

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

|                                   |   |                          |
|-----------------------------------|---|--------------------------|
| In the Matter of                  | ) | Case No.: 08-O-14901-RAP |
|                                   | ) |                          |
| PHILLIP ERIC MYERS                | ) | DECISION AND ORDER OF    |
|                                   | ) | INVOLUNTARY INACTIVE     |
| Member No. 77543                  | ) | ENROLLMENT               |
|                                   | ) |                          |
| <u>A Member of the State Bar.</u> | ) |                          |

**I. Introduction**

In this default disciplinary matter, respondent **Phillip Eric Myers** is charged with seven counts of professional misconduct. The court finds, by clear and convincing evidence, that he is culpable of four the charged acts of misconduct.

In view of respondent's extremely serious misconduct and the evidence in aggravation, which is not outweighed by mitigating circumstances, the court recommends that respondent be disbarred from the practice of law.

**II. Significant Procedural History**

On October 29, 2010, the State Bar of California, Office of the Chief trial Counsel (State Bar) filed and properly served a notice of disciplinary charges (NDC) on respondent. On January 7, 2011, respondent filed his response to the NDC.

On April 6, 2011, the State Bar filed a motion to amend the NDC, based on the grounds that the amendment to the NDC was necessary to conform the allegations to the evidence to be

introduced at trial. Attached to the State Bar's motion to amend was the State Bar's First Amended Notice of Disciplinary Charges (Amended NDC).

On April 18, 2011, a pretrial conference was held in this matter. Respondent and Deputy Trial Counsel (DTC) Charles Calix (Calix) appeared at that pretrial status conference. The court issued an order, which required respondent to file a response to the State Bar's motion to amend by April 26, 2011.

Thereafter, on April 21, 2011, respondent filed his answer to the State Bar's Amended NDC.

Respondent, however, did not appear for trial on April 26, 2011. The State Bar appeared by and through DTC Calix. Given respondent's nonappearance at trial and given that the requirements of rule 201 of the Rules of Procedure of the State Bar of California (Rules of Procedure)<sup>1</sup> had been met, the court entered respondent's default,<sup>2</sup> granted the State Bar's Motion to Amend the NDC, and ordered that respondent's answer to the Amended NDC be stricken. The court also heard evidence in the form of testimony from two witnesses, Ronald Berryessa and Cheryl Nell Applegate. The court admitted into evidence the State Bar's Exhibits 1 and 16 through 59.

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<sup>1</sup> Effective January 1, 2011, the Rules of Procedure of the State Bar of California were amended. The court, however, orders the application of the former Rules of Procedure in this hearing department matter based on its determination that injustice would otherwise result. (See Rules Proc. of State Bar (eff. January 1, 2011), Preface.) Therefore, all references to the Rules of Procedure in this decision are to the former rules of procedure, which were in effect prior to January 1, 2011, unless otherwise stated.

<sup>2</sup> On April 27, 2011, the court filed the Order of Entry of Default (Rule 201 - Failure to Appear) and Order of Involuntary Inactive Enrollment in case No. 08-O-14901.

A copy of the court's orders were filed and properly served on respondent on April 27, 2011, by certified mail, return receipt requested, addressed to respondent at his official address.<sup>3</sup> The return receipt, bearing an illegible signature, was received by the court on April 28, 2011.

Thereafter, on May 18, 2011, the court took the matter under submission following the filing of the State Bar's Closing Brief regarding culpability and discipline.

### **III. Findings of Fact and Conclusions of Law**

All factual allegations of the Amended NDC are deemed admitted upon entry of respondent's default. (Rules Proc. of State Bar, rule 201.)

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in California on December 21, 1977, and has been a member of the State Bar of California at all times since that date.

#### **B. The Buckalew Trust Matter (Case No. 08-O-14901)**

##### **Facts**

In or before 2001, respondent became the trustee of the Lynela Buckalew 2000 Revocable Trust (Buckalew Trust). On or about October 22, 2001, the Buckalew Trust became the owner of residential property (Brookings house) located in Brookings, Oregon. At or about that time, Lynela Buckalew (Buckalew), the trustor of the Buckalew Trust (Exh. 1), relocated to the Brookings house, where she resided until her death. Ciara Berryessa (Berryessa), daughter of Lynela Buckalew, was a beneficiary<sup>4</sup> of the Buckalew Trust, as were her siblings Ronald Berryessa (Ron) and Denise Carbaugh (Carbaugh).

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<sup>3</sup> Pursuant to Business and Professions Code section 6007, subdivision (e), respondent's involuntary inactive enrollment was effective April 30, 2011, three days after the service of the Order of Involuntary Inactive Enrollment by mail.

<sup>4</sup> It is alleged in paragraph three of the NDC that Berryessa was the "sole" beneficiary of the Buckalew Trust. However, the facts as set forth in Count Four, documentary evidence (e.g., Exh. 1), and the testimony of Ronald Berryessa, provide clear and convincing evidence that Berryessa was not the "sole" beneficiary of the Buckalew Trust.

On or about August 10, 2005, Buckalew died. (Exh. 16.)

In 2007, Berryessa, who has a cognitive disability, relocated to Oregon and began receiving developmental disabilities services from the Lane County Health and Human Services Department. Berryessa was also receiving assistance from Arc of Lane County, a nonprofit organization that was acting as a fiduciary by paying Berryessa's bills.

On January 12, 2007, respondent caused \$30,000 to be transferred from another account into the Buckalew trust account (Buckalew TA), which caused the balance to increase to \$30,002.08.

On January 18, 2007, respondent caused \$1,000 to be transferred out of the Buckalew TA to another account, reducing the balance to \$28,502.08.

On January 18, 2007, respondent caused \$25,000 to be transferred out of the Buckalew TA to another account, reducing the balance to \$3,502.08.

On January 19, 2007, respondent caused \$50,000 to be transferred from another account into the Buckalew TA, which caused the balance to increase to \$53,502.08.

On January 26, 2007, respondent caused \$10,000 to be wired out of the Buckalew TA to Jordon Myers, his daughter in England, thereby reducing the balance to \$43,472.08, once the \$30 wire fee was paid.

On February 5, 2007, respondent caused \$40,000 to be transferred out of the Buckalew TA to another account, reducing the balance to \$1,972.08.

On February 15, 2007, respondent caused \$30,000 to be wired from Robert Able into the Buckalew TA, which caused the balance to increase to \$31,972.08.

On February 20, 2007, respondent caused \$30,000 to be transferred out of the Buckalew TA to another account, reducing the balance to \$1,962.08.

In March 2007, the Brookings house was sold.

On March 16, 2007, respondent caused \$95,721.04 from the sale of the Brookings house to be wired from 1st American Title Insurance, the escrow company handling the sale of the Brookings house, into the Buckalew TA. The \$95,721.04 proceeds were deposited in the Buckalew TA. There was also a debit of \$10 for the wire transfer of the \$95,721.04 from 1st American Title Insurance; therefore, the remaining balance of the Brookings house sale proceeds on March 16, 2007, was \$95,711.04. On March 16, 2007, the balance in the Buckalew TA increased to \$97,673.12. (Exhibit 43, p. 5.)

During the period from March 2007 through August 2007, respondent disbursed approximately \$4,690 from the Buckalew TA to Arc of Lane County to pay Berryessa's living expenses. In or about May 2007, respondent also caused a check for \$2,000 to be paid to Carbaugh, another daughter of Lynela Buckalew and a beneficiary of the Buckalew Trust. (Exhibit 43, p. 38.) The disbursements to Berryessa and Carbaugh together totaled \$6,690. Thereafter, respondent made no further disbursements to or on behalf of the Buckalew Trust or its beneficiaries.

After the \$6,690 disbursements were made on behalf of and to two of the beneficiaries, respondent, as Trustee of the Buckalew Trust, was required to maintain the sum of at least \$89,021.04<sup>5</sup> from the sale of the Brookings house in the Buckalew TA, in trust for the benefit of the Buckalew Trust or the beneficiaries.

On March 20, 2007, respondent caused \$50,000 to be electronically transferred out of the Buckalew TA, reducing the balance to \$47,683.12.

On March 28, 2007, respondent caused \$12,000 to be electronically transferred out of the Buckalew TA, reducing the balance to \$35,683.12.

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<sup>5</sup> After the \$6,690 was disbursed from the Buckalew TA, the remaining balance in the trust account should have been \$89,021.04. ( $\$95,711.04 - \$6,690 = \$89,021.04$ )

By letter dated April 13, 2007, respondent informed staff at the Lane County Department of Health and Human Services that he would be making a disbursement from the Buckalew Trust to Berryessa in a sum he estimated to exceed \$20,000 within a couple of months after a final accounting had been completed.

On April 27, 2007, respondent caused \$10,000 to be wired out of the Buckalew TA to his daughter in England, Jordon Myers, thereby reducing the balance in the Buckalew TA to \$21,613.12, once the \$30 wire fee was paid.

On May 17, 2007, respondent caused \$1,000 to be transferred out of the Buckalew TA, reducing the balance to \$20,683.12.

On June 1, 2007, respondent caused \$4,000 to be transferred out of the Buckalew TA, reducing the balance to \$20,683.12.

On June 18, 2007, respondent caused a check for \$3,275 to be paid to his ex-wife, Phyllis Nordstrom, out of the Buckalew TA, reducing the balance to \$13,338.12.

On June 18, 2007, respondent also caused a check for \$4,000 to be paid to Ness Soloman Carroll out of the Buckalew TA, reducing the balance to \$9,338.12.

On September 17, 2007, respondent caused \$11,000 to be paid from an account belonging to Leslie G. Gray, one of respondent's clients into the Buckalew TA, which caused the balance to increase to \$21,552.12.

On October 1, 2007, respondent caused \$10,000 to be transferred out of the Buckalew TA, reducing the balance to \$11,552.12.

On October 15, 2007, respondent caused a check for \$1,000 to be paid to his ex-wife, Phyllis Nordstrom, out of the Buckalew TA, reducing the balance to \$10,552.12.

On October 16, 2007, respondent caused a check for \$1,845.28 to be paid to Comp USA out of the Buckalew TA, reducing the balance to \$6,706.84.

On October 19, 2007, respondent caused \$2,000 to be transferred out of the Buckalew TA, reducing the balance to \$4,706.84.

On November 1, 2007, respondent caused \$1,500 to be transferred out of the Buckalew TA, reducing the balance to \$3,206.84.

On January 25, 2008, respondent caused \$4,000 to be wired out of the Buckalew TA, reducing the balance to \$176.84.<sup>6</sup>

On February 12, 2008, the balance in the Buckalew TA was approximately \$176.84. On December 4, 2008, the balance in the Buckalew TA was zero, and the account was closed. Respondent misappropriated at least \$89,021.04 received on behalf of the Buckalew Trust from the sale of the Brookings House.

The transfers and checks out of the Buckalew TA, which respondent caused to be made, except for the \$6,690 in disbursements that were made to and on behalf of Berryessa and Carbaugh, were not made for the benefit of the Buckalew Trust, the beneficiaries of the Buckalew Trust, or related to the Trust. By causing the transfer of funds and checks out of the Trust (excluding the aforementioned \$6,690), respondent was in breach of his fiduciary duties to the beneficiaries.

Respondent deposited funds into the Buckalew TA and then caused transfers and checks out of the Buckalew TA in order to hide funds from creditors, including but not limited to potential creditors

On or about September 22, 2008, Oregon attorney Pam S.P. Beach (Beach) mailed a letter to respondent at his office address, which informed respondent that she represented

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<sup>6</sup> Paragraph 56 of the Amended NDC states that “[o]n January 25, 2007,” respondent caused \$4,000 to be transferred out of the Buckalew TA, reducing the balance to \$176.84. As noted in paragraph 14 of the Amended NDC, “[o]n or about February 12, 2008, the balance in the Buckalew TA was approximately \$176.84.” The reference in paragraph 56 to the year “2007” is clearly a typographical error. The year referenced in paragraph 56 should be “2008.” The court finds any harm resulting from the error to be de minimis.

Berryessa and demanded that he provide a copy of the Buckalew Trust, an inventory of the trust assets, an accounting for the trust assets for the period from the trustor's death to the present, and a disbursement to Berryessa. Respondent received the letter. Respondent did not respond to Beach's letter. Nor did respondent at any time provide an accounting to Berryessa or her counsel for the assets of the Buckalew Trust.

Between April 2006 and September 2008, numerous individuals made requests that respondent provide an inventory of Buckalew Trust assets and an accounting for the trust. The individuals include: (a) Ron Berryessa, a beneficiary of the Trust; (b) attorney Beach for Ciara Berryessa, a beneficiary of the Trust; (c) an employee of a social service agency, who was assisting Ciara Berryessa in obtaining housing and paying her living expenses; and (d) an employee of the Lane County Developmental Disability Service, who was assisting Ciara Berryessa in attempting to obtain governmental benefits. Although respondent repeatedly told the afore-listed individuals that he would provide an inventory and an accounting, he failed to do so, thereby breaching his fiduciary duties to the beneficiaries of the Buckalew Trust.

In or about March 2011, at least four months after the filing of the original NDC in this matter, respondent – for the first time – prepared an accounting regarding all funds coming into his possession that belonged to the Buckalew Trust. From April 2006 to March 2011, respondent had not maintained complete records of all funds belonging to the Buckalew Trust that came into his possession, thereby breaching his fiduciary duties to the beneficiaries.

## **Conclusions of Law**

### ***Count 1: Failure to Render Accounts (Rules of Prof. Conduct, Rule 4-100(B)(3))***<sup>7</sup>

Rule 4-100(B)(3) provides that an attorney must maintain records of all funds, securities, and other properties of a client in his possession and render appropriate accounts to the client.

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<sup>7</sup> All further references to the rules are to the Rules of Professional Conduct, unless otherwise stated.



The State Bar alleges that respondent failed to render appropriate accounts to a client regarding all funds coming into his possession by not providing an accounting of the assets of the Buckalew Trust to the beneficiaries in willful violation of rule 4-100(B)(3).

Respondent became the trustee of the Buckalew Trust in 2001.

It has not been clearly shown that the Buckalew Trust or the beneficiaries were respondent's clients or that the alleged offense (i.e., failing to render accounts) was committed in the practice of law. Rather, respondent failed his duties as a trustee, not as an attorney. Thus, respondent did not perform both legal and non-legal professional services for a client, and accordingly, respondent is not subject to the Rules of Professional Conduct with respect to those services.

The services that respondent was required to perform were to be performed in his capacity as a trustee, not an attorney. (Exh. 1.) As such, a trustee is not required to be an attorney and is not subject to the Rules of Professional Conduct of the State Bar. (*Layton v. State Bar* (1990) 50 Cal.3d 889, 904 ["An executor is not required to be an attorney, and executors are not, as such, subject to the Rules of Professional Conduct that govern attorneys."].)

In *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, however, the respondent therein served both as executor of the estate and as attorney to the estate. "[W]here an attorney occupies a dual capacity, performing, for a single client or in a single matter, along with legal services, services that might otherwise be performed by laymen, the services that he renders in the dual capacity all involve the practice of law, and he must conform to the Rules of Professional Conduct in the provision of all of them." (*Layton v. State Bar* (1990) 50 Cal.3d 889, 904.)

In *In the Matter of Lilly* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 473, the Review Department held that summary disbarment may be recommended based on victimization of a

client even when the crime was not committed in the course of the practice of law, and even though the betrayal of the client's trust occurred after the client's death. Because the client was a former or deceased client, the respondent in *Lilly*, who was appointed executor of the former client's estate, was held to have violated the trust and confidence of the former client. In the instant matter, however, there is no clear and convincing evidence that Lynela Buckalew had ever been a client of respondent.

Whether an attorney is providing legal services and is subject to the Rules of Professional Conduct depends on whether the attorney is performing a service that is performed as part of the practice of law and would constitute the practice of law if performed by a non-lawyer. In the instant matter, there is no clear and convincing evidence that respondent rendered legal services for the Buckalew Trust as part of the practice of law. Providing an accounting, in and of itself, does not involve the rendition of any legal services. (See *Layton v. State Bar*, *supra*, 50 Cal.3d 889, 904.)

Therefore, although respondent failed to provide the requested accounting to Berryessa or her lawyer and failed to provide an accounting to the other beneficiaries of the Buckalew Trust, in violation of his duties as Trustee, respondent did not fail to render accounts in violation of rule 4-100(B)(3). Trustees are not bound by the Rules of Professional Conduct; only attorneys, who are acting in their dual capacity by performing along with legal services the services that might otherwise be performed by a layman, are.

***Count 2: Failure to Maintain Client Funds in Trust Account (Rules Prof. Conduct, Rule 4-100(A))***

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith.

The State Bar alleges that by not maintaining funds from the sale of the Brookings house in the Buckalew Trust Account, respondent failed to maintain the balance of funds received for the benefit of a client in a client trust account in willful violation of rule 4-100(A).

However, as discussed in count 1, respondent was the Trustee of the Buckalew Trust and not the attorney for the Trust or its beneficiaries. There is no clear and convincing evidence that respondent, while acting as Trustee of the Buckalew Trust, was performing in a dual capacity as both attorney and trustee. Thus, by failing to maintain the trust funds in the Buckalew TA, respondent failed his duties as a trustee. However, as the evidence does not clearly show that respondent was performing in a dual capacity, this court cannot conclude that respondent violated rule 4-100(A).

***Count 3: Moral Turpitude – Misappropriation (Bus. & Prof. Code, § 6106)***<sup>8</sup>

Section 6106 provides, in pertinent part, “The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise. . .constitutes a cause for disbarment or suspension.” Thus, by its express terms, section 6106 applies regardless of whether the act was committed in the practice of law.” (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563,577.)

Moreover, as trustee of the Buckalew Trust, respondent had a fiduciary duty to the beneficiaries of the Trust. “When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.” (*Crooks v. State Bar* (1970) 3 Cal.3d 346, 355; *Galardi v. State Bar* (1987) 43 Cal.3d 683, 691.)

The mere fact that the balance in a trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation.

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<sup>8</sup> All further references to sections are to the provisions of the Business and Professions Code, unless otherwise noted.

(*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475.) The rule regarding safekeeping of entrusted funds leaves no room for inquiry into the attorney's intent. (See *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113.)

Here, respondent received \$95,721.04 from the sale of Brookings House in the Buckalew TA for the benefit of the beneficiaries. But, after he disbursed \$6,690 on behalf of and to Berryessa and Carbaugh, the balance fell below \$89,021.04.<sup>9</sup> Other than the \$6,690 disbursement made on behalf of and to Berryessa and Carbaugh, no further disbursements were made to or on behalf of the Buckalew Trust or its beneficiaries.

By allowing the balance in the Buckalew TA fell below the amount of entrusted funds of \$89,021.04 to \$176.84 on February 12, 2008 and to zero on December 4, 2008, respondent is found to have misappropriated funds from the Buckalew Trust and breached his fiduciary duties as Trustee of the Buckalew Trust, thereby committing acts of moral turpitude in willful violation of section 6106.

***Count 4: Moral Turpitude***

The State Bar alleged that by not providing an inventory of the assets and accounts of the funds in the Buckalew Trust, respondent committed acts of moral turpitude involving moral turpitude, dishonesty or corruption.

Between April 2006 and September 2008, numerous individuals made requests that respondent provide an inventory of Buckalew Trust assets and an accounting for the Trust. The individuals included: (a) Ron Berryessa, (b) attorney Beach for Ciara Berryessa, (c) an employee of a social service agency, who was assisting Ciara Berryessa in obtaining housing and paying her living expenses; and (d) an employee of the Lane County Developmental Disability

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<sup>9</sup> As noted, *ante*, the \$89,021.04 reflects a \$10 wire transfer fee that was deducted from the Buckalew TA in addition to the \$6,690 that was disbursed to and on behalf of Berryessa and Carbaugh .

Service, who was assisting Ciara Berryessa in attempting to obtain governmental benefits. Although respondent repeatedly told the afore-listed individuals that he would provide an inventory and an accounting, he failed to do so, thereby breaching his fiduciary duties to the beneficiaries of the Trust.

It was not until March 2011, at least four months after the filing of the original NDC in this matter, that respondent – for the first time – prepared an accounting regarding all funds coming into his possession that belonged to the Buckalew Trust.

By failing, for years, to render an accounting to the beneficiaries to whom he owed fiduciary duties, while repeatedly telling them the he would provide an inventory and an accounting (especially, when he knew or was grossly negligent in not knowing that one of the beneficiaries, Berryessa, was developmentally delayed and, therefore, vulnerable), respondent committed acts involving moral turpitude, dishonesty or corruption in willful violation of section 6106.

***Count 5: Moral Turpitude***

The State Bar has alleged that from April 2006 to April 2011, respondent breached his fiduciary duties to the beneficiaries of the Buckalew Trust by not maintaining complete records during that that time period regarding all funds belonging to the Trust that came into his possession, and thereby committing acts involving moral turpitude, dishonesty or corruption. The court does not agree.

As Trustee of the Buckalew Trust, respondent had a fiduciary duty to maintain complete records of all funds belonging to the Trust that came into his possession. However, the record in this proceeding provides little, if any, evidence regarding the records that respondent did keep, including the extent and degree of the deficiencies in the records that were kept.

While the evidence shows that between April 2006 and March 2011, respondent did not maintain complete records of all funds belonging to the Buckalew Trust that came into his possession, there is a lack of clear and convincing evidence that respondent's failure to maintain complete records rises to a level of moral turpitude. Consequently, Count Five is dismissed with prejudice.

***Count 6: Moral Turpitude***

By causing the transfer of funds out of the Buckalew TA and causing checks to be paid out from funds held in the Trust Account, respondent knew or was grossly negligent in not knowing that those transfers of funds out of the Trust Account and checks paid out from funds held in the Trust Account (except for the \$6,690 paid out to or on behalf of Berryessa and Carbaugh, as discussed *ante*) were not for the benefit of the Trust or its beneficiaries, or related to the Trust; and, by such conduct respondent breached his fiduciary duties to the Trust and its beneficiaries.

The court finds that by the aforesaid conduct, respondent committed acts involving moral turpitude, dishonesty, or corruption in willful violation of section 6106.

***Count 7:<sup>10</sup> Moral Turpitude***

By depositing funds into the Buckalew TA and then causing the transfer of funds and checks out of the Trust Account in order to hide funds from creditors, including but not limited to potential creditors, the court concludes that, respondent committed acts of moral turpitude, dishonesty or corruption in willful violation of section 6106.

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<sup>10</sup> As the last count in the Amended NDC, which is preceded by Count Five and Count Six, is entitled Count Five, it is obviously misnumbered. For purposes of clarity and to avoid confusion, the last count of the Amended NDC will be considered and referred to as Count Seven.

#### **IV. Aggravating and Mitigating Circumstances**

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,<sup>11</sup> stds. 1.2(e) and (b).)

##### **A. Aggravation**

###### ***1. Multiple Acts of Misconduct***

Respondent was found culpable of four acts of misconduct. Multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

###### ***2. Harm to the Trust and its Beneficiaries***

Respondent's misappropriation totaling at least \$89,021.04 significantly harmed the beneficiaries of the Buckalew Trust. (Std. 1.2(b)(iv).)

###### ***3. Failure to Cooperate***

Respondent's failure to participate at trial in this matter constitutes an additional factor in aggravation. (Std. 1.2(b)(vi).)

##### **B. Mitigation**

###### **No Prior Discipline**

Although respondent defaulted and submitted no mitigation into evidence, the record reveals that he had been admitted to the practice of law for almost 29 years with no prior record before his misconduct started in 2006. The absence of any prior record of discipline over many years of practice, coupled with present misconduct that is not deemed serious, is a mitigating factor. (Std. 1.2(e)(i).) However, because respondent's misconduct here is of such a serious nature, his lack of a prior record cannot outweigh the seriousness of his misconduct or the

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<sup>11</sup> Future references to standard(s) or std. are to this source.

surrounding aggravating circumstances. (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594.) (Std. 1.2(e).)

## **V. Discussion**

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.2(a) and 2.3 apply in this matter. The more 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 unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is a one-year actual suspension. Here, respondent's misappropriation of at least \$89,021.04 is hardly insignificant. And, while his lack of a prior record for 29 years is significant, respondent offered no other mitigating circumstances, compelling or otherwise, to outweigh his very serious misconduct.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The standards are not mandatory; they may be deviated from when there is a compelling, well-



defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar urges that respondent should be disbarred. The court agrees. The Supreme Court has repeatedly held that disbarment is the usual discipline for willful misappropriation. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; and *Howard v. State Bar* (1990) 51 Cal.3d 215, 221.)

Here respondent abandoned his fiduciary duties that he owed to the Buckalew Trust and its beneficiaries and has offered no explanation regarding the misappropriation of at least at least \$89,021.04. Moreover, in addition to misappropriation of funds from the Buckalew TA, respondent has been found culpable of engaging in other acts involving moral turpitude, dishonesty, or corruption. Based on respondent's egregious misconduct, his failure to participate in the present proceedings, the other factors in aggravation, and the lack of compelling mitigating circumstances that clearly predominate, the court finds no reason to deviate from the standards. Therefore, it is recommended that respondent be disbarred.

## **VI. Recommendations**

### **A. Discipline**

The court recommends that respondent **Phillip Eric Myers** 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.

### **B. California Rules of Court**

The court further recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, 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 matter.<sup>12</sup>

**C. Costs**

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

**VII. Order of Involuntary Inactive Enrollment**

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and new rule 5.111(D) of the Rules of Procedure of the State Bar, effective January 1, 2011. The inactive enrollment will become effective three calendar days after this order is filed.

Dated: August 1, 2011.

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RICHARD A. PLATEL  
Judge of the State Bar Court

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<sup>12</sup> Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)