FILED SEPTEMBER 22, 2008

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case Nos.: **00-O-11978-LMA**
	)	**07-O-13569-LMA**
WILLIAM CHIPMAN MILES,	)	**(Consolidated.)**
	)	
Member No. 40970,	)	**DECISION**
	)	
A Member of the State Bar.	)	

I. INTRODUCTION

In this contested, original disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (hereafter "State Bar") charges respondent **WILLIAM CHIPMAN MILES** with 22 counts of professional misconduct in a single matter in which he represented a group of 44 landowners. The court finds, by clear and convincing evidence, that respondent is culpable on only 15 of the 22 counts.

For the reasons stated *post*, the court recommends that respondent be placed on four years' stayed suspension, five years' probation, and two year's actual suspension continuing until respondent establishes his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.4(c)(ii).[1]

[1] This and all further references to standards are to the Standards for Attorney Sanctions for Professional Misconduct, which are located in title IV of the Rules of Procedure of the State Bar of California.

II. PERTINENT PROCEDURAL HISTORY

The State Bar filed the notice of disciplinary charges (hereafter "NDC") in case number 00-O-11978-LMA on May 14, 2007. Respondent filed his response to that NDC on June 21, 2007.

The State Bar filed the NDC in case number 07-O-13569-LMA on October 30, 2007. Thereafter, the State Bar filed a first amended NDC in case number 07-O-13569-LMA on November 28, 2007. Respondent filed his response to that first amended NDC on January 22, 2008.

On January 10, 2008, the court consolidated case number 00-O-11978-LMA with case number 07-O-13569-LMA for all purposes. The 11-day trial in the consolidated proceeding was held on February 13 through 15, 2008; February 21 and 22, 2008; February 26 through 28, 2008; March 7, 13, and 21, 2008; and May 23, 2008.

After both parties filed posttrial briefs, the court took the matter under submission for decision on June 23, 2008.

The State Bar was represented by Deputy Trial Counsel Esther Rogers. Respondent was represented by Attorney Jerome Fishkin.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Many of the court's findings of fact are based in large part on credibility determinations. After carefully observing respondent testify before it and after carefully considering, inter alia, respondent's demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome in this proceeding; his capacity to perceive, recollect, and communicate the matters on which he testified; and after carefully reflecting on the record as a

whole, the court finds that much, if not most, of respondent's testimony lacks credibility.[2] (See, generally, Evid. Code, § 780; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737; see also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 498, fn. 7 [trial court is not bound to accept as true the sworn testimony of a witness even in the absence of evidence contradicting it].) Respondent's testimony on cross-examination was particularly troubling; it was often evasive and hostile, and at times, it was even inconsistent and implausible.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 21, 1967, and has been a member of the State Bar of California since that time.

B. Findings of Fact

In the late 1980's, Karen and David Walker, who were then husband and wife, purchased a lot in a subdivision in Fairfield, California that is commonly referred to as Rancho Solano. In 1989, the Walkers and some other Rancho Solano lot owners had significant drainage and landslide issues on their lots because of an underground natural spring that runs through part of the subdivision.

The developers made a couple of attempts to abate the problems, but were unsuccessful. Thus, in December 1993, Karen Walker (hereafter referred to individually "Walker") spoke with respondent about the possibility of bringing a lawsuit against the developer, the sub-developer, prior owners, soil engineers, structural engineers, and others. After touring the subdivision, respondent told the Walkers that he believed that they had "significant damages" and that they

[2] Of course, the court's rejection of much of respondent's testimony " 'does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.' " (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265; see also *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.)

and the other lot owners should have received disclosures regarding the drainage and landslide issues before they purchased their lots.

Respondent told the Walkers that it would be beneficial for them to form a group of property owners who would share in the costs of a lawsuit. However, respondent failed to inform the Walkers that the formation of a group would create multiple potential conflicts of interests between the joint clients (i.e., the Walkers and the members of the group) such as whether to settle or go to trial, how much to settle for, how to divide the settlement proceeds among the joint clients.

Relying on respondent's representations as to the significant amount of their damages, the Walker's retained respondent's law firm, Miles & Brummitt (hereafter "M&B"),[3] to represent them. On December 13, 1993, the Walkers and respondent entered into a written fee agreement (hereafter "Walker fee agreement").

The Walker fee agreement stated, inter alia, that the Walkers were "seeking to form a large group of other clients to be represented by Attorney to pursue claims relating to landslides and unstable soils at Rancho Solano.

If this large group of clients is formed, Attorney shall represent that group, *including* [the Walkers], on terms to be negotiated along the lines of sample agreements shown [to the Walkers].

If no other clients are secured, Attorney nevertheless agrees to represent [the Walkers] on terms involving a straight 33 1/3% - 40% contingency fee of gross recovery with all costs to be advanced by Attorney until reimbursement upon recovery. If there is no recovery, there will be no fee.

[3] Eventually, Miles & Brummitt became Miles, Brummitt & Passalacqua; however, for consistency, the court will refer to it as M&B.

No costs to be advanced in excess of $1,000 without [the Walkers'] consent."[4] (Italics added.) Respondent attached, to the Walker fee agreement, a sample group agreement (hereafter "sample group fee agreement").

According to Karen Walker (hereafter individually "Walker"), she understood that the Walker fee agreement would control her and her husband's relationship with respondent and M&B even if a group of other lot owners was formed. In other words, Walker contends that her and her husband's relationship with respondent was not to be affected by any fee agreement that respondent might thereafter enter into with other Rancho Solano property owners. Walker's position is inconsistent with the plain language of the Walker fee agreement quoted *ante*. In any event, it is clear that the Walker fee agreement was voidable at the Walkers' election because it does not comply with the requirements in section 6147 that it (1) address how costs affect the attorney's fees and the clients' recovery and (2) state that the attorney's fees are negotiable and not set by law. (§ 6147, subd. (b) ["Failure to comply with any provision [of section 6147] renders the agreement voidable at the option of the [client], and the attorney shall thereupon be entitled to collect a reasonable fee."].)

On December 30, 1993, respondent filed a lawsuit in the Solano County Superior Court to toll the statute of limitations. Initially, respondent attempted to plead a class action. However, the court refused to certify the class because there were too many differences between the individual property owner's claims. Thereafter, the court permitted respondent to amend the complaint to name additional plaintiffs.

In August 1994, respondent consulted with Attorney Carol Langford, an attorney with experience regarding attorney ethics, regarding a fee agreement for the group of property owners that respondent and Walker hoped to form. Langford opined that there were ethical

[4] Because of their limited financial means at the time, the Walkers insisted that respondent obtain their permission before spending or incurring more than $1,000 in costs.

issues regarding respondent's use of the draft of a fee agreement he provided to her and which she revised. Specifically, Langford warned that the inclusion of a 2/3 majority vote provision in the agreement (see *post*) might be inappropriate. Despite Langford's warnings, respondent choose to use the group fee agreement Langford revised (hereafter "group fee agreement").

Ultimately, respondent and Walker formed a group of property owners who owned a combined total of 43 Rancho Solano lots exclusive of the lot the Walkers' owned. Each of the owners of those additional 43 lots signed the group fee agreement, which contained a number of clauses that were not in either the Walker fee agreement or the sample group fee agreement. Moreover, the Walker fee agreement was between (1) M&B and (2) the Walkers. The group fee agreement, however, was between (1) M&B, (2) the Knox Ricksen law firm (hereafter "KR"), and (3) each of the owners of the 43 additional lots. Accordingly, contrary to respondent's contentions, the Walkers did not have an independent contractual relationship with KR (or any of its attorneys). (§ 6147, subd. (a).)

Even though the Walker fee agreement clearly provided that, if a group was formed, respondent was to represent the Walkers on the same terms as he represented the group, respondent never had the Walkers sign a copy of the group fee agreement. What is more, on September 2, 1994, respondent sent the Walkers a sample of the letter that he sent to prospective members of the group and a copy of the group fee agreement. At the bottom of the sample letter he sent to the Walkers, respondent wrote: "Just for you to see what everybody got." That note alone all but rebuts respondent's incredible claims that the Walker fee agreement incorporated the group fee agreement.[5] In addition, the note is strong evidence

[5] In addition, the note supports the court's rejection, for want of credibility, of respondent's testimony that he believed that Walker was bound by the group fee agreement. Respondent could not have plausibly believed that Walker was bound by the group fee agreement because, inter alia, neither Walker nor her husband signed the group fee agreement.

supporting Walker's claim that respondent agreed to represent the Walkers under the Walker fee agreement and not under the group fee agreement.

The following provisions are among the provisions that are set forth only in the group fee agreement (and not in the Walker fee agreement or the sample group fee agreement).

> **5. SETTLEMENT.** Attorneys anticipate that they may obtain a settlement offer from Defendants or Cross-Defendants payable in a lump sum to Plaintiff Clients represented by Attorneys. Clients shall thereupon vote whether to accept the offer. An affirmative vote of at least two-thirds (2/3) of all Plaintiff Clients represented by Attorneys shall bind client and all Plaintiffs represented by Attorneys to accept the lump sum offer. . . .
>
> This 2/3 group approval condition shall apply to any partial or complete settlement involving consideration from one or more parties to one or more plaintiffs. This means that all plaintiffs represented by Attorneys must approve by a 2/3 vote any settlement to Client.
>
> **6. COSTS FUND. . . .**
>
> Upon execution of this Agreement, Client shall provide Attorneys with a signed copy of this Agreement together with the sum of $_____, which Attorneys shall set aside as a fund for costs and expenses. Monies received by the [Attorneys] will be deposited into an interest bearing checking account entitled "The Rancho Solano Property Owners Trust Account." The Attorneys will provide monthly statements of the account to the Administrative Committee, which is discussed below in paragraph 7. Attorneys shall have access to that account to pay for costs and disbursements.
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> * * *
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> **7. ADMINISTRATIVE COMMITTEE.** Client agrees that an Administrative Committee composed of an odd number of Clients appointed by Attorney will act as a liaison between Client and Attorneys. . . . That committee may make decisions for Client and all Plaintiffs represented by Attorneys in this matter. . . . Client should contact the Administrative Committee if client has any questions regarding this matter. . . .
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> **8. ALLOCATION OF SETTLEMENT FUNDS.** Attorneys agree to allocate in good faith among all Plaintiff Clients all

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(§ 6147, subd. (a) [contingent fee agreements *must* be signed by both the attorney and the client].)

> settlement funds received. If client cannot agree on an allocation of settlement funds, there shall be a final, binding, mandatory allocation determined by arbitration before attorney Mr. Richard Blair . . . . Clients may submit any and all arguments in support of his or her respective allocation arguments to the arbitrator. Attorneys' role in arbitration will be to provide a general explanation of the case to Mr. Blair and to assist Mr. Blair as needed in coming to a determination.
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> * * *

In August 1994, respondent opened a bank account at Wells Fargo Bank that was titled "Rancho Solano Property Owners Trust Account" (hereafter "Rancho Solano trust account") which was an interest bearing money market account. Respondent admits that he opened the Rancho Solano trust account "to maintain funds [he] received for the benefit of the Rancho Solano property owners." In addition, at least as late as July 2000, respondent believed that the group fee agreement required "that any funds collected during the course of the litigation before they are allocated . . . be deposited in an interest bearing client trust account."[6]

Moreover, respondent admits that he failed to comply with the provision in the group fee agreement that required him to provide monthly the bank statements of the Rancho Solano trust account to the Administrative Committee.

Even though respondent opened the Rancho Solano trust account, he and his law firm also maintained a general client trust account, which was a registered IOLTA account with the interest paid to the State Bar (hereafter "respondent's general CTA").

In February 1995, the Walkers sold their lot for $83,500. Respondent never discouraged the Walkers from selling their lot despite the ongoing Rancho Solano litigation. But, when they sold their lot, respondent advised the Walkers to disclose the drainage and landslide problems to the buyers. In fact, respondent prepared a detailed disclosure statement

[6] See exhibit 104 at p. 3 (Attorney William C. Reeves's July 25, 2000, letter to the State Bar). Moreover, as a fiduciary, an attorney presumably already has a duty to deposit all client funds that are not nominal in amount or that will be on deposit for more than just a short period of time into an interest bearing trust account with interest payable to the client.

for the Walkers to give to the buyer. That disclosure statement stated that the Walkers were selling their lot for a reduced price because of the drainage and landslide problems. Respondent opined to the Walkers that the sale of their lot would not impact their damage claims, but would "liquidate" their financial damages as the difference between (1) the $83,500 sales price and (2) the fair market value of the lot if it did not have the drainage and landslide problems. Under this "formula," the Walkers financial damages were at least about $114,000 ($197,500 less $83,500 sales price).

Respondent knew that the Walkers' damage claims were substantially higher than almost all of his other plaintiff clients because the landslides and drainage predominantly affected the Walker's lot and because the Walkers had to sell her lot for a reduced price due to the drainage and landslide issues. Most of respondent's other clients had less drainage and landslide issues on their lots, or the defendants substantially remediated the problems before the other clients sustained damage or sold their lots (and homes).

Beginning in September 1994, respondent was aware that Walker contended that the terms of Walker fee agreement were significantly different than the terms of the group fee agreement. Moreover, beginning in September 1994 when the other property owners began signing the group fee agreement, respondent knew that the interests of the Walkers and of the property owners who signed the group fee agreement *potentially* conflicted.[7]

In May 1995, M&B and KR entered into a fee sharing agreement under which M&B agreed to pay KR one-third of all attorney's fees that M&B collected from the plaintiffs in the Rancho Solano lawsuit. Respondent never informed Walker of that fee

[7] Likewise, the interests of each property owner who signed the group fee agreement potentially conflicted with the interests of every other property owner who signed the group fee agreement. However, unlike the Walker fee agreement, the group fee agreement contained a detailed waiver of the potential conflicts of interests.

sharing agreement; nor did respondent ever obtain Walker's consent to share the attorney's fees that he and M&B received for representing the Walkers.

In September 1995, respondent engaged in settlement discussions with some of the defendants. As a result of those discussions, respondent proposed that settlement funds be applied to remedy the landslide issue and to winterize the lots. On October 3, 1995, Walker sent respondent a letter objecting to the proposed settlement because she had sold her lot and a settlement involving remediation would not compensate her for her damages. Even though respondent received Walker's October 3, 1995, letter, he failed to respond to it. Thus, on October 28, 1995, Walker sent respondent another letter.

In about August 1998, respondent settled the Walkers' claims against Donald Congdon and Rancho Enterprises, Inc. (who sold the Walkers their lot) for $15,000 (hereafter "Congdon settlement"). Respondent proposed to Walker that the $15,000 from the Congdon settlement be applied to the costs incurred in the case. In response, Walker told respondent to deduct his one-third contingent fee of $5,000 and $1,000 in costs[8] from the Congdon settlement and give her the remaining $9,000 ($15,000 less $5,000 less $1,000) in accordance with the plain terms of the Walker fee agreement. Respondent rejected Walker's proposal and stated that he was going to accept the Congdon settlement and that Walker would receive her money from the developers.[9] Respondent reassured Walker that he was looking after her interests.

Although Walker agreed to the Congdon settlement, Walker made it clear to respondent that she was not bound by the terms of the group fee agreement. In particular, Walker again disputed respondent's claim that she was responsible for more than $1,000 in costs because

[8] Walker correctly maintained that her share of costs was capped at $1,000 because respondent had never obtained her consent to incur costs in excess of $1,000.

[9] Respondent's position was inconsistent with his duties under the group fee agreement to "allocate in good faith among all Plaintiff Clients all settlement funds received." The entire $15,000 Congdon settlement should have been allocated exclusively to the Walkers.

respondent had never obtained Walker's consent to incur more than $1,000 in costs. In addition, in a September 14, 1998, letter to respondent, Walker again made clear that she was not a party to the group fee agreement and was not bound by its terms.

On September 18, 1998, Attorney Randall Brummitt (who is an M&B partner) sent Walker a letter in which he discussed Walker's responsibility for costs. In his letter, Brummitt stated, inter alia, that the Walker fee agreement "contemplated signing a new agreement if [M&B] ended up representing a large group of homeowners (which we are), similar to the agreement signed by the rest of our clients. Unfortunately, that never happened." In his letter, Brummitt also proposed that Walker and M&B split the responsibility for Walker's portion of the costs over $1,000 and requested that Walker sign the group fee agreement. Brummitt closed his letter by stating: "Again, let me stress our commitment to represent you to the fullest of our abilities. I am concerned that you may hurt your case, and lessen your ultimate recovery, if you take on a new attorney (with attorney fees and costs in addition to ours) at this late stage."

On September 29, 1998, Walker sent respondent a letter rejecting the proposals in Brummitt's letter. Walker's letter stated that respondent and Walker could resolve their dispute over Walker's responsibility for the costs by arbitration after the case settled, if necessary.

On October 27, 1998, Walker agreed to accept the Congdon settlement, but made clear to respondent that her acceptance of the Congdon settlement was not be construed as her acceptance of the terms of the group fee agreement. She also reminded respondent that she and the other property owner plaintiffs had different fee agreements with different terms.

By October 1998, respondent had reached settlements with four defendants totaling $725,000. Respondent deposited that $725,000 into the Rancho Solano trust account. In October 1998, respondent issued an accounting indicating that he had paid M&B attorney's

fees totaling $241,666.66 (one-third of $725,000).[10] Even though respondent withdrew M&B's attorney's fees out of the Rancho Solano trust account, he did not distribute any of $725,000 in settlement proceeds to his clients. (See, e.g., *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 735.)

On December 11, 1998, in accordance with M&B's and KR's May 1995 fee sharing agreement, respondent sent Attorney William C. Robbins III (who was a KR partner before KR partially "dissolved" sometime in the mid-1990's) two checks totaling $80,555.55. The $80,555.55 was one-third of the $241,666.66 in attorney's fees that M&B collect from the Rancho Solano trust account in October 1998.

Included in the $80,555.55 that respondent paid Attorney Robbins was a portion of the attorney's fees M&B received from the Walker's share of the settlement funds.[11] However, respondent never obtained Walker's consent to divide the legal fees M&B received from the settlement of her claim with KR (or its former partner Attorney Robbins).

On May 28, 1999, respondent reached a $180,000 settlement with defendant Balbi & Chang Associates, Inc. (hereafter "Balbi & Chang settlement"). Respondent again deposited the entire settlement into the Rancho Solano trust account, but did not pay out any proceeds to any of the plaintiffs.

The Balbi & Chang settlement broke down property damages and emotional distress damages plaintiff-by-plaintiff. Out of the $180,000 settlement, each of the 44 lots were assigned $3,661.25 in property damage. The Walkers were two of only a handful of the plaintiffs to whom emotional distress damages were assigned. Specifically, the Walkers were assigned

[10] Of course, a portion of those attorney's fees were earned as a result of respondent's representation of Walker.

[11] At a minimum, $1,666.66 of the $80,555.55 came out of the $5,000 in attorney's fees that M&B collected from the $15,000 Congdon settlement.

$2,520 in emotional distress damages. Therefore, out of the $180,000 settlement, a total of $6,181.25 ($3,661.25 plus $2,520) was specifically assigned/allocated to the Walkers.

In August 1999, respondent sent a letter to the group and the Walkers indicating that he had received a $525,000 aggregate settlement offer from Amos & Andrews, Inc. and the remaining defendants (hereafter "Amos & Andrews settlement"). This additional $525,000 brought the final settlement amount to $1.43 million ($725,000 plus $180,000 plus $525,000). In his letter, respondent stated, based on the $1.43 million total settlement, "there should be about $15,000 net per [lot] after all costs are paid."[12] Respondent ended his letter by urging the group to vote "yes" for the Amos & Andrews settlement. On August 20, 1999, Walker voted "no" on the Amos & Andrews settlement and attached a letter to her ballot indicating that the settlement was not sufficient to compensate the plaintiffs. However, the Amos & Andrews settlement was approved by the plaintiffs by a vote of 40 to 3. On August 23, 1999, even though he did not obtain Walker's informed written consent to the $525,000 aggregate settlement, respondent stipulated to the Amos & Andrews settlement on the record in open court on behalf of Walker and the other property owners.

On September 7, 1999, Walker sent respondent a letter indicating that she was unable to sign the Amos & Andrews settlement agreement and that she did not consider the case settled on her behalf. She also reiterated that the Walker fee agreement was substantially different from the group fee agreement. Thus, as of September 7, 1999, an actual conflict existed between the Walkers and the other property owners voted to accept the $525,000 Amos & Andrews settlement offer. Respondent, however, failed to seek, much less obtain, Walker's informed

[12] Respondent's suggestion that the settlement proceeds should be equally distributed to each of the 44 lots at approximately $15,000 per lot was clearly inconsistent with his duty under the group fee agreement to "allocate in good faith among all Plaintiff Clients all settlement funds received." At a minimum, respondent should have suggested that the $15,000 Congdon settlement plus $6,181.25 out of the Balbi & Chang settlement should be allocated to the Walkers before any equal pro rata share allocation.

written consent to continue representing the property owners who signed the group fee agreement.

On September 13, 1999, Attorney Lisa Passalacqua (another M&B partner), wrote Walker a letter stating that, because Walker acted as though she were bound by the group fee agreement, she was bound by its terms. The letter also stated that, if Walker felt she was not bound by the group fee agreement, then Walker's interests are "obviously adverse to the interests of the rest of the client group and [she] should seek separate representation apart from [M&B]."

On October 14, 1999, respondent filed a motion seeking leave of court for his law firm and Attorney Fredrick Schwarz (who, until April 1996, was a KR partner) to withdraw as Walker's attorneys because she refused to sign the Amos & Andrews settlement. In his motion, respondent argued (1) that Walker was bound by the group fee agreement; (2) that her refusal to sign the Amos & Andrews settlement conflicted with the other members of the group; and (3) that respondent, therefore, had an ethical obligation to withdraw as Walker's counsel.

Walker opposed respondent's motion to withdraw on the grounds that respondent agreed to represent her before any group was formed and that respondent should, therefore, withdraw from representing the group and not Walker. On November 10, 1999, the superior court granted respondent's motion to withdraw.

As of November 17, 1999, respondent had paid M&B a total of $301,666.66 in attorney's fees out of the Rancho Solano trust account. According to respondent, M&B was still owed $175,000, which was the one-third contingent fee on the $525,000 Amos & Andrews settlement.

On November 17, 1999, respondent filed a motion for entry of judgment pursuant to the terms of the Amos & Andrews settlement, which had been approved by the group. Respondent executed and filed a declaration in support of that motion for entry of judgment. Respondent attached, to his supporting declaration, an October 30, 1996, letter and an August 18, 1999, letter that Walker sent to respondent in confidence and that were privileged attorney-client communications.

On November 29, 1999, Walker filed an opposition to respondent's motion for entry of judgment, contending that she was not bound by the group fee agreement. But, on December 17, 1999, the superior court granted the motion for entry of judgment. Notably, the superior court's order specifically stated: "This ruling is without prejudice to Karen Walker to pursue whatever remedies may exist against her now former attorneys [M&B], if she believes they did not property represent her in this action."

On December 22, 1999, Attorney Passalacqua wrote a letter to the group informing the members that a unanimous vote was required to distribute the settlement proceeds. The letter stated that, if the clients could not unanimously agree on how to divide the clients' share of the $1.43 million in settlement proceeds, then the matter would have to be submitted to Attorney Blair for binding arbitration. The letter stated that, if the group unanimously decided to equally split the proceeds, then the owners of each lot would receive approximately $15,000.

Attorney Passalacqua's letter also stated: "However, a unanimous vote is unlikely. We believe that, under our agreement, if any one client lot insists on arbitration, he or she is entitled to arbitration. Still, it may be compelling to the arbitrator if a large majority advises him that it prefers equal allocation. At the very least, that should serve to make the arbitration less timely and thus less expensive. Because we represent all of you, we are unable to take a position that would harm any of you."

In December 1999, Walker employed Attorney William Balin to represent her in her disputes with respondent. And on December 24, 1999, Balin sent respondent and Attorney Passalacqua a letter informing them that Walker demanded that they allocate $160,000 out of the $1.43 million in settlement proceeds to Walker. The letter stated that, if they refused to do so, then Walker demanded arbitration of the distribution of the settlement proceeds. The letter also stated that Walker did not agree to the appointment of Attorney Blair as arbitrator.

Attorney Balin's letter also informed respondent that Walker disputed respondent's right to collect a contingent fee from her share of the settlement proceeds. It requested that respondent provide Walker with an accounting of the reasonable value of the legal services M&B had provided to her. The letter also demanded that respondent participate in a non-binding fee arbitration separate from the arbitration to be held allocating the settlement proceeds if Walker did not agree with respondent's accounting of the reasonable value of legal services performed for her. The letter also confirmed Walker's prior request that respondent give Walker her *entire* case file.

On January 4, 2000, respondent sent a letter to Attorney Balin in which respondent refused to provide an itemization of the legal services M&B provided Walker and in which respondent stated that, due to the conflicts of interest, M&B would not be advocating for or against any one client in the arbitration to divide the settlement proceeds.

On February 4, 2000, Walker submitted to Attorney Blair a statement indicating that she was entitled to a much greater share of the settlement than other members of the group because, among other reasons: her lot had much greater drainage and landslide issues; she suffered actual, as opposed to theoretical, damages; she actually sold her lot for substantially less than market value due to the drainage and landslide issues; and she submitted a claim for emotional distress damages, unlike the majority of the group.

On or about February 9, 2000, the parties participated in an arbitration before Attorney Blair. At the February 9, 2000 arbitration, respondent effectively advocated for "equal distribution" of the settlement proceeds and indicated that each party would receive approximately $15,000. By advocating for "equal distribution" of the settlement proceeds at the arbitration and in his August 19, 1999, letter respondent took a position adverse to Walker. Respondent failed to obtain Walker's informed written consent before he took the position that the settlement proceeds should be distributed equally.

On February 11, 2000, Walker sent Blair a letter indicating that she objected to Blair serving as the arbitrator. Soon thereafter, Blair refused to issue a ruling unless permitted to do so by court order. Accordingly, on June 30, 2000, respondent filed a motion to enforce settlement and direct binding arbitrator to allocate settlement proceeds.

On July 25, 2000, the superior court issued an order permitting Blair to issue his ruling regarding allocation of the settlement proceeds. At the hearing, the superior court stated that Walker could still pursue a malpractice action against respondent.

On May 5, 2000, Walker filed a request for fee arbitration with the Contra Costa County Bar Association. However, because respondent had never accounted to Walker for the attorney's fees and costs he charged her, the Contra Costa County Bar Association rejected and returned Walker's fee arbitration application.

In August 2000, Attorney Blair issued his arbitration ruling, finding that all lot owners were to split the proceeds evenly. Thereafter, in the Fall 2000, respondent distributed $15,732.42 to the owners of the 44 lots, including the Walkers. Enclosed with the checks, was a letter from respondent stating that M&B has withheld $10,000 of the settlement proceeds "as a precaution in case of unanticipated costs. Depending upon how that goes, you should receive a small additional check around the end of October [2000]." Also enclosed with the checks was

the first page of a September 25, 2000, "accounting" with respect to the Rancho Solano trust account. Even though that first page disclosed, inter alia, that respondent charged his clients (and collected out of the funds on deposit in the Rancho Solano trust account) $803.73 in "Interest Accrued and Paid on Attorneys Fees," the first page failed to disclose that about $3,900 remained in the Rancho Solano trust account as of September 25, 2000. What is more, the fact that $3,900 remained on deposit in the Rancho Solano trust account was not disclosed anywhere in the entire nine pages of the September 25, 2000, "accounting."

Respondent never accounted to his clients for the $3,900 that remained in the Rancho Solano trust account.[13] Instead, respondent testified in this disciplinary proceeding that, in March 2001, he paid $3,909.14 to M&B out of the Rancho Solano trust account. According to respondent's testimony, that $3,909.14 represented additional interest that he charged and collected on M&B's $476,666.66 attorney's fees in the Rancho Solano litigation.

Moreover, respondent testified in this disciplinary proceeding that he miscalculated the amount of additional interest that M&B charged and collected. According to respondent's testimony, M&B was entitled to charge and collect only $2,808 (not $3,909.14) in additional interest. Thus, according to respondent's own testimony, he negligently misappropriated $1,101.14 ($3,909.14 less $2,808) from the Rancho Solano trust account. But, as respondent admits, there was no agreement that authorized respondent or M&B to charge and collect any interest on M&B's attorney's fees in the Rancho Solano litigation. Therefore, it is clear that respondent willfully misappropriated the entire $3,909.14 in interest that he charged and collected in March 2001. Similarly, it is clear that respondent willfully misappropriated the $803.73 in interest that respondent disclosed on the first page of the September 25, 2000, "accounting."

[13] Nor did respondent ever account to his clients for the $91.95 in interest that the $3,900 earned between October 2000 and March 2001.

On August 18, 2000, Walker filed a complaint against, inter alia, respondent and Attorney Passalacqua for legal malpractice, breach of fiduciary duties, and breach of contract in the Solano County Superior Court (hereafter "Walker/Miles lawsuit").[14]

On March 5, 2001, respondent sent the owners of the 44 lots a letter in which he stated that, since his last letter to them, which accompanied the $15,732.42 checks, "There has only been one cost, a $378 charge to record a number of settlement memos with the County Recorder. No interest has accrued because it is below the bank minimum. Accordingly, enclosed is your final distribution, which represents:

$10,000 - $378 = $9,622 ÷ 44 = $218.68 per lot."

Respondent's statement, in his March 5, 2001, letter, that "No interest has accrued because it is below the bank minimum," was deliberately false. When respondent made that statement he knew that the reason the clients' $10,000 did not earn any interest was because he previously transferred the $10,000 from the Rancho Solano trust account to respondent's general CTA, which is an IOLTA account (i.e., an account in which the interest is paid to the State Bar).

The Walker/Miles lawsuit went to trial in April 2003. During trial, respondent stated how he computed the attorney's fees and costs he charged Walker in the Rancho Solano lawsuit. Respondent explained that he took the total litigation costs incurred of $286,000 and attorney's fees he charged of $476,666, and divided them by 44, apportioning the costs and fees equally to the owners of each lot. Therefore, each lot owner, including Walker, paid approximately $6,500 in costs and approximately $10,833 in attorney's fees.

[14] At about this same time, Walker filed a complaint against respondent with the State Bar.

On April 23, 2003, the jury returned a verdict for Walker in the Walker/Miles lawsuit. Respondent appealed, and in June 2006, the Court of Appeal affirmed the jury verdict and award. In July 2006, respondent and Walker entered into a settlement agreement (hereafter the Walker/Miles settlement agreement"). Respondent was represented in the Walker/Miles lawsuit by Attorney Harry C. Gilbert.

The Walker/Miles settlement agreement contains a covenant not to sue in which "Walker promises and agrees never to commence or prosecute against any of the Released Parties [including respondent] any legal action or other proceeding, including fee arbitration or State Bar complaints. . . ." Moreover, on February 6, 2007, respondent received a letter from the State Bar notifying him that it intended to file disciplinary charges against him based on his misconduct in the Walker matter. On February 7, 2007, Attorney Gilbert sent Walker a letter in which he asked her to withdraw the State Bar complaint she filed against respondent in light of the Walker/Miles settlement agreement. These facts support findings (1) that respondent was aware of the "covenant not to sue" provision at the time he and Walker executed the Walker/Miles settlement agreement and (2) that Attorney Gilbert sent his February 7, 2007, letter to Walker at respondent's request.

C. Conclusions of Law – Case Number 00-O-11978-LMA

Count 1 – – Representing Multiple Clients Whose Interests Potentially Conflict

In count 1, the State Bar alleges, inter alia, that, when respondent accepted representation of the owners of 43 Rancho Solano lots under the group fee agreement beginning in September 1994, respondent knew that the interests of those owners potentially conflicted with the interests of the Walkers. Moreover, the State Bar then charges that, in September 1994 when he accepted representation of the other property owners under the group fee agreement without first obtaining Walker's informed written consent, respondent willfully violated rule 3-310(C)(1) of the Rules

of Professional Conduct of the State Bar of California[15] because he accepted, without the informed written consent of the clients, representation of more than one client in a matter in which the interests of the clients potentially conflicted. The court finds that the State Bar established this foregoing charged violation by clear and convincing evidence.

First, it is hard to imagine an instance when the "joint" or "dual" representation of multiple plaintiffs in the same lawsuit would not involve a *potential* conflict of interest. Second, the differences between the Walker fee agreement and the group fee agreement *alone* created *potential* conflicts between Walker and the members of the group. Respondent knew that Walker's obligation to pay costs and right to reject an aggregate settlement agreement, regardless of the voting provision included in the group fee agreement, created at least potential conflicts of interests. Respondent should not have entered into the group fee agreement with any of the other property owners until (1) he fully disclosed to Walker the relevant circumstances and the reasonably foreseeable adverse consequences to Walker of respondent's representation of the group, and (2) he obtained her written informed consent.

Count 2 -- Fee Splitting Among Lawyers

In count 2, the State Bar charges that respondent willfully violated rule 2-200, which provides in relevant part: "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."

[15] Unless otherwise indicated, all further references to rules are to the Rules of Professional Conduct of the State Bar of California.

The record clearly establishes that respondent willfully violated rule 2-200 in December 1998 when, without Walker's written consent, respondent divided, with Attorney Robbins, the $5,000 contingent fee that M&B collected on the $15,000 Congdon settlement. Contrary to respondent's contentions, the fact that his fee splitting predated the Supreme Court's opinion in *Chambers v. Kay* (2002) 29 Cal.4th 142, is neither a defense nor a mitigating circumstance.

Count 3 – Unauthorized Aggregate Settlement of Claims

In count 3, the State Bar charges that respondent violated rule 3-310(D), which provides: "A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client." The record clearly establishes that respondent willfully violated rule 3-310(D) on August 23, 1999, when he stipulated to the final aggregate settlement of $525,000 without Walker's informed written consent.

Count 4 -- Representing Multiple Clients Whose Interests Actually Conflict

In count 4, the State Bar charges that respondent willfully violated rule 3-310(C)(2), which provides that an attorney must not, without the informed written consent of each client, "Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict."

The record clearly establishes that respondent knew that Walker's interests actually conflicted with many of the property owners who signed the group fee agreement no later than September 1999 when he received Walker's September 7, 1999, letter in which she stated that she refused to sign the $525,000 settlement with the remaining defendants and that she did not consider the case settled on her behalf. Moreover, the record clearly establishes that respondent never thereafter sought, much less obtained, Walker's informed written consent to continue to represent the other

property owners who had signed the group fee agreement. Accordingly, the record clearly establishes that respondent willfully violated rule 3-310(C)(2) when he continued to represent the group after September 1999 without first obtaining Walker's informed written consent.

Even though respondent's withdrawal as Walker's attorney under the superior court's November 10, 1999, order granting his motion to withdraw terminated respondent's rule 3-310(C)(2) violation, respondent's withdrawal did not vitiate nor ameliorate the violation. (Cf. *Flatt v. Superior Court (Daniel)* (1995) 9 Cal.4th 275, 288 ["So inviolate is the duty of loyalty to an existing client that not even by withdrawing from the relationship can an attorney evade it."].)

Moreover, because respondent chose to terminate the conflict by withdrawing from representing Walker, his conduct was also governed by rule 3-700(A)(2), which mandates that an attorney must "not withdraw from employment until the [attorney] has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

Count 5 -- Failure to Maintain Confidentiality

In count 5, the State Bar charges that respondent violated section 6068, subdivision (e)(1), which provides that an attorney must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The record clearly establishes that respondent willfully violated section 6068, subdivision (e)(1) when he filed his declaration supporting his November 17, 1999, motion for entry of judgment, which had copies of Walker's October 30, 1996, and August 18, 1999, letters attached to it.

"Even in the joint-client context, one client may have independent communications with the attorney that would be separately protected from disclosure to the other client. [Citation.]" (*Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 226.) Thus, it is clear that respondent violated Walker's confidence by using her attorney-client privileged communications to support his motion for entry of judgment.

Counts 6, 7 & 8 – Successive Representation Adverse to Former Client

In counts 6, 7, and 8, the State Bar charges that respondent violated rule 3-310(E), which provides that an attorney must not, without the informed written consent of the client or former client, accept representation adverse to the client or former client where, by reason of the former representation, the attorney obtained confidential information material to the new representation. Without question, where the former representation involved joint clients and where the new representation relates to the same subject matter, the attorney cannot undertake the new representation without the informed written consent of the former joint client or clients. (Cf. *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 1294; see also *Rosenfeld Const. Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 575 [if a substantial relationship between the prior representation and the new representation, the rights of the former client will prevail, conflict will be presumed, and disqualification will be ordered in the new representation].)

As noted *ante*, when the superior court granted respondent's motion to withdraw as Walker's attorney of record on November 10, 1999, respondent's continuing violation of rule 3-310(C)(2) by representing conflicting interests ended. However, as of November 10, 1999, respondent willfully began to violate rule 3-310(E) when, without obtaining Walker's informed written consent, he (1) continued to represent the property owners who signed the group fee agreement; (2) filed the November 17, 1999, motion for entry of judgment; (3) advocated for the

equal distribution of the settlement proceeds at the February 9, 2000, arbitration; and (4) filed the June 30, 2000, motion to enforce the settlement agreement.

Count 9 -- Failure to Obey the Laws of The State of California

In count 9, the State Bar charges that respondent violated his duty, under section 6068, subdivision (a), to obey the laws of this state and of the United States when he breached his common law fiduciary duties to Walker.[16] The court declines to find respondent culpable under count 9 because the court has relied on most, if not all, of the alleged breaches to find respondent culpable of misconduct charged in other counts.

Because the appropriate level of discipline for an act of misconduct does not depend on how many rules or statues proscribe the misconduct, it is inappropriate to find redundant violations. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 128, 148; see also *In the Matter of Van Sickle* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 980, 992.) Accordingly, count 9 is DISMISSED with prejudice as duplicative.

Count 10 -- Withdrawal of Disputed Client Funds

In count 10, the State Bar charges that respondent violated rule 4-100(A)(2), which provides in relevant part: "When the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved."

As noted *ante*, respondent withdrew from representing Walker effective November 10, 1999. At that point, respondent no longer had a right to collect a contingent fee from Walker. Nonetheless, if and only if respondent withdrew with "*justifiable cause*," he was entitled to quantum meruit fees for the services he provided to Walker before he withdrew. (*Estate of Falco v. Decker* (1987) 188 Cal.App.3d 1004, 1016; *Hensel v. Cohen* (1984) 155 Cal.App.3d

[16] The State Bar also charges that respondent violated his duty of loyalty to Walker. An attorney's fiduciary duties encompass the duty of utmost loyalty to his or her clients.

563, 568-569.) In that regard, a client's refusal to settle is not justifiable cause for an attorney to withdraw. (*Estate of Falco v. Decker, supra*, 188 Cal.App.3d at p. 1018.) Moreover, the fact that a court has granted an attorney's motion to withdraw does not, standing alone, establish justifiable cause. (*Id*. at p. 1014.)

Furthermore, in his December 24, 1999, letter to respondent, Attorney Balin clearly disputed respondent's right to collect a contingent fee on any portion of Walker's share of the settlement proceeds and requested an accounting of the reasonable value of the legal services M&B had provided to her before its withdrawal from representation. In that letter, Balin also demanded that, if Walker did not agree with respondent's accounting, respondent participate in a non-binding fee arbitration with Walker. Respondent, however, expressly refused to provide Walker with an accounting of the reasonable value of M&B's legal services.

Notwithstanding the foregoing facts, which clearly establish that respondent knew that Walker disputed his right to withdraw any additional attorney's fees out of the Rancho Solano trust account, respondent withdrew an additional $175,000 from that account on February 23, 2000. That $175,000 withdrawal was the one-third contingent fee on the $525,000 Amos & Andrews settlement.

In short, respondent willfully violated rule 4-100(A)(2) when he withdrew the $175,000 before the resolution of the dispute with Walker over his right to receive all of those funds. Even if Walker's claims were meritless, respondent was still required to maintain the disputed fees in the Rancho Solano trust account until the claims were adjudicated meritless or otherwise resolved.

Count 11—Misappropriation of Client Funds

In count 11, the State Bar charges respondent with willfully violating section 6106's proscription of attorney acts involving moral turpitude, dishonesty, or corruption by misappropriating $5,500 from Walker.

The record clearly establishes that, in September 2000, respondent assessed and collected from the owners of the 44 Rancho Solano lots (including the Walkers') about $6,500 in litigation costs. At that time, respondent knew that, under the Walker fee agreement, the Walkers were liable for only $1,000 in costs. Accordingly, when he assessed and collected $6,500 in costs from the Walkers, respondent willfully misappropriated at least $5,500 from the Walkers. Clearly, respondent's misappropriation of $5,500 from the Walkers involved moral turpitude, if not dishonesty, in willful violation of section 6106.

Because respondent has not established that he has made full restitution to the Walkers for the $5,500 he misappropriated from them, the court will recommend that he be required to make restitution to them now. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 15, & fn. 7.)

Count 12—Failure to Pay Client Funds Promptly

In count 12, the State Bar charges respondent with violating rule 4-100(B)(4), which requires that an attorney promptly pay, as requested by a client, any money in the attorney's possession to which the client is entitled. Specifically, the State Bar charges that respondent violated rule 4-100(B)(4) by failing to pay Walker the $5,500 he misappropriated from her in September 2000. Count 12 is clearly duplicative of count 11. And, as noted in count 9, *ante*, it is inappropriate to find such redundant violations. (*In the Matter of Torres, supra*, 4 Cal. State Bar Ct. Rptr. at p. 148; see also *In the Matter of Van Sickle, supra*, 4 Cal. State Bar Ct. Rptr. at p. 992.) Accordingly, count 12 is DISMISSED with prejudice.

Count 13 -- Failure to Account

In count 13, the State Bar charges respondent with violating his duty, under rule 4-100(B)(3), to render appropriate accounts to a client regarding all client funds and property coming into his possession. The record clearly establishes that respondent willfully violated rule 4-100(B)(3) by waiting until April 2003 to provide Walker with an appropriate accounting of the attorney's fee and costs he charged her.

Count 14 -- Seeking To Withdraw a State Bar Complaint

In count 14, the State Bar charges that respondent violated section 6090.5, subdivision (a)(2), which proscribes an attorney from agreeing or seeking to agree that a "plaintiff withdraw a disciplinary complaint or . . . not cooperate with the investigation or prosecution conducted by the [State Bar]."

Notwithstanding respondent's contention to the contrary, the record clearly establishes (albeit by circumstantial evidence) that respondent willfully violated section 6090.5, subdivision (a)(2) when (1) he and Walker executed the Walker/Miles settlement agreement, which contained the "covenant not to sue" clause and (2) Attorney Gilbert sent his February 7, 2007, letter to Walker.

Count 15 – Assisting in Violation of State Bar Act

In count 15, the State Bar charges that respondent violated rule 1-120, which prohibits an attorney from assisting in, soliciting, or inducing a violation of the rules or the State Bar Act. Specifically, the State Bar charges that respondent assisted in, solicited, or induced Attorney Gilbert to violate section 6090.5, subdivision (a)(2) by including the "covenant not to sue" provision of the Walker/Miles settlement agreement and by sending the February 7, 2007, letter to Walker. Under count 14, the court has found that respondent is directly responsible both for the "covenant not to sue" provision and for the February 7,

2007, letter to Walker. Accordingly, any violation of rule 1-120 based on that provision or that letter is fully encompassed in the misconduct found in count 14. Accordingly, count 15 is DISMISSED with prejudice as duplicative of count 14.

Count 16 – Moral Turpitude Based on Gross Overreaching

In count 16, the State Bar charges that respondent again willfully violated section 6106. According to the State Bar, respondent's misconduct, as charged in counts 1 through 15, *ante*, was surrounded by such overreaching that it involves moral turpitude, dishonesty or corruption. Count 16 is duplicative of the charges set forth in counts 1 through 15. Accordingly, count 16 is DISMISSED with prejudice.

D. Conclusions of Law – Case Number 07-O-13569-LMA

***Count 1* -- Misappropriation**

In count 1, the State Bar charges that, in March 2001, respondent willfully violated section 6106 by misappropriating $3,909.14 from the Rancho Solano trust account for his and M&B's own use and benefit. The record clearly establishes this charged violation of section 6106.

As note *ante*, neither respondent nor M&B had an agreement with either the Walkers or the property owners who signed the group fee agreement to charge and collect interest on the attorney's fees in the Rancho Solano litigation matter. At least in the absence of a written agreement to the contrary (cf. § 6147), all the interest earned on the funds deposited into the Rancho Solano trust account belonged exclusively to the Walkers and the other property owners. (Cf. § 6211, subd. (b).) To conclude otherwise, would condone respondent and M&B making a secret profit off their clients. The fact that respondent disclosed, on the first page of the September 25, 2000, "accounting," that he had paid M&B $803.73 in interest on the attorney's fees does not operate as an amendment to the Walker fee agreement or the group fee

agreement authorizing respondent to pay M&B interest on the attorney's fees. Moreover, even though the State Bar failed to charge respondent with misappropriating the $803.73 in interest in September 2000, the court will recommend that respondent be required to make restitution in the full amount of $4,712.87 ($3,909.14 plus $803.73).

Count 2 – Failure to Perform

In count 2, the State Bar charges that respondent violated rule 3-110(A), which provides that an attorney must not repeatedly, recklessly, or intentionally fail to perform legal services with competence. The record clearly establishes that, in willful violation of rule 3-110(A), respondent repeatedly and recklessly, if not intentionally, failed to perform legal services with competence (1) by failing to provide the Administrative Committee with the monthly bank statements for the Rancho Solano trust account and (2) by failing to maintain, in the Rancho Solano trust account, the $10,000 he withheld in the Fall of 2000 for unexpected costs so that the $10,000 would earn interest for his clients.

Count 3 – Concealment

In count 3, the State Bar charges that respondent willfully violated section 6106 by concealing, from his clients, that the $3,909.14 balance in the Rancho Solano trust account belonged to them and by concealing, from his clients, that he failed to maintain the $10,000 he withheld for unexpected expenses in the Rancho Solano trust account where it would have earned interest. The record, however, clearly establishes only the latter violation. Respondent's concealment that he failed to maintain the $10,000 in the Rancho Solano trust account involved deliberate dishonesty in that he lied to his clients, in his March 5, 2001, letter when he falsely stated that no interest was earned on the $10,000 because it was "below the bank's minimum."

Count 4 -- Failure to Withdraw Attorneys' Interest

In count 4, the State Bar charges that respondent willfully violated rule 4-100(A)(2), which provides in relevant part: "In the case of funds [in a client trust account] belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed." According to the State Bar, respondent violated rule 4-100(A)(2) when he waited until March 2001 to withdraw, from the Rancho Solano trust account, the $3,909.14 in interest he claims M&B was entitled to collect. The court cannot agree.

As noted *ante*, neither respondent nor M&B was entitled to collect interest on the attorney's fees collected in the Rancho Solano litigation. Moreover, in count 1, the court has already found respondent culpable of willfully misappropriating the $3,909.14.

Count 4 is DISMISSED with prejudice.

Count 5 -- Failure to Accounts for Client Funds

In count 5, the State Bar charges that respondent willfully violated rule 4-100(B)(3), which requires that an attorney render appropriate accountings to a client regarding all funds of the client coming into the attorney's possession. Specifically, the State Bar charges that respondent violated rule 4-100(B)(3) because he never accounted to his clients for the $3,909.14 that he withdrew from the Rancho Solano trust account in March 2001. Again, the court has already found, in count 1 *ante*, that respondent misappropriated the $3,909.14 and that his misappropriation involved moral turpitude in willful violation of section 6106. Surely, respondent's failure to account for the $3,909.14 is encompassed within the found section 6106 violation. Accordingly, count 5 is DISMISSED with prejudice.

Count 6 -- Commingling

In count 6, the State Bar charges respondent with willfully violating rule 4-100(A), which provides, in relevant part, that no funds belonging to an attorney or law firm may be deposited into a client trust account or otherwise commingled with client funds except for one limited exception not relevant here. According to the State Bar, respondent commingled his funds with those of his clients' when he kept the interest on the attorney's fees he collected in the Rancho Solano litigation in the Rancho Solano trust account after the funds purportedly belonged to respondent. Again, neither respondent nor M&B was entitled to collect any interest on the attorney's fees collected and withdrawn from the Rancho Solano trust account. Accordingly, respondent did not commingle any of his or M&B's funds with those of clients. Thus, count 6 is DISMISSED with prejudice.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Respondent was admitted to the practice of law in the State of California on December 21, 1967, and has no prior record of discipline. (Standard 1.2(e)(i).)

Respondent has demonstrated good character. (Standard 1.2(e)(vi).) Eight attorneys and one former client testified as to respondent's good character. Respondent was described as honest, having an excellent reputation, and having integrity and high moral character.

As further evidence of his good character, respondent has engaged in pro bono activities. (Standard 1.2(e)(vi).) Respondent has helped United Policy Holders prepare numerous amicus briefs and has engaged in other pro bono work with that organization.

B. Aggravation

Respondent engaged in multiple acts of wrongdoing. (Standard 1.2(b)(ii).)

In addition to the misconduct found earlier in this decision, respondent also engaged in uncharged misconduct. (Standard 1.2(b)(iii).) Respondent's numerous misrepresentations to the State Bar and the Superior Court of Solano County are acts of uncharged misconduct which involve moral turpitude. Furthermore, loans which respondent received from many of the group clients to cover the mounting litigation costs involved uncharged conflict of interest (rule 3-300) violations.

Respondent's misconduct also significantly harmed his client Walker. Respondent's conduct resulted in Walker having to endure years of litigation and extreme emotional turmoil. (Standard 1.2(b)(iv).)

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his actions. (Standard 1.2(b)(v).) Respondent has expressed no remorse and has failed to atone for the harm caused to his client Walker. He also has not offered to return any of the money he misappropriated from the group. Respondent has shown no recognition of the seriousness of his misconduct.

Furthermore, respondent failed to cooperate with the State Bar in this matter. (Standard 1.2(b)(vi).) Respondent's failure to enter into a stipulation as to facts which respondent admitted in his response to the two NDC's, required the State Bar to present evidence as to facts which respondent did not contest.

V. DISCUSSION

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal

profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession."

In addition, standard 1.6 provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards provide for the imposition of sanctions ranging from reproval to disbarment. (Standards 2.2(a), 2.2(b), 2.6 and 2.10.) In addition, standard 1.6(a) states, in pertinent part, "If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding, and different sanctions are prescribed by these standard for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions." In this case, the most severe sanction is standard 2.2(a). Standard 2.2(a) sets forth that the sanction for misappropriation is disbarment, unless the amount misappropriated is insignificant or the most compelling mitigating circumstances predominate, in which case, the discipline imposed must not be less than one year irrespective of mitigating circumstances.

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id*. at p. 251.)

Respondent has been found culpable of multiple violations of the ethics rules, including those relating to representing conflicting interests, misappropriation of client funds, failing to perform legal services competently and other trust accounting violations. In aggravation, the court considered multiple acts of misconduct as well as uncharged misconduct, client harm, indifference and lack of remorse, and not cooperating with the State Bar regarding uncontested

matters. Mitigating factors include no prior record of discipline since 1967, a very significant mitigating factor, as well as good character and pro bono activities.

The court found instructive *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576. In *Davis*, discipline was imposed consisting of four years' stayed suspension; four years' probation; and actual suspension for two years and until he complied with standard 1.4(c)(ii) and until he made restitution of $29,875.89 in misappropriated funds. Respondent Davis was found culpable of violating Rules of Professional Conduct 4-100(A)(2) and (B)(3) (withdrawing disputed funds from client trust account and failing to account, respectively) and section 6106 for misappropriating $29,875.89. In aggravation, the court considered client harm, overreaching, indifference toward rectification and uncharged misconduct consisting of multiple conflicts of interest. Mitigating factors included no prior record of discipline in twelve years of practice, good character witnesses, and community service which was afforded considerable weight.

The State Bar also contends that *Chang v. State Bar* (1989) 49 Cal.3d 114 supports its recommendation of disbarment. However, both *Chang* and *Davis* are particularly distinguishable from the instant proceeding. Respondent had an unblemished record of legal practice for nearly 27 years prior to his wrongdoing. This is a very significant mitigating circumstance. In contract, Chang and Davis had merely eight and twelve years, respectively, of discipline free practice prior to their misconduct. Respondent has therefore previously demonstrated that he can conform his conduct to the professional standards required of attorneys in this state. Thus, the court finds that disbarment is not warranted in this matter. Disbarment will not be recommended where there is no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 472..)

Therefore, having considered the nature and extent of the misconduct, the aggravating and mitigating circumstances, as well as the case law, the court believes a lengthy actual suspension of two years and until he has demonstrated his rehabilitation, present fitness to practice and present learning and ability in the general law will be sufficient to protect the public and deter respondent from further misconduct.

VI. RECOMMENDED DISCIPLINE

The court recommends that respondent **WILLIAM CHIPMAN MILES** be suspended from the practice of law in the State of California for four years; that the four-year suspension be stayed; and that he be placed on probation for five years on the following conditions.

1. Miles is actually suspended from the practice of law in the State of California for the first two years of his probation and until he shows proof satisfactory to the State Bar Court of rehabilitation, present fitness to practice, and present learning and ability in the law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

2. Miles is to comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all of the conditions of this probation.

3. Miles is to 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)(1)). In addition, Miles is to maintain, with the State Bar's Office of Probation, his current home address and telephone number (Bus. & Prof. Code, § 6002.1, subd. (a)(5)). Miles's home address and telephone number is not be made available to the general public unless it is his official addresses on the State Bar's Membership Records. (Bus. & Prof. Code, § 6002.1, subd. (d).)

4. Miles is to submit written quarterly reports to the California State Bar's Office of Probation on each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury under the laws of the State of California, Miles must state whether he has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar, and all conditions of this probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the next following quarter date, and cover the extended period.

   In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of any applicable privilege, Miles is to fully, promptly, and truthfully answer all inquiries of the California State Bar's Office of Probation that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.

6. Within the first year of his probation, Miles is (1) to attend and satisfactorily complete the State Bar's Ethics School and (2) to provide satisfactory proof of completion of that school (i.e., passage of the test given at the end of the school) to the State Bar's Office of Probation. Ethics School is offered periodically both at 180 Howard Street, San Francisco, California 94105-1639 and at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the school must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Miles's California Minimum Continuing Legal Education (hereafter MCLE) requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing Ethics School. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Within the first year of his probation, Miles is to attend and satisfactorily complete the State Bar's Ethics School -- Client Trust Accounting School; and to provide satisfactory proof of completion of that program to the State Bar's Office of Probation. The school is offered periodically both at 180 Howard Street, San Francisco, California 94105-1639 and at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the school must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from Miles's MCLE requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this school. (Accord, Rules Proc. of State Bar, rule 3201.)

8. During each calendar quarter in which Miles receives, possesses, or otherwise handles funds or property of a client (as used in this probation condition, the term "client" includes all persons and entities to which Miles owes a fiduciary or trust duty) in any manner, Miles must submit, to the State Bar's Office of Probation with the probation report for that quarter, a certificate from a California Certified Public Accountant certifying:

   (a) whether Miles has maintained a bank account that is designated as a "Trust Account," "Clients' Funds Account," or words of similar import in a bank in the State of California (or, with the written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction);

   (b) whether Miles has, from the date of receipt of the client funds through the period ending five years from the date of appropriate disbursement of the funds, maintained:

      (1) a written ledger for each client on whose behalf funds are held that sets forth:

         (a) the name and address of the client,
         (b) the date, amount, and source of all funds received on behalf of the client,
         (c) the date, amount, payee, and purpose of each disbursement made on behalf of the client, and
         (d) the current balance for the client;

      (2) a written journal for each bank account that sets forth:

         (a) the name of the account,

(b) the name and address of the bank where the account is maintained,
(c) the date, amount, and client or beneficiary affected by each debit and credit, and
(d) the current balance in the account;

(3) all bank statements and cancelled checks for each bank account; and

(4) each monthly reconciliation (balancing) of (1), (2), and (3) and, if there are any differences, an explanation of each difference; and

(c) whether Miles has, from the date of receipt of all securities and other properties held for the benefit of a client through the period ending five years from the date of appropriate disbursement of the securities and other properties, maintained a written journal 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 Miles does not receive, possess, or otherwise handle client funds or property in any manner in during an entire calendar quarter and if Miles includes, in his probation report for that quarter, a statement to that effect under penalty of perjury under the laws of the State of California, Miles is not required to submit a certificate from a Certified Public Accountant for that quarter.

9. Miles is to make restitution to Karen Walker and David Walker, jointly, in the total amount of $5,500 plus 10 percent simple interest thereon per annum from December 6, 2000, until paid (or to the Client Security Fund to the extent of any payment from the fund to either of the Walkers, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and is to furnish satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

10. Miles is to make restitution to Karen Walker, David Walker, and each of the property owners who signed the group fee agreement and received a portion of the $1.43 million of the settlement proceeds in the Rancho Solano litigation matter in their pro rata proportional shares (or to the Client Security Fund to the extent of any payment from the fund to the Walkers or the other property owners, plus interest and costs, in accordance with Business and Professions Code section 6140.5) for the $4,712.87 in interest that respondent charged and collected; respondent's restitution is to include interest at the rate of 10 percent simple interest per annum from April 4, 2001, until paid; and respondent is to furnish satisfactory proof of his complete restitution to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

11. Miles's probation will commence on the effective date of the order of the Supreme Court imposing discipline in this matter. If, at the expiration of the period of this probation, Miles has complied with all the terms of his probation, the order of the Supreme Court suspending him from the practice of law for four years will be satisfied, and the suspension will be terminated.

VII. MPRE, RULE 9.20 & COSTS

The court further recommends that Miles be ordered to take and pass the Multistate Professional Responsibility Examination (hereafter MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period. Failure to pass the MPRE within the specified time results in actual suspension by the review department, without further hearing, until passage. (But see also Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rules 320, 321(a) and (c).)

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

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

Dated: September 22, 2008.

LUCY ARMENDARIZ
Judge of the State Bar Court

[17] Miles 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 punishable as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, inter alia, cause for disbarment, suspension, and revocation of any pending disciplinary probation. (Cal. Rules of Court, rule 9.20(d).)