

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 05-O-04057, 05-O-04919,
)	06-O-14075-DFM
KEVIN A. SPEIR,)	
)	DECISION
Member No. 119044,)	
)	
A Member of the State Bar.)	

INTRODUCTION

In this original disciplinary proceeding, respondent **KEVIN A. SPEIR** (“respondent”) is charged with misappropriating funds held by him in trust for eight clients. In each of the cases, respondent acknowledges withdrawing funds from his client trust account deposited there for his clients, but he contends that he was authorized in each instance to do so by the client.

The State Bar had the burden of proving misconduct by clear and convincing evidence. While it did not do so for all of the counts alleged against respondent, the court concludes that it did so for the counts related to five of the clients. Because of the nature of respondent’s misconduct and the magnitude of the misappropriations, the court recommends that he be disbarred.

Deputy Trial Counsel Eli Morgenstern appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent was represented at trial by Chet Potter.

PERTINENT PROCEDURAL HISTORY

On December 26, 2007, the State Bar filed both the initial NDC and an Amended Notice of Disciplinary Charges (the latter of which will be referred to herein as the NDC). On February 1, 2008, respondent, then representing himself, filed his response to the NDC.

On November 7, 2008, the parties filed a Joint Motion to Sever and Abate Case No. 05-O-01420, which encompassed the first seven counts of the NDC, based on the pendency of criminal charges against respondent based on the same matter. That motion was granted by the court on November 13, 2008.

The remaining cases alleged in the NDC commenced trial on December 1, 2008. At that time a dispute arose between the parties as to whether there was a valid stipulation allowing the State Bar to elicit testimony over the telephone from a complaining witness. At the completion of the first day of trial, both sides rested, pending the court's ruling on the State Bar's motion to enforce the stipulation. Respondent was then given an opportunity to present his written opposition to having this court enforce the prior stipulation. Thereafter, when the court determined that an enforceable stipulation existed and that the telephonic testimony of the State Bar's complaining witness should be allowed, the record was re-opened on the motion of the State Bar for both the testimony of that witness and testimony of another client. The trial was then reconvened on February 20, 2009, and then completed on April 3, 2009, when rebuttal witnesses offered by respondent were available. Thereafter respondent filed a motion to re-open the case to submit additional character evidence. A final day of trial was held on May 8, 2009, followed by post-trial briefing and the receipt of additional documentary and character evidence. The matter was submitted on July 27, 2009.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on (1) a Stipulation as to Facts executed by the parties and (2) the evidence submitted at the trial of this matter.

Jurisdiction

Respondent was admitted to the practice of law in this state on August 12, 1985, and has been a member of the State Bar of California since that time.

Hill Matter [Case No. 05-O-04057]

From at least in or about 2004 through at least in or about 2006, respondent maintained a client trust account at Citibank designated as account number 3844060990 ("CTA").

On or about March 7, 2004, Lita Hill ("Hill") hired respondent to substitute into her personal injury action, replacing attorney Mindy Bish ("Bish") as her counsel. On or about March 7, 2004, respondent informed Hill that he would pay her medical providers out of any settlement proceeds he would obtain on her behalf.

On or about June 15, 2005, respondent settled Hill's case for \$12,500. In or about mid to late June 2005, respondent called Hill to tell her that her case had settled.

In or about late June 2005, Safeco Insurance Company mailed respondent a settlement check in the amount of \$12,500, payable to respondent, Hill, the Law Offices of Larry Parker, and Sedin, Begaks and Bish ("Hill's settlement check").

Respondent endorsed Hill's settlement check with her name. On or about July 6, 2005, respondent deposited Hill's settlement check into his CTA. On or about that day, following the deposit of Hill's settlement check into his CTA, the balance in the CTA was \$27,550.23. Thereafter, respondent made withdrawals from his CTA, including, but not limited to the following:

<u>Date:</u>	<u>Pavee:</u>	<u>Amount:</u>	<u>Balance:</u>
07/06/05	Cash Withdrawal	\$4,000	\$23,550.23
07/08/05	Cash Withdrawal	\$3,000	\$20,550.23
07/14/05	Cash Withdrawal	\$1,000	\$18,550.23
08/11/05	Cash Withdrawal	\$800	\$935.46
08/12/05	Cash Withdrawal	\$400	\$435.46

None of the withdrawals made by respondent from the CTA between on or about July 6, 2005 and on or about August 12, 2005, were to Hill, Hill's medical providers, or otherwise for the benefit of Hill.

As of August 30, 2005, respondent had not disbursed any of Hill's settlement funds to her or on her behalf.

From on or about July 6, 2005 to at least August 30, 2005, respondent was to have held at least the following amounts in his CTA on behalf of Hill:

<u>For:</u>	<u>Amount:</u>
Hill	\$4,000
Health Plus	\$1,610
Hemet Valley Emergency Medical Group	\$252
Orange County Bureau	\$2,001
Allen Group Ambulance	\$1,118
Hemet Radiology	\$117
TOTAL:	<u>\$9,098</u>

Respondent acknowledged at trial withdrawing Hill's funds from his client trust account and using those funds for his own purposes. He contends, however, that he did this only after asking Ms. Hill to be allowed to borrow the funds for a couple of weeks and after Ms. Hill agreed to the loan. The Court does not find this testimony to be credible or convincing. There is no written record of any such loan transaction between respondent and his client, and there is no evidence that he took the steps that would have been required of him by rule 3-300 if there had been such a business transaction with an existing client. Moreover, Ms. Hill testified both

emotionally and credibly that she never agreed to any such arrangement, and she presented documentary evidence corroborating that she was complaining at the time of this purported loan about not having received her funds and about respondent failing to return her calls.

After respondent had used Hill's funds for a period because of his financial problems, he eventually repaid the funds to her or paid it out on her behalf. Between September 7, 2005 and February 22, 2006, respondent issued checks from his personal account at Citibank made payable to Hill and the medical providers in the respective amounts listed in the above chart.

Count 7 – Failure to Maintain Client Funds in Trust Account [Rule 4-100(A)]

Rule 4-100(A) of the Rules of Professional Conduct 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. This obligation includes funds held by the attorney for the purpose of paying medical liens. (*In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 286.)

By intentionally withdrawing Ms. Hill's funds for his own use without authorization from his client, and by failing to maintain in his client trust account the balance of the funds received by him for Ms. Hill and her medical providers, respondent willfully failed to comply with rule 4-100(A).¹

¹ As noted, each of the above findings of culpability reflect in large part the stipulation reached between the State Bar and respondent, together with the court's own findings based on the evidence. However, the conduct underlying this violation is essentially the same as that underlying the finding, below, that respondent is culpable of the more serious misconduct of committing acts of moral turpitude (misappropriation) in willful violation of section 6106. Accordingly, the court finds no need to assess any additional discipline as a consequence of it. (See *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) This comment applies with equal vigor to the other clients, discussed below, for whom misappropriated funds initially deposited in his client trust account.

Count 8 – Moral Turpitude - Misappropriation [Section 6106]

Section 6106 of the Business and Professions Code prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, a finding of gross negligence will support such a charge where an attorney's fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

By intentionally withdrawing Ms. Hill's funds for his own use without authorization from his client, respondent intentionally misappropriated for his own purposes more than \$9,000 of his client's funds. Such conduct by him constitutes an act of moral turpitude, in willful violation of section 6106.

Daines-Madak Matter [Case No. 05-O-04919]

In or about 2004, respondent was hired by Nancy Daines-Madak ("Daines-Madak") to represent her in her marital dissolution. She paid him \$2,500 to handle the dissolution.

In or about mid-December 2004, respondent received a check from opposing counsel in the amount of \$29,869.93, representing Ms. Daines-Madak's share of the proceeds from the sale of the home formerly owned by Daines-Madak and her ex-husband.

On or about December 28, 2004, respondent deposited Daines-Madak's funds into his CTA. On or about that same day, following the deposit of Daines-Madak's funds into his CTA, the balance in the CTA was \$29,919.00. Between on or about December 28, 2004, and on or about December 31, 2004, respondent did not disburse any of the Daines-Madak's funds to Daines-Madak or to anyone on her behalf.

Between on or about December 28, 2004 and on or about December 31, 2004, respondent made four cash withdrawals for himself from the Daines-Madak's funds. In addition, between

on or about December 28, 2004 and on or about December 31, 2004, the balance in respondent's CTA fell below \$29,869.93 on repeated dates including, but not limited to the following:

<u>Date:</u>	<u>Pavee:</u>	<u>Amount:</u>	<u>Balance:</u>
12/28/04	Respondent	\$1,000	\$28,919.00
12/30/04	Respondent	\$25,000	\$3,669.00
12/31/04	Respondent	\$1,000	\$4,636.06
12/31/04	Respondent	\$1,000	\$3,623.82

Respondent testified that Ms. Daines-Madak had agreed to loan him the money in exchange for his agreement not to charge her any additional fees for handling the dissolution action. The Court does not find this testimony to be credible or convincing. There is no written record of any such loan transaction between respondent and his client, and there is no evidence that he took the steps that would have been required of him by rule 3-300 if there had been such a business transaction with an existing client. Moreover, Ms. Daines-Madak, who is employed at the San Bernardino Sheriff's Department, testified credibly that she never agreed to any such arrangement. Instead she complained that she had felt that the dissolution was taking too long to be finalized; that she had only gotten \$10,000 of the funds in April 2005, when she indicated to respondent that she needed funds; and that she did not get the remaining funds until the dissolution was finalized in May 2005.

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

By intentionally withdrawing Ms. Daines-Madak's funds for his own use without authorization by his client, and by failing to maintain in his client trust account the balance of the funds received by him for Ms. Daines-Madak, respondent willfully failed to comply with rule 4-100(A).

Count 10 – Moral Turpitude - Misappropriation [Section 6106]

By intentionally withdrawing Ms. Daines-Madak's funds for his own use without authorization from his client, respondent intentionally misappropriated for his own purposes more than \$25,000 of Ms. Daines-Madak's funds. Such conduct by him constitutes an act of moral turpitude, in willful violation of section 6106.

Faraci Matter [Case No. 05-O-04919]

In or about 2004, respondent was hired by Nadia Faraci ("Faraci") to represent her in a personal injury matter. In or about the Spring 2004, Faraci's case settled for \$5,500. In or about early May 2004, Robert Moreno Insurance Services mailed respondent a check payable to Faraci and respondent in the amount of \$5,500 ("Faraci's funds").

On or about June 28, 2004, respondent deposited Faraci's funds into his CTA. On or about that day, following the deposit of Faraci's funds into his CTA, the balance in the CTA was \$6,618.73. Faraci was entitled to, and respondent was to have held, no less than \$3,488.50 for her from her settlement.

Between on or about June 28, 2004 and on or about November 25, 2004, respondent did not disburse any of Faraci's funds to Faraci or to anyone on her behalf. Between in or about those dates, the balance in the CTA fell below \$3,488.50 on repeated dates including, but not limited to the following:

<u>Date:</u>	<u>Balance:</u>
06/30/04	\$4,618.73
07/02/04	\$2,018.73
07/09/04	\$ 818.73
08/18/04	\$ 227.57
09/02/04	\$ 127.57

On November 22, 2004, respondent issued a check from his CTA payable to Faraci in the amount of \$3,488.50.

Respondent testified that Ms. Faraci was a longtime friend and client and was aware that he was going through financial problems. He further indicated that he asked Ms. Faraci whether he could use her funds for awhile and that she agreed that he could. He then testified that he subsequently repaid all of the funds to Ms. Faraci.

During a latter session of the trial, Ms. Faraci was called by respondent as a witness at trial. She agreed with respondent's recollection of the events. She testified that she was aware of the settlement, that she had endorsed the settlement check, and that she had authorized respondent to borrow and use the funds for his own purposes as a loan. Finally, she confirmed that he subsequently repaid to her all of the money.

Count 11 – Failure to Maintain Client Funds in Trust Account [Rule 4-100(A)]

The State Bar has failed to present clear and convincing evidence of a willful violation of rule 4-100(B)(3) by respondent as alleged in the NDC with regard to the Faraci funds. Respondent was authorized by the client to withdraw the funds from his trust account as a loan by her to him. He then repaid the funds directly to her. Accordingly, this count is dismissed with prejudice.

Count 12 – Moral Turpitude - Misappropriation [Section 6106]

The State Bar has failed to present clear and convincing evidence of a willful violation of section 6106 by respondent as alleged in the NDC with regard to the Faraci funds. Respondent was authorized by the client to withdraw the funds from his trust account as a loan by her to him. He then repaid the funds directly to her. Accordingly, this count is dismissed with prejudice.

Johnson Matter [Case No. 05-O-04919]

In or about 2004, respondent was hired by Darlene Johnson (“Johnson”) to represent her in a personal injury matter. In or about September 2004, Johnson’s case settled for \$10,000. On or about September 21, 2004, Royal Surplus Lines Insurance Company mailed respondent a check payable to Johnson and respondent in the amount of \$10,000 (“Johnson’s funds”).

On or about September 28, 2004, respondent deposited Johnson’s funds into his CTA. On or about that day, following the deposit of Johnson’s funds into his CTA, the balance in the CTA was \$10,127.57.

Johnson was entitled to, and respondent was to have held, no less than \$6,666 from the settlement.

Between on and about September 28, 2004 and on or about December 2, 2004, Respondent did not disburse any of Johnson’s funds to Johnson or to anyone else on her behalf. Between in or about those dates, the balance in the CTA fell below \$6,666 on repeated dates, including but not limited to the following:

<u>Date:</u>	<u>Balance:</u>
10/05/04	\$5,427.57
10/13/04	\$1,427.57
11/26/04	\$619.07
12/02/04	[-\$4,380.93]

On December 12, 2004, respondent issued a check from his CTA made payable to Johnson in the amount of \$5,000.

On January 3, 2005, respondent issued two checks from his CTA made payable to Johnson in the amount of \$1,000 and \$666, respectively.

Respondent acknowledges that there was a negative balance in his client trust account in December, explaining that he was “derelict” in his bookkeeping. However, he also testified that Ms. Johnson had agreed to allow him to use her money prior to him disbursing the funds to her in mid-December. The Court does not find this testimony to be credible or convincing. There is no written record of any such loan transaction between respondent and his client, and there is no evidence that he took the steps that would have been required of him by rule 3-300 if there had been such a business transaction with an existing client. Moreover, Ms. Johnson testified credibly that she never agreed to any such arrangement. Instead she complained that respondent had initially attempted to settle his account with her by paying her less than the sum to which she believed she was entitled. It was only after she complained that he paid her the additional funds in January 2005.

Count 13 – Failure to Maintain Client Funds in Trust Account [Rule 4-100(A)]

By intentionally withdrawing Ms. Johnson’s funds for his own use without authorization from his client, and by failing to maintain in his client trust account the balance of the funds received by him for Ms. Johnson, respondent willfully failed to comply with rule 4-100(A).

Count 14 – Moral Turpitude - Misappropriation [Section 6106]

By intentionally withdrawing Ms. Johnson’s funds for his own use without authorization from his client, respondent intentionally misappropriated for his own purposes more than \$6,000 of Ms. Johnson’s funds. Such conduct by him constitutes an act of moral turpitude, in willful violation of section 6106.

Page Matter [Case No. 05-O-04919]

In or about 2004, respondent represented Mike Page (“Page”) in a matter against Page’s ex-wife, Donna (“Donna”). On or about November 12, 2004, Page wrote respondent a \$5,000 check payable to respondent (“Page’s check”). Pursuant to the agreement between respondent

and Page, respondent was to deposit Page's check into his CTA and thereafter issue a check to Donna in the amount of \$5,000 for settlement of the dispute between Page and Donna.

On or about November 12, 2004, respondent deposited Page's check into his CTA. On or about that day, following the deposit of Page's check in the CTA, the balance in the CTA was \$14,927.57.

Between on or about November 12, 2004 and on or about December 2, 2004, respondent did not disburse Page's check to Donna or to anyone on Page's or Donna's behalf. Between those dates, the balance in the CTA fell below \$5,000 on repeated dates, including but not limited to the following:

<u>Date:</u>	<u>Balance:</u>
11/24/04	\$4,107.57
12/01/04	\$619.07

On or about November 17, 2004, respondent wrote Donna check number 1640 from his CTA in the amount of \$5,000. On or about December 2, 2004, when Donna presented the check to the bank for payment, the balance in respondent's CTA was [-\$4,380.93], and so the check was not paid. On or about December 17, 2004, Donna again presented the check to the bank for payment, but the balance in respondent's CTA was then [-\$4,410.93] and so the check was again not paid.

On or about December 20, 2004, respondent provided Donna with a cashier's check in the sum of \$5,010.

Respondent testified that Page had agreed to allow him to use the money prior to his disbursing the funds to Donna. Mr. Page was called as a witness by the State Bar. During the cross-examination of him by respondent's counsel, Page corroborated respondent's testimony.

Count 15 – Failure to Maintain Client Funds in Trust Account [Rule 4-100(A)]

The State Bar has failed to present clear and convincing evidence of a willful violation of rule 4-100(B)(3) by respondent as alleged in the NDC with regard to the Page funds.

Respondent was authorized by the client to withdraw the funds from his trust account as a loan by the client to respondent. Accordingly, this count is dismissed with prejudice.

Count 16 – Moral Turpitude - Misappropriation [Section 6106]

The State Bar has failed to present clear and convincing evidence of a willful violation of section 6106 by respondent as alleged in the NDC with regard to the Page funds. Respondent was authorized by the client to withdraw the funds from his trust account as a loan by the client to respondent.² Accordingly, this count is dismissed with prejudice.

Barton Matter [Case No. 05-O-04919]

On or about July 23, 2004, respondent issued check number 1629 from his CTA in the amount of \$25,000 to his client, Diana Barton (“Barton”). The “memo” portion of check number 1629 said “p.i. settlement.” The funds paid to Barton reflected monies previously received by respondent at least several months before as a consequence of a settlement of a case being handled by respondent for Barton.

Between November 1, 2003 and July 23, 2004, no settlement funds were deposited into respondent’s CTA on behalf of Barton. Between on or about November 1, 2003 and on or about July 23, 2004, the balance in the CTA fell below \$25,000 on repeated dates including, but not limited to the following:

<u>Date:</u>	<u>Balance:</u>
03/01/04	\$238.73

² Respondent’s acts of issuing bad checks on his CTA are not the basis for the charge in the NDC of a violation of section 6106. Nor did the State Bar present clear and convincing evidence that such acts constitutes acts of moral turpitude by respondent.

05/24/04	\$2,887.73
07/09/04	\$818.73

Respondent acknowledges during the trial that he did not deposit these settlement funds into his CTA. He was unable to explain why he had not, other than to say that he was undergoing financial and emotional problems at the time. At the same time, he cannot explain where the money was retained or how it was used.

Respondent did acknowledge using the funds for his own purposes for at least a couple of months. He contends, however, that he did this only after asking Barton to be allowed to borrow her funds if he needed to and being told by her that he could. The Court does not find this testimony to be credible or convincing. There is no written record of any such loan transaction between respondent and his client, and there is no evidence that he took the steps that would have been required of him by rule 3-300 if there had been such a business transaction with an existing client.

Count 17 – Failure to Maintain Client Funds in Trust Account [Rule 4-100(A)]

By failing to deposit and maintain Ms. Barton’s funds in his client trust account, respondent willfully failed to comply with rule 4-100(A).

Count 18 – Moral Turpitude - Misappropriation [Section 6106]

By intentionally using Ms. Barton’s funds for his own purposes without authorization from his client, respondent misappropriated those funds. Such conduct by him constitutes an act of moral turpitude, in willful violation of section 6106.

Bryant Matter [Case No. 05-O-04919]

In or about 2005, respondent represented Cynthia Bryant (“Bryant”) in her marital dissolution. On or about September 1, 2005, respondent received a check payable to Bryant and

respondent in the amount of \$28,000 from Bryant's ex-husband for the husband's "final divorce payment" to Bryant ("Bryant's funds"). On or about September 2, 2005, respondent deposited Bryant's funds into his CTA.

On or about that day, following the deposit of Bryant's funds in his CTA, the balance in the CTA was \$35,430.11.

Between on or about September 2, 2005, and on or about September 23, 2005, respondent did not disburse any of Bryant's funds to her or to anyone on her behalf. Between in or about those dates, respondent made the following ten cash withdrawals from his CTA, and the balance in his CTA fell below \$28,000 on repeated dates, including but not limited to the following:

<u>Date:</u>	<u>Payee:</u>	<u>Amount:</u>	<u>Balance:</u>
09/06/05	Respondent	\$10,000	\$24,930.11
09/08/05	Respondent	\$4,000	\$20,930.11
09/12/05	Respondent	\$1,000	\$19, 930.11
09/12/05	Respondent	\$1,000	\$18,930.11
09/13/05	Respondent	\$2,000	\$16,977.11
09/13/05	Respondent	\$3,000	\$13,977.11
09/13/05	Respondent	\$2,000	\$11,977.11
09/16/05	Respondent	\$1,000	\$10,977.11
09/22/05	Respondent	\$1,500	\$9,477.11
09/23/05	Respondent	\$600	\$8,877.11

Respondent testified that he represented Bryant in several matters and that she agreed that he could use the funds he had collected on her behalf while she was incarcerated as a result of a criminal conviction. In exchange for this loan of funds, respondent represented Bryant on several other matters for no charge. He eventually repaid all of the money to her after she was released.

During the April 3 session of the trial, Ms. Bryant (now Ms. Gasnar) was called by respondent as a witness at trial. She agreed with respondent's recollection of the events. She testified that she had authorized respondent to borrow and use her funds for his own purposes as a loan while she was in jail. In exchange for this loan, he represented her for free. Finally, she confirmed that he subsequently repaid to her all of the money.

Count 19 – Failure to Maintain Client Funds in Trust Account [Rule 4-100(A)]

The State Bar has failed to present clear and convincing evidence of a willful violation of rule 4-100(B)(3) by respondent as alleged in the NDC with regard to the Bryant funds. Respondent was authorized by the client to withdraw the funds from his trust account as a loan by the client to respondent. Accordingly, this count is dismissed with prejudice.

Count 20 – Moral Turpitude - Misappropriation [Section 6106]

The State Bar has failed to present clear and convincing evidence of a willful violation of section 6106 by respondent as alleged in the NDC with regard to the Bryant funds. Respondent was authorized by the client to withdraw the funds from his trust account as a loan by the client to respondent. Accordingly, this count is dismissed with prejudice.

Mares Matter [Case No. 06-O-04057]

On or about June 8, 2006, State Farm Insurance Company ("State Farm") issued a check in the amount of \$4,000 payable to respondent and his client, Arthur Mares, for settlement of a claim by Mares. On or about June 15, 2006, respondent deposited this settlement check into his CTA.

On or about June 15, 2006, following the deposit of the Mares settlement check into his CTA, the balance in the CTA was \$12,504.49. Mares was entitled to no less than \$2,653 of the \$4,000 settlement funds.

On or about June 16, 2006, respondent issued check number 1711 from his CTA in the amount of \$2,653 to Mares. On or about June 22, 2006, when Mares presented check number 1711 to the bank for payment, the balance in respondent's CTA was [-\$1,456.51].

In or about late June 2006, Mares informed respondent that check number 1711 had bounced and respondent then gave Mares cash in the amount of \$2,653.

Respondent acknowledged at trial withdrawing the Mares funds from his client trust account and using those funds for his own purposes. He contends, however, that he did this only after asking Mares to be allowed to borrow the funds and after Mares had agreed to the loan. The Court does not find this testimony to be credible or convincing. There is no written record of any such loan transaction between respondent and his client, and there is no evidence that respondent took the steps that would have been required of him by rule 3-300 if there had been such a business transaction with an existing client.

Count 21 – Failure to Maintain Client Funds in Trust Account [Rule 4-100(A)]

By intentionally withdrawing the Mares funds for his own use without authorization from his client, and by failing to maintain in his client trust account the balance of the funds received by him for Mares, respondent willfully failed to comply with rule 4-100(A).

Count 22 – Moral Turpitude - Misappropriation [Section 6106]

By intentionally withdrawing Mares' funds for his own use without authorization from his client, respondent intentionally misappropriated for his own purpose more than \$2,600 of the Mares funds. Such conduct by him constitutes an act of moral turpitude, in willful violation of section 6106.³

³ A dip in the balance of the attorney's client trust account below the required level is a prima facie showing of "willful misappropriation." (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122-123.)

Aggravation

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).)⁴

Multiple Acts of Misconduct

Respondent's misconduct in the present proceeding involves multiple acts of misconduct. (Std 1.2(b)(ii).)

Significant Client Harm

Respondent's misconduct caused significant client harm. (Std. 1.2(b)(iv).)

Lack of Candor, Insight and Remorse

Respondent fails to demonstrate any realistic recognition of or remorse for his wrongdoings and instead continued during his testimony in this matter to falsely assert that his actions in withdrawing client funds from his CTA were authorized and appropriate. (Std. 1.2(b)(v).) "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

Uncharged Violations

Respondent consistently sought to justify his actions in withdrawing client funds from his CTA by stating that he had entered into agreements with existing clients whereby they would loan money to him. As noted above, some of such agreements were corroborated by testimony elicited by respondent from his clients. Those corroborated business transactions required compliance by respondent with rule 3-300. The testimony was uncontradicted and consistent

⁴ All further references to standards are to this source.

that there was no such compliance, and the transactions represent willful violations by respondent of his duties under rule 3-300. Such misconduct may be considered by the court in assessing what discipline is appropriate to address culpability for misconduct that has been charged.

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Standard 1.2(e).)

No Prior Discipline

Respondent practiced law in California for approximately 10 years prior to the commencement of the instant misconduct. During that span, respondent had no prior record of discipline, entitling him to “full” mitigation credit. (Std. 1.2(e)(i); *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88)

Cooperation

Respondent entered into an extensive stipulation of facts, for which conduct respondent is entitled to some mitigation. (Std. 1.2(e)(v); see also *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443.)

Character Evidence

Respondent presented good character testimony from a number of different individuals, including several attorneys. While this evidence is given some weight by the court, that weight is diminished by the lack of awareness by the witnesses of the nature of the pending charges against respondent. (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190; *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 359.)

Restitution

Although respondent misappropriated the funds of his clients for his own temporary use, he also repaid all of such sums to those clients prior to any complaint being made to the State Bar or the initiation of these disciplinary proceedings. Such conduct is a mitigating factor. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 13, citing *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310; *Weller v. State Bar* (1989) 49 Cal.3d 670, 676; *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1089; *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366-1367; *Waysman v. State Bar* (1986) 41 Cal.3d 452.)

Emotional/Family Circumstances

Respondent at various times during his testimony alluded to the fact that he was undergoing marital stress and financial problems during the time of his misconduct. He also indicated that these problems caused him to use his clients' funds. The court gives respondent very little mitigation credit on this issue, since it was not established to the court's satisfaction that these stressors have been resolved or will not result in future misconduct.

DISCUSSION

Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the review department noted more than 18

years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not do so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6(a) provides that, if two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions.

The most severe sanction is found at standard 2.2(a) which recommends disbarment for willful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is a one-year actual suspension. Misappropriation of client funds has long been viewed as a particularly serious ethical violation. It breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar*, (1991) 53 Cal. 3d 1025, 1035; *Kelly v. State Bar* (1988) 45 Cal. 3d 649, 656.)

The amount of money misappropriated by respondent from his various clients cannot be characterized as “insignificantly small.” In fact it was quite the contrary.

While the court recognizes that there are significant mitigating factors present, when those factors are weighed against the significant nature and magnitude of the misconduct and the substantial aggravating factors, the court find that there are not adequate reasons to deviate from the standards in this instance. Rather the protection of both the public and the profession dictate that an order of disbarment be imposed. The absence of any prior discipline does not compel or justify here a contrary result. (See, e.g., *Kaplan v. State Bar* (1991) 52 Cal.3d 1067; *In re Abbott* (1977) 19 Cal.3d 249.)

DISCIPLINE RECOMMENDATION

Disbarment

The court hereby recommends that respondent **Kevin A. Speir** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this State.

Rule 9.20

The court recommends that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.⁵

Costs

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

VII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after service of this order.

Dated: October _____, 2009

DONALD F. MILES
Judge of the State Bar Court

⁵ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar*, *supra*, 44 Cal.3d 337, 341.) In addition to being punished as a crime or a 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).)