



Trial was held on July 27 and 28, 2011. The matter was submitted for decision at the conclusion of trial.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in the State of California on May 31, 1979, and has been a member of the State Bar of California since that time.

#### **B. Credibility Determinations**

With respect to the credibility of the witnesses, the court has carefully weighed and considered their demeanor while testifying; the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; and their capacity to accurately perceive, recollect, and communicate the matters on which they testified. (See, e.g., Evid. Code section 780 [list of factors to consider in determining credibility].) As illustrated below, the court finds respondent's testimony to be not credible.

#### **C. Case Number 10-O-06758 – The Mercado Matter**

##### **Findings of Fact**

On January 27, 2005, respondent filed a substitution of attorney in the marital dissolution proceeding entitled, *Merlinda Mercado v. Arnel Mercado*, Orange County Superior Court case number 04D009188 (the “Mercado dissolution matter”), replacing Merlinda Mercado<sup>1</sup> (Merlinda) who had been representing herself in propria persona. Respondent did not prepare a written retainer agreement because he did not believe it was needed. Under their oral agreement, respondent agreed to represent Merlinda in the Mercado dissolution matter for a flat fee which Merlinda paid over installments.

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<sup>1</sup> Merlinda Mercado’s name has been changed to Merlinda Mercado Espinosa.

On February 2, 2006, pursuant to an order issued by the court in the Mercado dissolution matter, respondent deposited \$30,000, a portion of the net proceeds from the sale of the Mercado's marital home, in his client trust account at East West Bank (CTA). Respondent was required to maintain these funds in trust pending further order from the court.

On or about August 1, 2006, the parties in the Mercado dissolution matter, with the approval of the court, stipulated that Merlinda was entitled to the \$30,000.

On August 2, 2006, respondent issued CTA check number 1194 to purchase a cashier's check in the sum of \$15,000 payable to Merlinda. But respondent did not forward her the check until some three months later in or about November 2006.

In or about 2007, Merlinda contacted respondent a total of approximately 30 times via voice mail message and facsimile inquiring about the remainder of her funds (\$15,000). Respondent received some of the messages and facsimile but ignored them.

On or about April 3, 2008, Merlinda faxed to respondent a letter requesting her remaining funds. Between in or about April and October 2008, respondent told Merlinda on several occasions that he had mailed her the remaining funds. (Respondent denied the allegation but testified that Merlinda's recollection of events was better than his recollection.) In fact, respondent did not distribute Merlinda's funds during this period.

In or about October 2008, Merlinda met with respondent at a restaurant, anticipating that respondent would hand-deliver the remaining funds to her. Respondent did not provide Merlinda with the remaining funds during the meeting. Respondent denied that he told Merlinda that the purpose of the meeting was to return her funds, but claimed that the meeting was to go over the case status. Again, respondent's testimony was that Merlinda's recollection of events was better than his recollection.

In or about 2009, respondent told Merlinda that the judgment in the Mercado dissolution matter was vague concerning the disbursement of the remaining \$15,000, and that he needed to prepare and file with the court an additional pleading before he could disburse the remaining funds to her.

According to respondent, Arnel Mercado told respondent that Arnel believed the judgment filed in their matter stating that the remaining \$15,000 that was to go to Merlinda would be credited to his delinquent child support. Respondent was concerned that Arnel would contest any further child support orders based on his belief and that eventually respondent might be held liable for distributing the funds to Merlinda.

A review of the judgment makes clear that the remaining \$15,000 owing to Merlinda was an equalization payment and not a credited child support order in Arnel's favor.

On or about July 3, 2009, Merlinda and Arnel, at respondent's request, signed a pleading that respondent prepared and captioned, "Stipulation & Agreement For Disbursement of Funds" (Stipulation). Respondent never filed the Stipulation with the court because he had determined that the Stipulation did not have to be filed.

As of December 3, 2009, respondent should have been holding over \$90,000 in his CTA on behalf of two clients – Merlinda and Peters (see below). Instead, his CTA balance was \$12,190.

On December 3, 2009, respondent wrote to Merlinda, charging her additional attorney fees of \$2,720 for the preparation of the Stipulation. He stated that he would disburse a net payment to Merlinda of \$12,280 if she consented to the additional fees. Respondent did not send the balance of the funds to Merlinda (\$12,280) with the letter because he did not have the funds in his CTA. In addition, respondent drafted the judgment and any mistake or ambiguity in the judgment was the fault of the drafter.

Before sending Merlinda the December 3, 2009 letter, respondent had never discussed with Merlinda that he was charging a fee for the preparation of the Stipulation and for his attempts to obtain Arnel's signature.

On March 31, 2010, respondent mailed Merlinda a letter stating that he was willing to reduce his fees to \$2,176, and that he would disburse a net payment of \$12,824 to Merlinda if she consented to the additional fees. Respondent stated in the letter that he held \$15,000 in trust on behalf of Merlinda. In fact, as of March 31, 2010, the balance in respondent's CTA dropped to \$2,248.98. Respondent's testimony that he was unaware of the balance of his CTA because he had not checked it for about four years is not credible.

Merlinda disputed respondent's fee for the preparation of the Stipulation and never paid the fee.

Finally, on December 23, 2010, respondent provided Merlinda with a cashier's check in the amount of \$15,000.

Between August 2, 2006, and December 23, 2010, respondent was required to maintain a balance of \$15,000 in the CTA on behalf of Merlinda. But between on or about December 29, 2008, and on or about August 31, 2010, the balance in the CTA repeatedly dropped below \$15,000. On or about May 4, 2010, the balance in the CTA fell to a low of \$140.98.

Although respondent was required to maintain a minimum balance of at least \$15,000 on behalf of Merlinda in his CTA, his relevant CTA balance was as follows:

<i>Date</i>	<i>CTA Balance</i>
12/31/08	\$14,988.29
12/3/09	\$12,190.00
3/31/10	\$ 2,248.98
5/4/10	\$ 140.98

On or about July 26, August 12, and November 5, 2010, a State Bar investigator mailed letters to respondent at his State Bar membership records address regarding the Merlinda complaint. The letters requested respondent respond in writing to specified allegations of misconduct under investigation by the State Bar raised by Merlinda's complaint.

Respondent received the letters but failed to open them, placing them in another client's (Peters) file. Respondent found the letters and enclosures within a week of July 27, 2011, and opened and read the letters. After claiming that he did not open the letters because he believed the letters referred to recent correspondence with the State Bar in the Peters matter, respondent eventually testified that he was afraid to open the letters upon receipt. Respondent failed to provide a written response to the allegations raised by Merlinda's complaint or otherwise cooperate in a State Bar investigation.

### **Conclusions of Law**

#### ***Count One – Rule 4-100(B)(4), Rules of Professional Conduct – Failure to Pay Client Funds Promptly<sup>2</sup>***

Rule 4-100(B)(4) provides that an attorney must promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the attorney which the client is entitled to receive. Despite Merlinda's repeated requests for her funds, respondent waited four years before distributing the balance of the funds to Merlinda in December 2010. Thus, the court finds by clear and convincing evidence that respondent willfully violated rule 4-100(B)(4) by failing to promptly pay client funds in the amount of \$15,000 to Merlinda.

#### ***Count Two – Rule 4-100(A) – Failure to Maintain Client Funds in Trust Account***

Rule 4-100(A) provides that all funds received or held by an attorney for the benefit of a client must be deposited in one or more identifiable bank accounts labeled "Trust Account,"

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<sup>2</sup> All further references to rule(s) are to this source, unless otherwise indicated.

“Client’s Funds Account” or words of similar import. The court finds by clear and convincing evidence that respondent failed to maintain client funds in a trust account, in willful violation of rule 4-100(A), by failing to maintain \$15,000 on behalf of his client Merlinda in his CTA between December 2008 and May 2010.

***Count Three – Business and Professions Code Section 6106<sup>3</sup> – Misappropriation***

Section 6106 prohibits an attorney from committing an act involving moral turpitude, dishonesty or corruption.

When respondent received \$15,000 in February 2006, he was required to maintain the funds in his CTA for Merlinda. However, the balance in respondent’s CTA repeatedly dropped below \$15,000 between December 2008 and August 2010. By May 4, 2010, it dipped to \$140.98.

It is well settled that the mere fact that the balance in an attorney’s trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation. (*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.)

“[O]nce the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn.” (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) When the balance in the CTA fell below \$15,000 and dropped to \$140.98, respondent misappropriated \$14,859.02 (\$15,000 - \$140.98) of his client funds.

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<sup>3</sup> All further references to section(s) are to the Business and Professions Code, unless otherwise indicated.

“There is no doubt that the wilful misappropriation of a client’s funds involves moral turpitude.” (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) Thus, respondent committed an act of moral turpitude in willful violation of section 6106 by misappropriating at least \$14,859.02 of Merlinda’s funds as of May 2010.

***Count Four – Section 6106 – Misrepresentation to Client***

When respondent told Merlinda in his March 31, 2010 letter that he was holding \$15,000 on her behalf in his CTA, he knew or should have known that the balance was only \$2,248.98. The court finds by clear and convincing evidence that respondent committed an act involving dishonesty, in willful violation of section 6106, by making a false statement to his client concerning the balance of her funds being held in respondent’s CTA.

***Count Five – Section 6068, Subdivision (i) – Failure to Cooperate in State Bar Investigation***

Section 6068, subdivision (i), provides that it is the duty of an attorney to cooperate and participate in any disciplinary investigation pending against respondent. The court finds by clear and convincing evidence that respondent failed to cooperate and participate in State Bar investigation pending against respondent, in willful violation of section 6068, subdivision (i), by failing to respond in writing to a State Bar investigator’s July, August and November letters requesting a response to the allegations in the Merlinda complaint.

**D. Case Number 10-O-07565 – The Peters Matter**

**Findings of Fact**

On June 1, 2006, respondent filed a substitution of attorney in the marital dissolution proceeding titled, *Warren Peters v. Annmarie Peters*, Orange County Superior Court case number 06D000395 (the Peters dissolution matter), replacing Warren Peters who had been representing himself in propria persona.



On October 3, 2006, the court in the Peters dissolution matter ordered that the proceeds of the sale of Peterses' marital home be transferred to respondent's client trust account. Pursuant to the court's October 3, 2006 order, the funds were not to be disbursed without further court order or stipulation.

On October 18, 2006, respondent deposited \$102,000, the proceeds from the sale of the Peterses' marital home, in his CTA.

Between April 5, 2007, and May 4, 2010, respondent disbursed a total of \$35,097.72 of the Peterses' funds (\$15,000 to Warren + \$9,597.72 on behalf of the Peterses + \$10,500 to Warren) with and without court approval or stipulation, as follows:

- On three separate occasions in 2007, without court order or stipulation and in contravention of the court's October 3, 2006 order, respondent bought cashier's checks with CTA funds and paid Warren a total of \$15,000 as follows:

<i>Date</i>	<i>Amount</i>	<i>CTA Check No.</i>
4/5/2007	\$ 10,000	1255
9/13/2007	\$ 2,000	1320
11/2/2007	<u>\$ 3,000</u>	1340
<i>Total</i>	<b><i>\$ 15,000</i></b>	

- Pursuant to stipulation, respondent paid a total of \$9,597.72 to the following payees on behalf of the Peterses:

<i>Date</i>	<i>Amount</i>	<i>Payees</i>
10/5/2007	\$6,700.00	National Action Financial Services
9/5/2008	\$1,397.72	Professional Collection Consultants
9/17/2008	<u>\$1,500.00</u>	David Wald, an evidence master
<i>Total</i>	<b><i>\$9,597.72</i></b>	

- Between April 2008 and February 2009, respondent periodically distributed \$10,500 in cash to Warren as follows:

<i>Date</i>	<i>Amount</i>
April 9, 2008	\$1,000
August 6, 2008	\$1,500
August 28, 2008	\$1,000
November 22, 2008	\$2,000
January 21, 2009	\$1,000
January 26, 2009	\$1,000
January 30, 2009	\$1,500
February 2, 2009	<u>\$1,500</u>
<i>Total</i>	<b><i>\$10,500</i></b>

Meanwhile, between October 18, 2006 (the date of the \$102,000 deposit) and May 4, 2010, the balance in the CTA repeatedly dropped below the amount that respondent was entrusted to hold in the CTA, as follows:

<i>Date</i>	<i>CTA Balance</i>
9/30/2007	\$26,949.36
2/17/2010	\$ 5,109.63
5/4/2010	\$ 140.98

After disbursing \$12,000 to Warren by September 13, 2007, respondent was required to maintain \$90,000 (\$102,000 - \$12,000) on September 30, 2007 in the CTA. On February 17, 2010, after disbursing a total of \$35,097.72 by February 2, 2009, he was required to maintain a minimum balance of \$66,902.28 (\$102,000 - \$35,097.72) in his CTA,

On May 4, 2010, the balance in the CTA fell to a low of \$140.98. Respondent misappropriated \$66,902.28 of the Peterses' funds as of May 4, 2010.<sup>4</sup>

On or about February 17, 2010, respondent and Warren signed the Judgment on Reserved Issues (the "Judgment") in the Peters dissolution matter. On March 19, 2010, the Judgment was

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<sup>4</sup> The CTA balance of \$140.98 as of May 4, 2010, was already credited to the Mercado matter.

filed with the court. Pursuant to the Judgment, respondent was ordered to make the following disbursements to, or on behalf of, the Peterses:

<i>Amount</i>	<i>Payees</i>
\$12,000	Bank of America
\$36,000	Annmarie Peters
\$46,402.28	Warren Peters

The Judgment stated that respondent was holding \$94,402.28 in the CTA on behalf of the Peterses. In fact, the balance in the CTA was \$5,109.63 on February 17, 2010.

On December 22, 2009; and January 19, March 4, March 22, April 5, and April 22, 2010, Kevin Qualls, attorney for Annmarie Peters, sent letters to respondent's address as appeared on his letterhead and the last letter to that address and to respondent's P.O. Box number, in the Peters matter. Qualls was demanding payment of the funds owed to his client. Respondent did not respond to the six letters. Respondent testified that he did not receive the letters because the address on his letterhead was incorrect and the mail delivery to his P.O. Box was inconsistent, which was a similar explanation he gave for not receiving his monthly bank CTA statements.

Respondent did not change his P.O. Box address during the time he claimed to have had serious problems receiving his mail, for which no adequate explanation was given.

On or about August 13, 2010, respondent provided Annmarie with a cashier's check in the amount of \$36,000.

On or about July 25, 2011, respondent sent a check in the amount of \$12,000 to Qualls. The funds were to be credited to the Bank of America debt according to the Judgment. Respondent testified that he could not determine what agency or person currently was holding the lien and therefore could not distribute the funds. Respondent felt it necessary to divest himself of the funds and have the funds held by Qualls.

Respondent's fee for representing Warren was \$20,902.28, which respondent unilaterally determined and withdrew from his CTA without prior court approval.

### **Conclusions of Law**

#### ***Count Six – Rule 4-100(A) – Failure to Maintain Client Funds in Trust Account***

The court finds by clear and convincing evidence that respondent failed to maintain client funds in a trust account on behalf of Peters, in willful violation of rule 4-100(A), by failing to maintain a minimum balance of \$90,000 on September 30, 2007 and \$66,902.28 on February 17, 2010.<sup>5</sup>

#### ***Count Seven – Section 6106 – Misappropriation***

After the disbursements of \$35,097.72, there should have been \$66,902.28 left in trust for the Peterses. But on May 4, 2010, the account fell below that amount. Thus, the court finds by clear and convincing evidence that respondent committed an act or acts involving moral turpitude, in willful violation of section 6106, by misappropriating \$66,902.28 of the Peterses' funds as of May 4, 2010.

At trial, respondent admitted that he had misappropriated about \$31,000 in client funds for his own purpose. But he argued that not all misappropriations are the same or should be given the same weight, claiming that the \$30,000 removed from his CTA in a failed land sale (involving a client, Sukhdev Sandhu); his legal fee of \$20,902.28 in the Peters matter; and the cash advances to Warren should not be thought of as true misappropriations.

While respondent's cash disbursements to Warren are not considered as misappropriation, the court rejects his other arguments. Based on Sandhu's testimony and other evidence presented at trial, respondent's gross negligence in handling the CTA resulted in

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<sup>5</sup> The funds that should have been left in the CTA at various times differ from the alleged amounts in the NDC (\$93,902.28 in count 6; \$93,761.30 in count 7) since respondent is credited with additional disbursements of funds totaling \$35,097.72.

misappropriation. Respondent may not unilaterally withdraw entrusted funds to satisfy his fee, even though he may be entitled to reimbursement for his services. Thus, respondent's gross negligence violated his "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds." (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.)

Sandhu testified to the following: In June 2007, respondent was approached by a client, Antonio Amba, who wanted to sell a parcel of land in the City of Adelanto, San Bernardino County. Respondent contacted Sukhdev Sandhu, a friend and client, about purchasing the land. After describing the land and location, Sandhu agreed to purchase the land for \$30,000 and told respondent that he would wire transfer \$35,000 into respondent's CTA the next day. Respondent immediately started working to secure the land on behalf of Sandhu. The seller, Amba, agreed to the sale.

Between June 28 and December 31, 2007, respondent issued five checks from his CTA to Amba in furtherance of the Sandhu land purchase, totaling \$30,000:

<i>Date</i>	<i>Amount</i>
June 28, 2007	\$15,000
July 14, 2007	\$ 5,000
September 15, 2007	\$ 5,000
December 6, 2007	\$ 2,500
December 31, 2007	<u>\$ 2,500</u>
<i>Total</i>	<i>\$30,000</i>

In January 2008, respondent contacted Sandhu to determine how Sandhu wanted to take title to the parcel of land. Sandhu told respondent that he had decided not to purchase the parcel of land and had forgotten to inform respondent. Also, Sandhu informed respondent that he never wire-transferred the \$35,000 into respondent's CTA in June 2007. Respondent testified that he was unaware the wire transfer did not occur because he never checked his CTA statements.

Over a six-month period, respondent issued checks to Amba to purchase the land parcel without once checking his CTA statement or conferring with Sandhu.

Accordingly, the \$30,000 respondent paid from his CTA to Amba for the purchase of the land parcel came from funds being held on behalf of Peters and Merlinda. Due to respondent's gross negligence in the supervision of his CTA, the \$30,000 were misappropriated.

Therefore, respondent's gross negligence constituted violations of the oath of an attorney to faithfully discharge his duties to the best of his knowledge and ability, and involved moral turpitude as it breached the fiduciary relationship owed to his clients. In other word, his failure to manage his CTA is no defense to the disciplinary charge of misappropriation in willful violation of section 6106.

***Count Eight – Section 6103 – Failure to Obey a Court Order***

Section 6103 provides that an attorney must not willfully disobey or violate an order of the court requiring him to do or forbear an act connected with or in the course of his professional duty which he ought in good faith to forbear. Respondent conceded that he paid out funds to his client in violation of a court order. Thus, by clear and convincing evidence, respondent disobeyed the October 3, 2006 court order by disbursing a total of \$15,000 from the CTA to Warren in April, September and November 2007 without having first obtained a court order or stipulation for distribution, in willful violation of section 6103.

***Count Nine – Section 6068, Subdivision (d) – Seeking to Mislead a Judge***

Section 6068, subdivision (d), provides that it is a duty of an attorney never to seek to mislead the judge or judicial officer by an artifice or false statement of fact.

Respondent admitted that he misrepresented to the court that he was holding funds in his trust account when the funds were not in his account. Therefore, by clear and convincing evidence, respondent sought to mislead a judge, in willful violation of section 6068, subdivision

(d), by signing the Judgment that stated respondent was holding \$94,402.28 in client funds in his CTA in the Peters matter when the balance in the CTA was \$5,109.63 on February 17, 2010. Respondent's statement was a willful misrepresentation to the court because he was aware that the he did not maintain \$94,402.28 in the CTA when he signed the Judgment.

***Count Ten – Section 6068, Subdivision (i) – Failure to Cooperate in State Bar***

***Investigation***

On July 19, 2011, the court granted the State Bar's oral motion to dismiss count 10. Therefore, count 10 is dismissed without prejudice.

**IV. MITIGATION AND AGGRAVATION**

**A. Mitigation**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.2.)<sup>6</sup> The instant matter involves the following factors in mitigation.

***No Prior Record of Discipline***

Respondent was admitted to the practice of law in the State of California in 1979 and has no prior record of discipline. (Std.1.2(e)(i); *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749.) However, since respondent's present misconduct is serious and substantial, this factor in mitigation is not given its full weight.

***Extreme Emotional Difficulties***

Respondent's lay opinion that he suffered from depression due to the death of his father and difficulties with his domestic partner during the time of his misconduct is given some weight. However, respondent's testimony was not supported by expert testimony and there is no

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<sup>6</sup> All further references to standard(s) are to this source.

clear and convincing evidence that respondent no longer suffers from such difficulties or disabilities. (Std. 1.2(iv).)

On December 1, 2006, respondent's father died from pancreatic cancer. Respondent was very close to his father, working with him as a young man and learning many aspects in the real estate field. Respondent described how the death of his father caused him to become confused, depressed, and grief stricken. Respondent felt melancholy for about two and a half years.

During this time, respondent was also attempting to cope with the effects of a difficult relationship with a woman he described as being similar to a common-law wife. Respondent had a long term live-in relationship with this woman, who unfortunately was an illegal drug abuser. She was in and out of rehabilitation centers and would leave the house for days at a time in pursuit of illegal drugs. Respondent would search the streets until the early morning hours in an attempt to find her and bring her back to their house.

According to respondent, his care, concern, and love for this woman came before his attention to his law practice, which he let crumbled. The woman was not employed and respondent was her only source of income. Their relationship ended in 2009 when she relocated out of state. She returned to California in 2010.

During this period, between 2006 and 2009, respondent did not seek professional help to deal with any mental health issues. In late 2009, respondent met with a mental health professional for advice but not for treatment. Respondent believes that he became depressed as the result of his father's death and his struggle to care for his domestic partner. Both issues were a major cause leading to his misconduct. Respondent believes that he is now fit to practice law.

Respondent did not produce any competent mental health professional testimony concerning his claim of depression, that his depression played a significant part in his misconduct, and that he has recovered from any mental health problem.



Respondent's testimony concerning his relationship with his then domestic partner clearly shows a problem in his family life and respondent is entitled to mitigation for this factor.

### ***Good Character***

Respondent presented the testimony of one witness attesting to his good character. (Std. 1.2(e)(vi).) Sukhdev Sandhu has known respondent for about 12 years and considers respondent to be his friend and advisor. He testified to respondent's good character for honesty and integrity. Since respondent's one character witness does not demonstrate a wide range of references, the weight of this evidence is minimal. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387.)

### ***Remorse***

Although respondent testified to his remorse for his misconduct, he has yet to display any remorse to Merlinda. Thus, there is no clear and convincing evidence of his remorsefulness. (Std. 1.2(e)(vii).)

## **B. Aggravation**

It is the State Bar's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).) The record establishes two factors in aggravation.

### ***Multiple Acts/Pattern of Misconduct***

The current misconduct by respondent evidences multiple acts of misconduct and a pattern of misconduct. (Std. 1.2(b)(ii).) Respondent misappropriated almost \$82,000 of client funds in the two matters and repeatedly failed to maintain client funds in the CTA from 2006 through 2010, which constituted a pattern of misconduct. He unilaterally withdrew his fees from those funds, made disbursements without court approval, misrepresented to his client and the court about those funds, and failed to promptly pay funds which the client was entitled to receive.

### ***Harm to Client***

Respondent's misconduct resulted in significant harm to Merlinda and the Peters. (Std. 1.2(b)(iv).) Although both clients eventually received their funds, respondent deprived them of the use of their funds for long time. Merlinda had to wait more than four years to receive her funds.

## **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(b) 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.

Standards 2.2(a), 2.2(b), 2.3, and 2.6 apply in this matter. 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 unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one-year actual suspension.

The standards, however, “do not mandate a specific discipline.” (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51

Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that respondent be disbarred from the practice of law.

Respondent argues that a two-year actual suspension would be sufficient, citing *McKnight v. State Bar* (1991) 53 Cal.3d 1025; *Weller v. State Bar* (1989) 49 Cal.3d 670; and *Murray v. State Bar* (1985) 40 Cal.3d 575), in support of his contention. These cases involved misconduct that was less egregious and the amount of misappropriation was less significant than that of respondent's.

The Supreme Court has repeatedly held that disbarment is the usual discipline for the willful misappropriation of client funds. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; and *Howard v. State Bar, supra*, 51 Cal.3d 215, 221.)

“In a society where the use of a lawyer is often essential to vindicate rights and redress injury, clients are compelled to entrust their claims, money, and property to the custody and control of lawyers. In exchange for their privileged positions, lawyers are rightly expected to exercise extraordinary care and fidelity in dealing with money and property belonging to their clients. [Citation.] Thus, taking a client’s money is not only a violation of the moral and legal standards applicable to all individuals in society, it is one of the most serious breaches of professional trust that a lawyer can commit.” (*Howard v. State Bar, supra*, 51 Cal.3d 215, 221.)

The court also finds these cases instructive.

In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, the Supreme Court disbarred an attorney who intentionally misappropriated \$29,000 from his law firm. In mitigation, the attorney had no prior record of discipline in 12 years of practice of law and suffered from emotional problems. The court did not find these factors sufficiently compelling to warrant less than disbarment.

In a similar case, *In re Abbott* (1977) 19 Cal.3d 249, the attorney intentionally

misappropriated approximately \$30,000 from a single client, and as a result, he was convicted of grand theft. In mitigation, he had practiced law blemish-free for 13 years before his misconduct, presented evidence that he suffered from manic-depressive psychosis, submitted character evidence from several attorneys and judges, and had displayed remorse. The Supreme Court again did not find these factors sufficiently compelling to warrant less than disbarment.

Moreover, in *Grim v. State Bar* (1991) 53 Cal.3d 21, the attorney misappropriated over \$5,500 of client funds and did not return the funds to the client until after almost three years later and after the State Bar had initiated disciplinary proceedings and held an evidentiary hearing. The Supreme Court did not find compelling mitigating circumstances to predominate and rejected his defense of financial stress as mitigation because his financial difficulties which arose out of a business venture were neither unforeseeable nor beyond his control. Finally, the attorney intended to permanently deprive his client of her funds. The Supreme Court therefore did not find his cooperation with the State Bar and evidence of good character to constitute compelling mitigation in view of the aggravating factors. He was disbarred.

Here, respondent misappropriated a total of \$81,761.30 (\$14,859.02 + \$66,902.28) from Merlinda and the Peterses as of May 4, 2010. He then failed to cooperate in the State Bar investigation of the Mercado matter and offered less-than-credible testimony at trial.

Although respondent argued that all missing funds have been paid, “restitution made only under the pressure of a forthcoming disciplinary investigation is entitled to no weight as a mitigating circumstance.” (*Murray v. State Bar* (1985) 40 Cal.3d 575, 582.)

While the court sympathizes with respondent regarding his emotional difficulties, the court’s “primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause ....” (*In re Abbott, supra*, 19 Cal.3d 249, 254.) Despite the lack of a prior disciplinary record and his emotional stress related to domestic problems and the death of his

father, respondent failed to present any compelling factors in mitigation or demonstrate remorse that would justify a recommendation of less than disbarment. Accordingly, lesser discipline than disbarment is not warranted because the amount misappropriated is not insignificantly small and the most compelling mitigating circumstances do not clearly predominate.

After considering the standards and relevant case law and balancing the evidence in mitigation and aggravation, the court concludes that respondent's disbarment from the practice of law is appropriate to protect the public and preserve public confidence in the profession.

## **VI. RECOMMENDATIONS**

Accordingly, it is recommended that respondent **Cedric Troncoso** 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.

### **California Rules of Court, Rule 9.20**

It is also recommended 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.<sup>7</sup>

### **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 INACTIVE ENROLLMENT**

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of

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<sup>7</sup>Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

California effective three days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 5.111(D)(1).)

Dated: September 7, 2011.

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RICHARD A. PLATEL  
Judge of the State Bar Court