidence, we decline to give respondent mitigation for his post-misconduct practice.

B. Aggravation

The hearing judge found one aggravating factor: Respondent committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) We adopt this finding, and we find additional aggravation.

The State Bar urges us to find that respondent's misconduct significantly harmed his client. (Std. 1.2(b)(iv).) Without doubt, respondent advanced the Harveys' case against Principal in the face of difficult odds. His zealous advocacy enabled Mr. Harvey to receive costly medical care for years after Principal had initially stated it intended to terminate his coverage. Nevertheless, we ultimately agree with the State Bar that respondent's misconduct

significantly harmed his client. Respondent fails to understand that "'[t]he essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.' [citation.]" (*Beery v. State Bar, supra*, 43 Cal.3d 802, 813.) Respondent exerted undue influence over Mrs. Harvey such that she felt victimized by him. Moreover, the trust that she placed in respondent was completely compromised.

We further find that respondent was indifferent to the emotional upheaval he caused Mrs. Harvey and to her plight due to her husband's dire circumstances, which constitutes an additional aggravating circumstance. (Std. 1.2(b)(v).) Evidence of his lack of remorse is found in the innuendo contained in his Fee Petition and Arbitration Brief suggesting that Mrs. Harvey was somehow responsible for her husband's death.

C. Discipline

The primary purposes of these disciplinary proceedings are 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. (Std. 1.3; *In re Morse*, *supra*, 11 Cal.4th at p. 205.) For guidance, we look to the standards (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580), which are afforded "great weight." (*In re Silverton, supra,* 36 Cal.4th 81, 92.)

The standards applicable to the misconduct found in this case are standards 2.2(b), 2.3, 2.7 and 2.8.[45] Where two or more acts of misconduct are present, the disciplinary sanction shall

[45]Standard 2.2(b) provides that "Culpability of a member of commingling of entrusted funds" shall result in at least three months' actual suspension, irrespective of mitigating evidence. Standard 2.3 applies to acts of moral turpitude. Standard 2.7 provides for at least 6 months' actual suspension when there is an agreement to charge or collect an unconscionable fee. Standard 2.8 provides that a willful violation of rule 3-300 shall result in suspension unless the extent of the member's misconduct and the harm to the client are minimal, in which case the degree of discipline shall be reproval.

be the most severe sanction applicable. (Std. 1.6(a).) Standard 2.3, which applies to acts of moral turpitude, provides the most severe sanction since it calls for actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled, the magnitude of the act of misconduct and the degree to which it relates to the practice of law. However, as we stated in *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940, "ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case. [Citations.]"

The State Bar views the charging of an unconscionable fee as the gravamen of this case, and so do we. In addition to the unconscionable fee, we have found in two client matters that respondent is culpable of moral turpitude due to overreaching and misrepresentations, failure to maintain funds in a trust account and to render an accounting, obtaining an adverse interest in a client's property and commingling of funds. We also have found additional aggravation: 1) client harm, and 2) indifference. But the aggravating factors here are offset by respondent's significant mitigation, including nearly 24 years of discipline-free practice, his cooperation with the State Bar by entering into a stipulation as to facts and culpability, and his strong good character evidence. (The hearing judge found ten counts of misconduct in three client matters and only one aggravating factor.)

A review of unconscionable fee cases reveals a broad spectrum of discipline, ranging from three months' actual suspension (e.g., *Goldstone v. State Bar* (1931) 214 Cal. 490 [three-months' actual suspension imposed where attorney charged an unconscionable fee]) to disbarment (e.g., *In re Silverton, supra,* 36 Cal.4th 81). But, in almost every unconscionable fee case where disbarment has been recommended, there has been a prior disciplinary record and serious misconduct associated with the charging of the unconscionable fee. (*In re Silverton, supra*, 36 Cal.4th 81 [disbarment imposed on reinstated attorney who charged three clients unconscionable fees]; *Barnum v. State Bar* (1990) 52 Cal.3d 104 [disbarment imposed on attorney with two prior incidents of discipline who collected an unconscionable fee and

disobeyed multiple court orders]; *Dixon v. State Bar* (1985) 39 Cal.3d 335 [disbarment imposed on attorney with a prior two-year actual suspension who collected an unconscionable fee, failed to render an accounting, failed to refund unearned fees, and committed acts involving moral turpitude]; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725 [disbarment recommended for attorney with a prior record of discipline who charged an unconscionable fee, failed to maintain client funds in trust, failed to promptly disburse client funds, and engaged in fraudulent billing in 41 cases over a ten-month period constituting a pattern of misconduct].)

We find the above-cited disbarment cases to be significantly distinguishable from the facts present here. Respondent practiced law for 24 years without discipline prior to the misconduct of concern here. He fully participated in these proceedings and cooperated with the State Bar by entering into an extensive stipulation as to facts and culpability. Although he committed multiple acts of misconduct, we do not find they constitute a pattern. "Only the most serious instances of repeated misconduct over a prolonged period of time have been considered as evidence of a 'pattern of misconduct.' [Citations.]" (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 959.) We thus agree with the hearing judge that the State Bar's insistence on disbarment is disproportionate to the gravity of respondent's ethical violations as tempered by the significant mitigating factors.

Although we do not believe respondent should be disbarred, neither do we believe the more lenient discipline of three months' actual suspension suggested by respondent is appropriate. In arriving at this conclusion, we find that this case is indeed sui generis. We thus find the misconduct in the instant case to be qualitatively different than that in *In the Matter of Van Sickle*, *supra*, 4 Cal. State Bar Ct. Rptr. 980, wherein we recommended three months' actual suspension for an attorney who improperly obtained an interest adverse to his client and in two separate instances charged the same client an unconscionable fee. That attorney's misconduct significantly harmed the client and involved multiple acts of wrongdoing. In

mitigation, the attorney cooperated with the State Bar by stipulating to facts and culpability and was involved in pro bono and community service.

What distinguishes this case from *Van Sickle* is the seriousness and extent of the over-reaching that occurred when respondent obtained the modifications of the original fee agreement in a manner that was abusive of his client. The Supreme Court has long recognized that the right to practice law "is not a license to mulct the unfortunate." *(Recht v. State Bar* (1933) 218 Cal. 352, 355.) The mere fact that it took many weeks for Mrs. Harvey to comprehend, much less concur with, the various modifications to the fee agreements should have served as a warning to respondent that he had entered troubled waters. But instead, he plowed ahead, continuing to press for contractual changes that would protect his right to collect a fee. "When an attorney, in his zeal to insure the collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client. [Citations.]" (*Hulland v. State Bar* (1972) 8 Cal.3d 440, 448.)

In the Matter of Wells (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, is one of our most recent unconscionability opinions and perhaps the closest to this case factually. There, we recommended six months' actual suspension where an attorney, in addition to charging unconscionable and illegal fees to two clients, was culpable of engaging in the unlawful practice of law in another state, committing acts of overreaching with her clients, giving false information to officials in California and South Carolina who were investigating her law practice, and failing to return unearned fees and maintain a trust account. In aggravation, Wells was previously disciplined, committed multiple acts of misconduct, significantly harmed the public, clients, and the administration of justice, and she demonstrated indifference. In mitigation, Wells entered into an extensive stipulation of facts as to her culpability, suffered from extreme emotional distress, and presented eight character witnesses, including a retired superior court judge and three attorneys.

The hearing judge found *In the Matter of Lantz* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 126 involved facts analogous to this proceeding. In *Lantz,* the attorney committed a variety of ethical violations spanning a period of approximately five years involving four separate client matters. We found the attorney culpable of charging an illegal fee of $29,466, failing to return unearned fees, failing to render an appropriate accounting, failing to obey a court order, two instances of failing to competently provide legal services, and two counts of moral turpitude – one for grossly negligent misappropriation of $3,903 and the other for improperly withholding the $29,466 fee for more than two years without first obtaining approval. We observed that the attorney displayed a lack of candor as well as indifference toward rectification for his misconduct. We further noted that his misconduct involved multiple acts, caused significant client harm, and involved overreaching. Before recommending a one-year actual suspension, we afforded the attorney mitigation for his good character and limited mitigation for his pro bono activities and the seven-year period he had practiced without prior discipline.

In *In the Matter of Yagman* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, we recommended a one-year actual suspension for an attorney who was culpable of moral turpitude because he entered into an illegal fee agreement and collected an unconscionable fee. Additionally, the attorney failed to communicate a written settlement offer, failed to promptly pay client funds, failed in two matters to render an appropriate accounting, commingled funds, and misappropriated funds in two separate instances. The attorney's multiple acts of misconduct significantly harmed his clients. Furthermore, the attorney had previously suffered a six-month actual suspension for seeking an unconscionable fee. We recommended a one-year actual suspension, observing that the attorney presented compelling evidence of good character, entered into stipulations of fact, and promptly took action to resolve the underlying fee dispute with his clients. (See also *Bushman v. State Bar* (1974) 11 Cal.3d 558 [one-year suspension where the attorney charged an unconscionable fee and committed other misconduct involving

four clients, three of whom were on welfare and one who was a minor, plus illegal solicitation; *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 [18-month actual suspension for charging unconscionable fee plus numerous solicitation violations, acts of moral turpitude, and splitting legal fees with non-attorneys].)

Although we consider respondent's ethical violations more serious than those in *In the Matter of Van Sickle*, *supra,* 4 Cal. State Bar Ct. Rptr. 980, we find the magnitude of respondent's misconduct to be less extensive than that in *In the Matter of Lantz, supra*, 4 Cal. State Bar Ct. Rptr. 126 and *In the Matter of Yagman, supra*, 3 Cal. State Bar Ct. Rptr. 788. *Lantz* and *Yagman* both involved rule 4-200 violations and moral turpitude, coupled with trust account or accounting violations. But, unlike the instant matter, both of these cases also involved misappropriation of client funds. Moreover, in *In the Matter of Lantz, supra*, 4 Cal. State Bar Ct. Rptr. 126, four clients were harmed by the attorney, and the attorney failed to provide competent service and displayed a lack of candor. In *In the Matter of Yagman, supra*, 3 Cal. State Bar Ct. Rptr. 788, the attorney failed to communicate a written settlement offer and most significantly had been previously disciplined with a six-month actual suspension. Both *Lantz* and *Yagman* also involved extensive aggravating factors. For these reasons, we believe the appropriate discipline should be less severe than the one-year actual suspension recommended in *Lantz* and *Yagman*, and instead we recommend a six-month actual suspension.

VI. RECOMMENDATION

We therefore recommend that respondent, Mark B. Scott, be suspended from the practice of law in the State of California for two years, that execution of that suspension be stayed, and that respondent be placed on probation for two years on the condition that he be actually suspended from the practice of law in the State of California during the first six months of probation, and on the following further conditions:

A. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of this probation.

B. Respondent must maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current office address and telephone number, or if no office is maintained, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1(a).) Respondent must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (Bus. & Prof. Code, § 6002.1(a)(5).) Respondent's home address and telephone number will not be made available to the general public. (Bus. & Prof. Code, § 6002.1(d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

C. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and must certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(1) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(2) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (2) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

D. If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent shall file with each required report a certificate from respondent and a certified public accountant or other financial professional approved by the State Bar's Office of Probation in Los Angeles, certifying that: respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Client's Funds Account"; and respondent has kept and maintained the following:

i. a written ledger for each client on whose behalf funds are held that sets forth:

1. the name of such client,
2. the date, amount, and source of all funds received on behalf of such client,
3. the date, amount, payee and purpose of each disbursement made on behalf of such client, and
4. the current balance for such client;

ii. a written journal for each client trust fund account that sets forth:

1. the name of such account,
2. the date, amount, and client affected by each debit and credit, and
3. the current balance in such account.

iii. all bank statements and canceled checks for each client trust account; and

iv. each monthly reconciliation (balancing) of (i), (ii), and (iii) above, and if there are any differences between the monthly total balances reflected in (i), (ii), and (iii) above, the reason for the differences, and that respondent has maintained a written journal of securities or other properties held for a client that specifies:

1. each item of security and property held;
2. the person on whose behalf the security or property is held;
3. the date of receipt of the security or property;
4. the date of distribution of the security or property; and
5. the person to whom the security or property was distributed.

If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of perjury in the report filed with the State Bar's Office of Probation for that reporting period. In this circumstance, respondent need not file the accountant's certificate described above.

The requirements of this condition are in addition to those set forth in rule 4-100, Rules of Professional Conduct.

E. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

F. Within one year after the effective date of the Supreme Court order in this matter, respondent must submit to the Office of Probation satisfactory evidence of completion of no less than four hours of Minimum Continuing Legal Education (MCLE) approved courses in general legal ethics. This condition of probation is separate from any MCLE requirements, and respondent will not receive MCLE credit for attending the courses. (Rules Proc. of State Bar, rule 3201.)

G. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and Client Trust Accounting School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate from any MCLE requirements, and respondent will not receive MCLE credit for attending the courses. (Rules Proc. of State Bar, rule 3201.)

H. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for two years will be satisfied, and the suspension will be terminated.

PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the first year of his probation and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

RULE 9.20 COMPLIANCE

We further recommend that respondent be ordered to comply with rule 9.20 of the California Rules of Court and to perform the acts specified in paragraphs (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code, section 6086.10 and that

such costs be enforceable both as provided in Business and Professions Code, section 6140.7 and as a money judgment.

EPSTEIN, J.

We concur:

WATAI, Acting P. J.

STOVITZ, J.*

*Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge