FILED NOVEMBER 1, 2012

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **ALEXANDER TUCKER,** **Member No.: 202794,** A Member of the State Bar.	)	**Case No.: 11-O-14258-DFM** **DECISION**

INTRODUCTION

Respondent Alexander Tucker (Respondent) is charged here with five counts of misconduct involving a single client matter. The counts include allegations that Respondent willfully violated (1) rule 4-100(A)(1) of the Rules of Professional Conduct[1] (failure to maintain client funds in trust account) [two counts]; (2) Business and Professions Code section 6106 (moral turpitude - misappropriation)[2] [two counts]; and rule 4-100(B)(3) (failure to render accounts of client funds). The State Bar had the burden of proving the above charges by clear and convincing evidence. The court finds culpability and recommends discipline as set forth below.

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

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

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California (State Bar) on March 23, 2012. On April 5, 2012, Respondent filed his response to the NDC.

An initial status conference was held in the matter on April 30, 2012. At that time, the case was given a trial date of July 17, 2012, with a four-day trial estimate.

On April 5, 2012, Respondent filed a motion seeking an order allowing him to take the depositions of the complaining witness, Debra Deck, and her sons Coy Deck III and Samuel Deck. On April 6, 2012, the State Bar filed a response to the motion, agreeing to the deposition of Debra Deck but opposing the depositions of Coy Deck III and Samuel Deck on the contention that "the testimony of either is irrelevant and burdensome as to the allegations or defenses at issue." On April 10, 2012, this court issued an order authorizing the requested depositions.

On July 3, 2012, Respondent filed a motion requesting that the scheduled trial be continued. The motion was based on the illness of one of Respondent's anticipated defense witnesses and on claimed efforts by the three Deck deponents to evade being served with subpoenas to appear for the depositions authorized by this court. On July 5, 2012, the State Bar filed an opposition to the motion. At the pretrial conference of this matter, the request for a continuance was denied. In so doing, the court notified counsel that none of the Deck deponents would be allowed to appear as a complaining witness for the State Bar without first appearing for deposition. In addition, counsel for the State Bar agreed that the ailing defense witness could appear to testify telephonically.

On July 17, 2012, Respondent filed a motion to dismiss the proceeding based on (1) the failure of Coy Deck III to appear for his scheduled deposition; (2) continued claims that Coy

Deck III was avoiding service of the process requiring him to appear and give testimony in this matter; and (3) complaints that the State Bar had failed to cooperate with Respondent in having Coy Deck III appear to testify in the case.[3] On July 23, 2012, the State Bar filed an opposition to the motion, disputing both the procedural basis for the motion and the contention that it was responsible for Respondent's inability to secure access to the testimony of Coy Deck III. This court deferred its ruling on that motion until after the evidence in this matter had been received and the evidentiary record closed. Having completed that process, this court agrees with the procedural objections made by the State Bar to the motion and concludes that no showing has been made that the State Bar is responsible for the failure of Coy Deck III to make himself available to give testimony, either in deposition or at trial. Accordingly, the previously filed motion to dismiss is now DENIED.

Trial was commenced as scheduled and completed on August 3, 2012, after ten days of testimony. During the course of the trial, the State Bar called Debra Deck and Samuel Deck, among others, as witnesses during the presentation of its case-in-chief. The State Bar was represented at trial by Deputy Trial Counsel Mia Ellis.[4] Respondent was represented at trial by Monique Candor.

During the trial, the State Bar filed a motion to strike Respondent's exhibits 519.0001-519.0002, which had previously been received in evidence. The motion was based on (1) a

[3] Counsel for the State Bar did assist in securing the attendance of Debra Deck and Samuel Deck at deposition.

[4] During the trial, Respondent's counsel served a subpoena on DTC Ellis to appear as a witness at trial with regard to documents held by the State Bar. The State Bar then filed a motion to quash that subpoena, which motion was opposed by Respondent. In turn, Respondent filed a motion to compel compliance with the subpoena's requirement that documents be produced, which motion was opposed by the State Bar. Both motions were eventually resolved at trial by an agreement by the State Bar to produce certain documents at trial without having DTC Ellis testify. Accordingly, the two motions were deemed withdrawn.

claim that the documents had not been previously produced during pretrial disclosure[5] and (2) an objection that the documents were inadmissible hearsay and unreliable. Respondent subsequently agreed to withdraw the exhibit. Accordingly, that motion was also deemed withdrawn.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC, the stipulation of undisputed facts and conclusions of law previously filed by the parties, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on November 23, 1999, and has been a member of the State Bar at all relevant times.

Case No. 11-O-14258 [Deck Matter]

Coy Deck III (Coy) is the son of the complaining witness, Debra Deck (Deck). In 2008, he was 18-years old and attending school at Grossmont College. Upset with being bullied and insulted by classmates at the school, Coy responded on September 9, 2008, by making statements on the internet that he was going to physically harm individuals at Grossmont College, including a statement that he was going to "kill Jake and the fags with a gun."

When the school and law enforcement authorities became aware of Coy's threats, immediate steps were taken. Two days later, on September 11, 2008, FBI agents and the La Mesa police went to Deck's home, where Coy was then living, and took him into custody. Deck was at her home when the FBI agents arrived. They transported Coy to the county hospital for a 24-hour observation. When Deck went later that day to the facility, she was not allowed to see

[5] The written motion was not accompanied by any supporting declaration.

her son. The county facility did an initial assessment and then transferred Coy to a lock-down private hospital, API, operated by Helix Health Care, for a 72-hour hold pursuant to the Lanterman-Petree-Short Act.

While Coy was at API, Deck was allowed to see him. She was unhappy that he was being kept there. She accused the hospital during her testimony at trial of just keeping Coy at the facility in order to bill an insurance company. "They had no right to keep him there." Deck was also unhappy with many other aspects of what was happening to Coy at the facility. He broke a tooth while there and also injured his head. He was exposed to a fellow inmate's masturbation. Most of all, Deck was "horrified," "shocked," and angry to learn that her son was being given anti-psychotic drugs involuntarily. She described him during the trial as being "drugged up." "It affected him." "They were playing games with her."

On September 14, 2008, when Deck went down to pick up Coy at the end of his 72-hour hold, she was informed that the authorities had decided not to release him. In the meantime, the authorities at Grossmont College had acted as a result of Coy's apparent mental instability and had initiated steps to have Coy permanently expelled from the school. At that point, Deck decided that she needed to hire an attorney.

Although Deck had never worked with Respondent, she knew of him because they were members of the same church. On September 15, 2009, Deck met with Respondent at her home to discuss the situation. Respondent then went that same day to the mental health detention facility and met there with Coy. On September 17, 2008, with Coy still locked up in the mental health facility, Deck and Respondent signed a retainer agreement. The stated purpose of this agreement was for Respondent: "To represent Clients [defined as Deck and Coy] as Attorney for the purpose of representing Clients regarding all related matters with regard to the detention and

medical treatment of Coy Deck III." In Deck's discussions with Respondent, she directed him to take steps to resolve both the mental health detention problem and the possible expulsion by Grossmont. She also authorized him to begin evaluating whether a lawsuit could be filed against the hospital. Under the retainer agreement, Respondent was entitled to receive a $2,500 retainer, to be applied against future fees and the clients were obligated to replenish this retainer as it was exhausted by such future fees. Deck paid this initial retainer on September 17, 2008, with a check.

Respondent was soon able to get Coy released from the mental health hospital. Although a hearing was scheduled to be held on September 17, 2008, at the hospital for the purpose of responding to the hospital's request for an additional 14-day "hold" on Coy, Respondent was able to negotiate a resolution of the situation whereby Coy agreed to stay voluntarily at the hospital until September 22, 2008, at which time he would be released.

When Coy left the hospital on September 22, Deck picked him up. She felt that he had been changed by the anti-psychotic drugs that he had been given. At trial, she described him on release as being "drugged up," drooling around the mouth, ten pounds lighter, and needing to go through drug withdrawal for several months. She had to help him walk out of the facility. Coy later described his problems as including difficulty in focusing and reading and impaired memory. (Exh. 510.0004.) When Respondent met with Deck and Coy shortly after Coy was released, Deck directed him to investigate how the hospital had dealt with her son. He then began to do so. Among other things, he requested and reviewed records from the FBI, the La Mesa Police, and the hospital. He also gathered information about the effects of the medications that had been given to Coy at the facility.

In the meanwhile, expulsion proceedings were beginning at Grossmont College. A permanent expulsion hearing was scheduled to be held at the college on October 9, 2008. Respondent met with both Deck and Coy about the situation and with representatives of the college. To assist him in assessing the situation, Respondent also consulted with a medical doctor, who advised against having Coy appear and participate in the hearing. Respondent then discussed the issue separately with both Deck and Coy. Deck agreed with the doctor's recommendation that Coy not be there, given the effect that the drugs had had on him. Coy, for his part, "didn't want to go."[6]

When the hearing was held, the college decided to expel Coy permanently from the school. Respondent met with Deck and Coy on October 15, 2008, about future handling. Deck was upset that the expulsion was permanent and concerned about the long-term effect that the decision would have on her son. She directed Respondent to do everything he could to keep her son from being expelled. It was agreed that Respondent would file an appeal of the decision, which he eventually did.

In mid-October 2008, Respondent met with Deck at her home to discuss the status of his work on the Coy matters, including the forthcoming hearing on the appeal. At that time, Deck told him that she wanted him to evaluate and possibly pursue a number of long-overdue accounts receivable owed to the family now-defunct sign business. She handed him a stack of envelopes containing information about various companies that had owed money to the business. On October 21, 2008, Deck paid Respondent $2,500 as an advance for doing this work. Respondent then went through the information contained in the various files and concluded that the statute of

[6] During the trial, Deck mentioned during the course of one her answers that Coy did not care about the expulsion.

limitations had run on most of the debts. There were four accounts, however, that were not time-barred.

In November 2008, Respondent met with Deck about the four accounts. At that time Deck authorized him to go forward in trying to collect the funds. Letters were then written to the four account debtors. In response, two of these companies (Sol-Tech and Erickson) provided satisfactory evidence that they had previously paid their bills in full. The remaining companies were named Amoroso and Edge. On or about November 26, 2008, Deck and Respondent signed a retainer agreement regarding Respondent's efforts to collect those various accounts receivable. Deck initialed the one-page schedule of billable rates attached to the retainer agreement, which explicitly stated that Respondent's stated billable rate for this work was $375/hour. (Exh. 20-00001.)[7]

After Respondent had sent a demand letter and then discussed the matter with Amoroso representatives and Deck, the Amoroso account receivable matter settled fairly quickly for $43,200. After a release was prepared and signed, a check was written by Amoroso on December 8, 2008, and deposited by Respondent into his CTA on or about December 10, 2008. A bill for work in the amount of $6,547.50 was then prepared and presented to Deck, who

[7] In Deck's application to the Client Security Fund (CSF) for money, she falsely stated that the "attachment to the Attorney Fees in the Fee Agreement indicated that Mr. Rucker's fee was $200 per hour." (Exh. 537, p. 5.) At trial, she acknowledged that she never "clarified" for the State Bar the fact that the actual attachment that she had signed provided for a $375/hour billing rate. Deck's CSF application also concealed the fact that Respondent had been hired to handle the various matters involving Deck's son, including the lawsuit against the hospital. Instead, it disclosed only the fee agreement regarding the accounts receivable and stated that no other family, personal, or business relationship existed at any time with Respondent. This answer is also misleading, given that Deck's other son (Samuel) was meeting weekly with Respondent for individual Bible study, and Deck was socializing with Respondent's wife during the same time that Respondent was handling Deck's legal affairs.

authorized Respondent to pay himself with money from the Amoroso check. On or about December 15, 2008, Respondent withdrew $6,547.50 from his CTA.

Also in November, Respondent attended the hearing on the appeal regarding the Grossmont expulsion. So did Deck and Coy, who both testified at the hearing. The appeal was denied and the expulsion was made permanent. In subsequently discussing with Deck and Coy the results of his investigation regarding the hospital's actions, Respondent was authorized by them to go forward with filing a tort lawsuit against the hospital for damages. Both Coy and Deck were especially concerned about the lasting effects of the drugs on Coy, including his loss of memory and coordination. Because Respondent was not willing to handle the matter on a contingency basis, Deck authorized him to retain and use the funds he was collecting on the accounts receivable.[8]

After doing sufficient research and investigation, Respondent took formal steps in July 2009 to file an action against the owners of the hospital. A notice of intention to commence suit against a healthcare provider was served on July 16, 2009. The notice stated that Coy had not legally consented to the administration of the anti-psychotic drugs and that, as a result of the administration of those drugs, he had suffered permanent loss of mental capacity, loss of memory, mental confusion, difficulties with hand/eye coordination, anxiety, and irritability. Thereafter, a formal complaint for damages was filed against the hospital.

Collecting the Edge account proved to be not as easy as the Amoroso account. Eventually, Respondent had to file a lawsuit against Edge in February 2009, followed by a First Amended Complaint in October 2009. The lawsuit sought collection of an account receivable alleged to be $144,721.98

[8] The daily time entries contained in the bill for $6,547.50 show that time was also being billed for work being done on the newly authorized personal injury litigation.

While the lawsuit was pending, but before the filing of the First Amended Complaint, Edge sought to resolve the case by going around Respondent and dealing directly with Deck. Deck had previously handled business matters directly with Edge before retaining Respondent. In fact, she hired Respondent only after Edge representatives stopped returning her calls about the account receivable. In an attempt to resolve the case cheaply, on August 13, 2009, Edge sent directly to Deck a proffered settlement check for $75,813, made payable to her. The check had language on it making clear that acceptance of it would constitute settlement of the litigation with Edge.

Deck notified Respondent of her receipt of the check. She wanted to cash the check but still have Edge be responsible for paying the attorney's fees that she had incurred with Respondent. Respondent, who had been regularly meeting with Deck on a near-weekly basis throughout this time period and keeping her orally informed of the status of the legal charges incurred in the pending two matters, advised Deck at the time that her accrued charges on the Edge matter were approximately $18,000. He also advised her that he felt that her claim was worth more than $75,813,[9] and that cashing the check would preclude any ongoing claims against Edge. Deck then decided not to cash the Edge check. However, she personally retained it, rather than sending it back to Edge or giving it to Respondent. Respondent then sent a letter to Edge, rejecting the settlement proposal. In October 2009, he filed the First Amended Complaint. In December, he participated in the scheduling of a mediation to be held in January 2010.

[9] Contrary to Deck's subsequent sworn statements to the State Bar, Respondent did not threaten to sue her if she cashed the check. Nor did the *Edge* matter settle at that time. (Cf. Exh. 537, p. 5.)

In January 2010, after negotiations between Respondent and Edge, Edge agreed to settle the collection case for $98,500, an amount that was $22,687 more than what Edge had previously offered in settlement. On or about January 11, 2010, Deck and Edge entered into a written settlement agreement. To fund the settlement, Deck was authorized by Edge to deposit the $75,813 check that had previously been sent to her. Edge also sent Respondent an additional check for $22,687.

By the time of the *Edge* settlement, Respondent had filed Coy's personal injury action against the hospital and had spent extensive time and expense in moving that case forward. As previously noted, Deck and Respondent had previously agreed that the proceeds of the collection matters, including the *Edge* lawsuit, would be used to fund that suit in addition to the collection matters. With Deck's ongoing agreement, Respondent had been orally reporting to her on a regular basis about the fees and costs that he had incurred in both matters and that he was withdrawing from the Amoroso settlement funds still remaining in his client trust account. With the favorable settlement of the *Edge* lawsuit, Respondent informed Deck that he felt that he did not need to retain all of the $98,500 *Edge* settlement proceeds in order to cover his past and anticipated future legal fees in the *Coy* matter. As a result, they agreed that Deck would keep the proceeds of the check for $22,687, but that she would turn over to Respondent the $75,813 check that she had previously been holding, so that he could deposit it in his client trust account. From this $75,813, Deck authorized Respondent (1) to pay himself for the already accrued but unpaid costs and fees in the *Edge* and *Coy* matters, and (2) to retain the balance of the funds as an advance toward future costs and fees in the *Coy* matter. Pursuant to this agreement, Deck, Samuel Deck, and Respondent went together to Union Bank on January 12, 2010, in order for

Respondent to deposit the $75,813 check (made out solely to Deck) into Respondent's client trust account.

For the balance of 2010, Respondent prepared the *Coy* lawsuit for trial. He had retained a medical expert to provide opinion testimony and took steps to get that expert prepared by having him interview Deck and other members of Coy's family. Unfortunately for Coy and Deck, the findings and opinions of the retained expert were not particularly favorable for Coy's claims. While the doctor was critical of the facility for keeping Coy for more than 72 hours, he was unwilling to testify that the administration of the anti-psychotic drugs was unnecessary. Moreover, with regard to Coy's claimed damages of mental upset and irritability, the doctor concluded that Coy had other serious mental problems and that there was a history of mental problems throughout the Deck family, including with Deck herself.[10] As a result, Respondent began to encourage Coy and Deck to resolve the lawsuit on the best terms possible, rather than to continue to pursue it. They gave him no authority to do so. Depositions were then taken by the defense of this expert and of the family members, including Deck. A mediation of the case was then held in mid-2010. Before the mediation, Respondent and Deck discussed the potential settlement value of the case. Deck told Respondent that she thought the case was worth $2 million. In response, he told her that there was no way that she would ever get that amount of money in the action. At the mediation, attended by Respondent, Deck and Coy, the defendant offered $20,000 to settle, a figure rejected by Deck and her son. Trial was then scheduled to begin in January 2011.

[10] Throughout Deck's testimony at trial, she repeatedly alluded to some of these problems, including the death of Coy's father in 2005 and the subsequent decision by her oldest son to commit suicide with a gun after being diagnosed with AIDS.

Eventually, Respondent realized that he had been wrong in stating that the $75,813 would be sufficient to pay for all the time and expense of the case if it had to go through a full trial. Coy talked to his mother about advancing more money for the case, but she was not willing to do so. As an accommodation, Respondent then offered Coy and Deck a transitional and reduced contingency fee agreement in October 2010. By the terms of this agreement, Respondent agreed to go forward with working on the *Coy* matter and be potentially compensated for his future efforts with only a 20% contingency fee based on any future recovery. The contract, however, was explicit in stating that the first $72,000 of any recovery, after deducting expenses incurred after the date of the contract, would first go to reimburse Deck for the funds that she had already advanced on the case. Coy signed the contract. Deck did not.

When the *Coy* case was scheduled to commence trial in early January 2011, both Deck and Coy were present, together with Respondent. Before jury selection began, the defense made a settlement offer of $18,500, which was then accepted by Coy and Deck. However, when the settlement check subsequently arrived, Respondent had difficulty reaching either Coy or Deck to resolve how the money should be distributed. When the check was eventually sent by Respondent to Deck's home via Federal Express, Respondent was subsequently told that the envelope had never been received. Sometime later, after Respondent had made arrangements with the defense attorneys for a replacement settlement check to be issued, Coy tried to cash the original check. At trial, Deck produced the original Federal Express envelope in which the settlement check had been sent, but denied that there had been a check in it.

In Respondent's January 2011 correspondence to Deck about the settlement, he promised to provide her with a complete and detailed accounting of all of his services and of the trust account. He acknowledged that this accounting was overdue and apologized for its lateness.

Notwithstanding this promise, such an accounting was never provided. At trial he sought to attribute part of his failure to provide this accounting on a computer failure he experienced in June 2010.

From her retention of Respondent in September 2008 until the resolution of Coy's lawsuit in early 2011, Deck was aware of what Respondent was doing on the various matters, what fees and costs he had incurred, where the money he had collected on her behalf was deposited, and of the fact that those monies were being used (with her approval) to fund the *Edge* and *Coy* matters. Throughout this entire period, Deck never complained that she had not received any of the funds that Respondent had received from Edge or Amoroso or suggested that Respondent was using these funds to pay his own legal fees without her permission. To the contrary, both Respondent's wife, Dana, and Rusty Kamholz, both of whom participated with Deck in Bible study sessions during that same time period, testified credibly at trial that Deck had described to them the fact that Respondent had successfully collected approximately $150,000 for Deck from various contractors and that he was now using that same money to pursue the *Coy* personal injury lawsuit against the hospital. Ms. Kamholz did recall, however, that Deck had complained in mid-December 2010 that she had asked for an accounting from Respondent and had not received it.

In this proceeding, four of the five counts brought against Respondent are for misappropriation and mishandling of the funds received from Amoroso and Edge. Those counts are completely dependent on the credibility of Deck and on the accuracy of her claims that she never authorized Respondent to deposit the funds in his own trust account but instead believed that Respondent had deposited her funds into a bank account in the name of her living trust, where it was going to remain (accruing interest) until she withdrew it. The counts further depend

on the vitality of Deck's contention that she never authorized Respondent to use the retained funds to pay the costs and fees for his work on the *Edge* and *Coy* matters.

The court finds that the evidence supporting Deck's claims that Respondent mishandled and misappropriated her money is neither clear nor convincing. Further, with respect to the testimony of Deck, the court finds that it lacks both credibility and candor.

The evidence demonstrating Deck's lack of candor throughout this proceeding is extensive. The first hint of Deck's lack of reliability as a witness came in her resistance to providing deposition testimony before trial. It was only after this court announced on the record that she would not be allowed to testify unless and until she appeared for deposition that she made herself available as a deponent. At that deposition, however, she resisted efforts to examine her about documents by stating that she could not readily read documents because she had not brought her magnifying glass to the proceeding. During the trial of this matter, however, she was frequently observed by this court to be quite able to read documents without the assistance of a magnifying glass when she chose to do so, although she would sometimes seek to hide behind that same defense when confronted by impeaching documents on cross-examination.

In turn, Deck's responses to potentially damaging or revealing questions can best be described as verbosely non-responsive. An answer to a simple question, when the answer might be impeaching, would regularly generate minutes of rambling, non-responsive monologue by Deck, typically consisting of repeating testimony that she had previously given against Respondent, even though it was completely non-responsive to the question, and then wandering off to discuss completely unrelated subjects. During the process of these evasive responses, Deck would occasionally include some highly irrelevant but derogatory statement or accusation about Respondent, routinely generating a motion to strike. This pattern continued despite this

court's admonitions to Deck and even when questions were being re-asked in order to get an actual responsive answer. These seemingly incoherent and non-responsive answers, however, were not the result of any misunderstanding, confusion, lack of intelligence, or mental impairment on Deck's part. To the contrary, on each occasion when Deck was asked by the court, after a lengthy non-responsive answer, if she recalled what the original question had been, Deck was able to recite the original question with considerable accuracy.

Even more damaging to Deck's credibility was the fact that so many of her substantive answers were demonstrated to be untrue, were impeached by contradictory statements made by her on prior occasions, or were just plain not believable.[11]

Her pattern of prevarication was amply demonstrated by the many false and misleading statements she made to the State Bar, who then relied on her statements in bringing charges against Respondent.

Deck's false statements to the State Bar began with her initial complaint in May 2011, complaining about Respondent's handling of the Amoroso and Edge matters. This complaint was filled with inaccuracies, ones that must have been known to Deck to be inaccurate at the time that she submitted the complaint. By way of example, she provided the State Bar with the following statement regarding the history of the $75,813 check received by her from Edge:

> In August 2009, there was a settlement of another claim. Of this, $75,813 was sent directly to me. After receipt, I contacted Mr. Tucker to ask for an update on any balance I might owe him. At that time he told me I cannot retain the check because we have a fee agreement and I must endorse it over to him for deposit into his trust account. He also told me if I do not do so, he would sue me. Thereafter, I did endorse the check to Mr. Tucker.
>
> (Exh. 528.0016.1.)

[11] Illustrative of this last category is Deck's claim that she did not know about Coy's lawsuit against the hospital until being asked to be interviewed by the medical expert in 2010.

To the extent that Deck stated in this letter that any such settlement or conversation took place in August 2009, it was demonstrably untrue. There was no settlement in August 2009; and, when Deck received the check, Respondent advised her not to deposit the check at all, because to do so would have prevented her from recovering additional money from Edge—which Respondent was eventually successful in doing. During her testimony in the trial of this matter, Deck did not make any similar claim that Respondent had made any such demands or threats regarding her receipt of the $75,813, either in August 2009 or when the case actually settled in January 2010. For her to have done so would, of course, have validated Respondent's own testimony at trial that he and Deck had previously agreed that those funds would be used to pay for Respondent's work on the *Coy* lawsuit -- since there would have been no other logical reason for Respondent to have threatened such a lawsuit against Deck if she did not allow him to put the funds in his trust account. In her original complaint to the State Bar, she just chose to deal with the issue of the *Coy* lawsuit by not disclosing it. She followed the same approach in her claim for money to the CSF.

The fact that Respondent stated in her original complaint to the State Bar that Respondent deposited the $75,813 <u>into his trust account</u> is also significant because it directly contradicts the testimony of Deck and her son Samuel at trial, that they believed the money was being deposited into a bank account in Deck's name (one version) or into an account in the name of Deck's living trust (another version). Respondent, of course, has always stated that the money was deposited into his trust account.

In her original complaint, Deck also complained several times that Respondent had billed her at a rate of $375 for handling the account receivable matters, claiming that

Respondent contracted to bill her at a rate of only $200/hour and that she "never agreed to pay Mr. Tucker any more than $200 per hour." As previously noted above (see footnote 7, above), the fee agreement that Deck signed and initialed was explicit in stating that she was being billed at $375 per hour and Deck never subsequently advised the State Bar that her original complaint had been inaccurate. Instead, she repeatedly reiterated this false contention, right up to the time of trial.

At the conclusion of the original complaint, Deck also made the following allegation:

> I have attempted many contacts seeking explanation [sic] of his fees and the balance of the money due me. Mr. Tucker tells me he has been very sick and on one occasion that he was near death. His wife informed me that because Mr. Tucker believed he was going to die, he had transferred the money in the account to another account for her benefit.

This is a serious charge that was unsupported by any testimony by Deck at trial; was not corroborated by any evidence at trial, including evidence of any contemporaneous complaint or inquiry by Deck to Respondent about any such possible transfer (which one would reasonably expect had Deck received any such statement); was completely disproved by the bank records of the trust account; and was highly inconsistent with Deck's testimony at trial, during which she stated that she always believed that the money had been deposited and maintained into a bank account in Deck's name (or in the name of Deck's living trust). In addition to all of the above, it strains credulity to believe that Respondent's wife would have ever made such a statement to Deck, especially if there were any truth to the statement.[12]

[12] Respondent's counsel complained at trial, with some justification, that these false statements caused the State Bar to issue subpoenas to his bank accompanied by affidavits repeating these false charges.

Deck's lack of candor continued beyond her original complaint and included both her claim to the CSF (discussed briefly above) and her direct dealings with the State Bar investigators. For example, when Deck was interviewed by Investigator Collier on September 22, 2011, Deck again claimed that her fee agreement for Respondent's work on the account receivable matters stated that Respondent's hourly rate was "$200, not $375 like [Respondent] says in his response." (Exh. 525.0008.) With regard to Respondent's work on those matters, Deck told Collier that the only work Respondent did on those matters was "write two letters and the creditors paid the outstanding bills." This purported history, of course, ignores the fact that a lawsuit was filed by Respondent against Edge in February 2009 and the months of litigation before the case settled at a mediation. Deck then went on to repeat, in a slightly different format, her claim that Respondent had threatened her to get access to the check for $75,813:

> [Deck] stated that Edge…sent her a check made out to her for $75,813. [Respondent] told [Deck] that he would sue her if she tried to cash that check, so [Deck] gave the check to [Respondent]. After Edge sent [Deck] the $75,813, [Respondent] told [Deck] that he needed to make more money and that he would sue Edge.

Once again, during the trial of this matter, Deck made no comparable claims during her testimony.[13]

Investigator Collier interviewed Deck again in November 2011. At that time, Deck again falsely stated that the Edge matter had been settled for $75,813 in August 2009. Significantly, however, Deck again acknowledged during the interview that she knew at that time that Respondent had deposited both the $43,200 Amoroso settlement

[13] Once again, any statement by Respondent during the *Edge* lawsuit to the effect that he needed to secure more money from Edge because <u>he needed it</u>, would tend to corroborate Respondent's contention that Deck and he had agreed that any such recovery would be available to Respondent to fund the work then being done on the *Coy* lawsuit. Absent such a claim by Respondent to the funds, any increase in the amount of a settlement with Edge would go only to Deck.

check and the $75,813 portion of the Edge settlement into his trust account. (Exh. 525.0012.) No claim was being made by Deck in November 2011 that she had ever been told or led to believe that any of her money was being deposited by Respondent into a bank account in her own name.

During another interview by Investigator Collier with Deck, Collier reported that "CW [Deck] stated that her son told her that [Respondent] might not have finished his case. CW will have her son, Coy Deck III, call me tomorrow to discuss this." (Exh. 525.0020.) Since Deck was present in court when the *Coy* matter was settled and she was the recipient of the letter and the settlement check sent by Respondent to her home via Federal Express in January 2011, there was no justifiable basis for her to pretend in November 2011 that she did not know that the *Coy* action had been resolved or for her to hint that the case might be still ongoing.

On March 6, 2012, Deck was interviewed by Deputy Trial Counsel Ellis. In that conversation, Deck repeated many of the above inaccuracies. It was during this interview that Deck apparently first made to the State Bar the claim that the Amoroso and Edge settlements were supposed to have been put into a trust in Deck's name.[14] (See Exhs. 525.0022, 525.0024.) This accusation then became a core ingredient to four of the five

[14] This contention under oath by Deck is completely not credible. If the account had been in her name, she would have been entitled to learn from the bank at any time the status of the funds and to withdraw them. There was no evidence that she ever sought to do either. She said that she was supposed to receive monthly statements on the account and receive interest on the deposits. She then complains that she received neither. Why she did not go to the bank to see why she was not getting monthly statements or accrued interest is also unexplained. Although Deck testified during trial to having gathered information for her accountant at tax time, she provided no explanation as to her apparent failure to make any inquiries regarding (a) the status of the alleged account in her name, (b) the failure of the bank to provide her with any annual interest statement for use with her tax return, or (c) the amount of reportable interest on the account for all of the tax years after the Amoroso money was deposited in late 2008.

counts alleged by the State Bar against Respondent. There is no indication that Deck was ever asked by the State Bar, either before or during the trial, to explain why she had previously accused Respondent of taking her money and putting it into his trust account after threatening her with a lawsuit.

Count 1 - Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]
Count 2 – Section 6106 [Moral Turpitude – Misappropriation]

Rule 4-100(A) requires that all funds received or held for the benefit of clients by an attorney or law firm, including advances for costs and expenses, shall be deposited and maintained in a designated client trust account.

Section 6106 provides that an attorney's "commission of any act involving moral turpitude…whether committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

In these counts, the State Bar accuses Respondent of violating rule 4-100(A) and section 6106 by depositing the $43,200 of Amoroso settlement funds into his client trust account, rather than into a separate trust account under the name of Deck "and for her benefit" and then withdrawing the funds from his trust account without Deck's authorization. As explained above, the evidence offered in support of these claimed violations is neither clear nor convincing. Instead, the court finds that his conduct, in both depositing and then subsequently withdrawing the money, was authorized by Deck and done with her contemporaneous knowledge and approval.

These counts are dismissed with prejudice.

Count 3 - Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]
Count 4 – Section 6106 [Moral Turpitude – Misappropriation]

In these counts, the State Bar accuses Respondent of violating rule 4-100(A) and section 6106 by depositing the $75,813 of Edge settlement funds into his client trust account, rather than into a separate trust account under the name of Deck "and for her benefit" and then withdrawing the funds from his trust account without Deck's authorization. As explained above, the evidence offered in support of these claimed violations is neither clear nor convincing. Instead, the court finds that his conduct, in both depositing and then subsequently withdrawing the money, was authorized by Deck and done with her contemporaneous knowledge and approval.

These counts are dismissed with prejudice.

Count 5 – Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

Rule 4-100(B)(3) requires a member to "maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them[.]" (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 952 [culpability established for failure to account despite lack of formal demand for accounting].)

Although Respondent was routinely giving Deck oral reports on the status of his fees and the funds still remaining in his client trust account, at no time after his December 15, 2008 billing did he provide her with any written accounting. This is true despite the fact that Deck began to request a formal accounting in late 2010, and Respondent promised to provide her a belated one in January 2011.

This failure by Respondent constituted a willful violation by him of his duties under rule 4-100(B)(3).

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)[15] The court finds the following with regard to aggravating factors.

Uncharged Violations

Although this court concludes that Respondent was not culpable of four of the five charges filed here, that does not mean that his handling of the various matters for the Deck family generally were in compliance with the Rules of Professional Conduct. To the contrary, his successful defense was predicated on an agreement to accept payments from a third party (Deck) to represent another (Coy) without any prior compliance with the requirements of rule 3-310(F) and without a written fee agreement with the client. While that misconduct may not be the subject of independent discipline because of the lack of prior notice, it may, under the circumstances, be treated by this court as an aggravating factor for the purpose of determining the appropriate discipline for a different violation. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36 [evidence of uncharged misconduct may be considered in aggravation where the evidence is elicited for a relevant purpose and where the determination of uncharged misconduct is based on the attorney's own evidence].)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds the following with regard to mitigating factors.

[15] All further references to standard(s) or std. are to this source.

No Prior Discipline

Respondent had practiced law in California for more than nine years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline. Respondent's lengthy tenure of discipline-free practice is a mitigating factor. (Std. 1.2(e)(i); *In the Matter of Rech* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 310, 316 [eight years]; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88 [ten years].)

Contrary to the express terms of standard 1.2(e)(i) and the contentions of the State Bar, case law permits a long period of prior discipline to be treated as mitigation, notwithstanding the seriousness of the present misconduct. (See, e.g., *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13, citing *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029.)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle*

(2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 2.2(b), which provides, "Culpability of a member of commingling of entrusted funds or property with personal property or the commission of another violation of rule 4-100, Rules of Professional Conduct, none of which offenses result in the wilful misappropriation of entrusted funds or property shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances."

It is this court's conclusion that Respondent's misconduct in this matter warrants discipline exceeding the minimum requirement of standard 2.2(b). To the extent that Respondent had provided Deck and Coy with fee agreements in the past, these agreements had obligated him to provide monthly billing statements and assured his clients that such statements would be forthcoming. They were not. To the extent that he entered into a new agreement with his clients to undertake a lawsuit against the hospital, to be funded by the proceeds of future collections from Amoroso and Edge, he failed to document that agreement and failed to document the charges he was making against those funds after they had been collected and retained by him. Even after Respondent had acknowledged to his client that he was overdue in providing a promised accounting, he failed to provide one. While he now points to a computer

failure in June 2010, that event does not excuse or explain Respondent's complete failure to provide any sort of accounting for the many months after that date, especially an accounting of the money in the trust account.

RECOMMENDED DISCIPLINE

Recommended Suspension/Probation

For all of the above reasons, it is recommended that **Alexander Tucker** be suspended from the practice of law for one year; that execution of that suspension be stayed; and that Respondent be placed on probation for one year, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first four (4) months of probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
3. Respondent must maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation, 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, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will not be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (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.

4. Within thirty (30) days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation and must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.

5. Respondent must report, in writing, to the State Bar's Office of Probation 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).[16] 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 certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

    (a) 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

    (b) 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

[16] To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. 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.

6. 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 the State Bar's Client Trust Accounting School and provide satisfactory proof of such completion to the State Bar's Office of Probation. This condition of probation is separate and apart from Respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Respondent is ordered not to claim any MCLE credit for attending and completing these courses. (Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.

MPRE

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

Rule 9.20

The court recommends that Respondent be ordered to comply with rule 9.20 of the California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[17]

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and that such payment obligation be enforceable as provided for under section 6140.5.

Dated: November _____, 2012

DONALD F. MILES
Judge of the State Bar Court

[17] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia,* cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)