

Filed August 6, 2014

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 12-O-10827
	)	
RICHARD THOMAS FERKO,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 80029.	)	
_____	)	

Due to serious professional misconduct, a hearing judge recommended that Richard Thomas Ferko be suspended for two years and until he proves his rehabilitation and fitness to practice law. The judge found Ferko committed five ethical violations in a single client matter including the grossly negligent misappropriation of over \$50,000 in settlement funds, the unauthorized practice of law (UPL) in another jurisdiction, and charging and collecting an illegal fee.

Ferko and the Office of the Chief Trial Counsel of the State Bar (OCTC) both appeal. Ferko argues that OCTC did not prove any misconduct but, under any circumstances, his “mitigation is compelling and justifies a lesser sanction.” OCTC seeks Ferko’s disbarment, arguing that the misappropriation was intentional rather than grossly negligent, and that we should find additional aggravation and less mitigation.

Upon our independent review (Cal. Rules of Court, rule 9.12), we reject Ferko’s arguments and adopt the hearing judge’s culpability findings, except that we agree with OCTC that Ferko’s misappropriation was intentional. We also find additional aggravating factors (dishonesty, overreaching, and lack of insight) and less mitigation for Ferko’s discipline-free

practice and remorse. We conclude that disbarment is the appropriate discipline to protect the public, the courts, and the legal profession.

## I. PROCEDURAL HISTORY

OCTC filed a Notice of Disciplinary Charges (NDC) on November 29, 2012, alleging five counts of misconduct in a single client matter for: (1) failing to maintain funds received on a client's behalf in his client trust account (CTA) (Rules Prof. Conduct, rule 4-100(A));<sup>1</sup> (2) committing an act of moral turpitude by misappropriating the client's settlement funds (Bus. & Prof. Code, § 6106);<sup>2</sup> (3) failing to promptly notify the client that he received settlement funds on her behalf (rule 4-100(B)(1)); (4) committing UPL in Utah, in violation of that state's regulations (rule 1-300(B)); and (5) charging and collecting an illegal fee (rule 4-200(A)). The hearing judge found Ferko culpable of all five counts.

The hearing judge filed her opinion on June 17, 2013, recommending that Ferko be suspended for two years and until he proves his rehabilitation and fitness to practice in accordance with Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(c)(1).<sup>3</sup> Both Ferko and OCTC filed a request for review.

On July 8, 2014, during the pendency of this appeal, Ferko filed a request for review in a separate case (13-O-10942), appealing a hearing judge's disbarment recommendation. On July 10, 2014, we issued an order to show cause (OSC) why or why not we should abate the instant matter, pending consideration of case no. 13-O-10942, and whether the two matters

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<sup>1</sup> All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

<sup>2</sup> All further references to sections are to the Business and Professions Code.

<sup>3</sup> All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, and reflect the modifications to the standards effective January 1, 2014.

should be consolidated. Having considered the positions advanced by both parties as well as the protection goals of attorney discipline, we determined that the instant matter would not be abated and the two matters would not be consolidated.

Our independent review of the record is based on evidence that satisfies the clear and convincing standard.<sup>4</sup> We also give great weight to the hearing judge's findings that significant portions of Ferko's testimony lacked credibility. (Rules Proc. of State Bar, rule 5.155(A).)

## **II. THE OLMEDO MATTER**

### **A. Facts**

Ferko was admitted to the State Bar of California in June 1978, and practiced law over 30 years without any prior discipline. For eight of those years, he represented Ricardo Olmedo in various criminal and civil matters. Ricardo<sup>5</sup> was unable to pay the outstanding legal fees he owed Ferko, which totaled approximately \$45,000. In January 2009, Ricardo's 18-year old nephew, Cesar Ramirez, was shot and killed on a Utah highway. Ramirez's mother, Alma Olmedo, is Ricardo's sister and a Utah resident. Alma contacted Ricardo and told him she needed an attorney. He recommended Ferko, who agreed in February 2009 to assist Alma with obtaining insurance benefits on behalf of Ramirez's estate. Ferko was not licensed in Utah. Alma did not speak English, but Ricardo was bilingual, so she agreed to have him translate for her and relay communications between her and Ferko.

Progressive Insurance insured the vehicle Ramirez was traveling in when he was shot. From February through May 2009, Ferko negotiated the claim on behalf of Alma and her son's estate. Ferko contacted the Progressive claims agent, who was located in Utah, to discuss the

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<sup>4</sup> Clear and convincing evidence must leave no substantial doubt and must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

<sup>5</sup> We use the first names of Ricardo Olmedo and Alma Olmedo to avoid confusion, not out of disrespect.

benefits available under the insured's policy and sent the agent a letter confirming the policy limits. Ferko testified that he told the claims agent he was not licensed to practice law in Utah. The hearing judge specifically found this testimony was not credible. Ferko's written correspondence with Progressive included a demand for \$50,000 in uninsured motorist benefits and a letter interpreting Utah statutes to support Alma's entitlement to insurance payable to her son. He also sent Progressive the necessary documentation to support the claims on behalf of Ramirez's estate, including an affidavit signed by Alma that he prepared. All of the correspondence was written on his letterhead. During the negotiations with Progressive, Ferko relayed information to Alma verbally through Ricardo, although he wrote to her directly when he needed her notarized signature on the affidavit establishing her right to receive Ramirez's benefits. Alma returned the signed document within three to five days.

Ferko settled the Ramirez estate matter on May 13, 2009, for a total of \$53,000. On that date, Progressive mailed Ferko a \$3,000 check for survivor benefits, and on May 18, a subsequent \$50,000 check to settle all remaining claims. Progressive made the checks payable to Alma and Ferko, and required that Alma sign a release of all claims. However, Ferko did not send the checks or the release to Alma. Instead, he gave them to Ricardo, who signed Alma's name without indicating he had done so and returned them to Ferko. Ferko testified he believed that Ricardo had informed Alma about the settlement and obtained her authority to sign the checks and release. The hearing judge did not find his testimony credible.<sup>6</sup> Both Ricardo and Ferko testified that Alma authorized Ricardo to use the insurance settlement to pay Ricardo's outstanding legal fees to Ferko because she considered it as "blood money." The hearing judge also found that their testimony lacked credibility.

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<sup>6</sup> Ferko did not speak Spanish and therefore relied entirely upon Ricardo's translation.

Ferko deposited the \$3,000 check into his CTA on May 18, 2009, and deposited the \$50,000 check on May 20. Additionally, he signed his name on the release as a witness to Alma's signature even though he had not witnessed her signature and, in fact, it was not hers.

After Ferko received the settlement funds, he realized that he had not obtained a fee agreement from Alma. So, on May 28, 2009, he sent a contingency fee agreement to her with a transmittal letter requesting she sign it and return it to him. In the letter, Ferko never mentioned that he had already received the \$53,000 in settlement funds from Progressive. The day after he sent the fee agreement to Alma, and before she signed and returned it to him, the balance in Ferko's CTA fell to \$26,476.43. On June 4, the day before Alma signed the agreement, his CTA balance was \$20,850.37.

On June 17, 2009, Ferko sent Alma a \$2,000 check and an accounting showing that as of that date Ferko had received \$3,000 and retained \$1,000 as his attorney fees. His cover letter stated: "Enclosed is our check in the amount of \$2,000 representing the monies that we have received from Progressive insurance." His accounting and cover letter were untrue since neither advised Alma that he had received the additional \$50,000. Ferko did not distribute any additional settlement funds to Alma; instead, he used the funds to satisfy Ricardo's outstanding legal fees. Ferko did not inform Alma that he had applied the settlement funds in this manner. By the end of June 2009, Ferko's CTA balance fell to \$121.56.

Alma did not know about the settlement and never authorized Ricardo to endorse the checks on her behalf or to use the funds as payment for Ricardo's legal fees. In fact, she only learned about the settlement after calling Progressive to inquire about the status of her claim. When she discovered that Ferko had received the settlement, she directed certain friends and family to call him about the insurance claim, but they could not obtain a direct answer from Ferko or his legal staff. Thereafter, Alma hired a Utah attorney to assist her with recovering the

additional \$51,000 in settlement proceeds from Ferko. She also complained to the California State Bar. After Ferko was contacted by OCTC on March 21, 2012, he sent Alma's attorney a check for \$50,000. The Utah attorney retained a certain portion as attorney fees. At the end of 2012, Ferko paid Alma the remaining \$1,000.

## **B. Culpability**

### **Count One: Rule 4-100(A) (Failure to Maintain Funds in Trust)**

### **Count Two: Section 6106 (Moral Turpitude)<sup>7</sup>**

The hearing judge found that Ferko failed to maintain Alma's settlement funds in his CTA and that he misappropriated those funds by gross negligence, in violation of rule 4-100(A) and section 6106. We agree with these culpability findings, but we find his misappropriation was intentional for several reasons.

First, Ferko never informed Alma that he had received the funds, and he began withdrawing the settlement proceeds immediately after depositing them into his CTA. In fact, he was not entitled to any money until after he received a signed fee agreement. Once his fee was established, he should have maintained \$35,335.10 in his CTA on Alma's behalf,<sup>8</sup> yet his CTA repeatedly fell below the necessary amount. The day before Alma signed the agreement on June 5, 2009, the account balance dipped to \$20,850.37. Ultimately, the balance on the account fell as low as \$46.56 in August 2009.

Second, when Ferko sent Alma a check for \$2,000 on June 17, 2009, his cover letter represented that this was the amount he had received from Progressive; he failed to disclose that he had received the additional \$50,000. Further, the "accounting" stated only that he had

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<sup>7</sup> Rule 4-100(A) requires an attorney to put all funds received for the benefit of clients in a trust account. Section 6106 provides that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes a cause for disbarment or suspension.

<sup>8</sup> The contingency fee agreement indicates Ferko would receive "33 1/3 %" of any settlement. The amount Ferko should have maintained in his trust account is calculated as follows:  $\$53,000 \times 33 \frac{1}{3} \% = \$17,664.90$   $\$53,000 - \$17,664.90 = \$35,335.10$ .

received \$3,000, and it contained a signature line for Alma to authorize the disbursement of these funds as set forth therein. No similar signature was sought for the authorized distribution of the \$50,000, and no other accounting showed those funds had been received.

Third, it is highly suspect that Ferko would agree to retain the funds as payment for Ricardo's attorney fees without confirming this with his client, Alma. Ferko claimed that Ricardo told him Alma authorized his use of the entire settlement to pay Ricardo's outstanding legal bills. However, Alma denied knowing about the settlement or giving such authorization, and the hearing judge did not find Ferko's or Ricardo's testimony credible on this point. (See *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055 [credibility determinations made by judge who heard and saw witness entitled to great weight].) In contrast, Alma's testimony is corroborated by her telephone call to the insurance company asking about the status of her claim and by her subsequent actions in retaining Utah counsel to pursue her claim against Ferko for her son's medical and funeral expenses.

Based on this evidence, we find that OCTC proved by clear and convincing evidence that Ferko intended to misappropriate Alma's money, and in so doing, committed an act of moral turpitude, in violation of section 6106.

The facts that prove Ferko misappropriated Alma's funds also establish his failure to maintain them in his CTA in violation of rule 4-100(A). But we do not consider this violation when determining the level of discipline because the same underlying misconduct is addressed by the misappropriation charge. (See *In the Matter of Sampson* (Review Dept.1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional weight given to rule 4-100(A) violation when same misconduct addressed by § 6106].)

**Count Three: Rule 4-100(B)(1) (Failure to Notify Client Receipt of Funds)<sup>9</sup>**

Ferko violated rule 4-100(B)(1) by failing to notify Alma that he received a \$50,000 settlement check. Ferko's misconduct is not excused because he informed Ricardo about the settlement funds. He had a professional responsibility to notify Alma directly of such a significant event, as he had done when he needed her signature on an affidavit.

**Count Four: Rule 1-300(B) (UPL in Another Jurisdiction)<sup>10</sup>**

The NDC charged Ferko with committing UPL in Utah, in violation of that state's regulations, by performing legal services there on behalf of Alma to obtain her son's insurance benefits. Ferko asserts that OCTC failed to provide clear and convincing evidence that he violated rule 1-300(B). We disagree with Ferko, and find a violation of rule 1-300(B).

Rule 5.5(b) of the Utah Rules of Professional Conduct provides that a "lawyer who is not admitted to practice in this jurisdiction shall not: [¶] . . . [¶] (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction."

Rule 14-802(a) of the Utah Supreme Court Rules of Professional Practice provides that "only persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah." The practice of law includes representing the interests of another "by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law . . . to that person's facts and circumstances." (Utah Sup. Ct. Rules of Prof. Prac., rule 14-802(b)(1).) Ferko negotiated Alma's insurance claim with the Progressive claims agent and sent the agent a demand letter based on his interpretation of Utah law. The correspondence was on his law office letterhead and sent to the claims agent in Utah.

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<sup>9</sup> Under rule 4-100(B)(1), an attorney must promptly notify a client of the receipt of the client's funds.

<sup>10</sup> Rule 1-300(B) provides that an attorney shall not practice law in a jurisdiction if it would violate the professional regulations in that jurisdiction.



He also prepared Alma's affidavit supporting her insurance claim, again based on Utah law. These actions establish that Ferko violated Utah's professional regulations by representing that he was entitled to practice law and in fact practicing law in that jurisdiction.

Next, we reject Ferko's contention that the legal services he provided Alma fall within the exceptions outlined in rule 5.5(c) of the Utah Rules of Professional Conduct. To qualify for those exceptions, the out-of-state attorney's legal services must be such that they "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." (Utah Rules Prof. Conduct, rule 5.5(c)(3) and (4).) Neither exception applies. All of the legal services Ferko provided were related to Alma's insurance claim concerning her son's death, which occurred in Utah, not California. Moreover, Alma was not a former client of Ferko and there is no evidence that she had substantial contact with California. (See *In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250, 259 [applying ABA model rule 5.5(c)].)

Nor does rule 14-802(c) of the Utah Supreme Court Rules of Professional Practice apply, as Ferko argues. That rule outlines activities permitted by a *nonlawyer* "who is not otherwise claiming to be a lawyer or to be able to practice law." (Utah Sup. Ct. Rules of Prof. Prac., rule 14-802(c); emphasis added.) Ferko sent the insurance agent various correspondence on letterhead designated "Law Office of Richard T. Ferko, A Professional Corporation," and thus held himself out as an attorney.

Finally, Ferko argues that he is not culpable of UPL because he consulted with a Utah attorney who advised him he could provide Alma the services he afforded her. An attorney "may not rely on the opinion of another attorney as a defense to violating the rules or sections governing attorney ethics." (*In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221, 232.)

**Count Five: Rule 4-200(A) (Illegal Fees)**

Rule 4-200(A) prohibits an attorney from entering into an agreement for or charging an illegal or unconscionable fee. Our conclusion that Ferko is “culpable of UPL compels the further conclusion that the fees [he] charged and collected” were illegal under rule 4–200(A). (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 904 [attorney not entitled to recover fees for UPL committed in violation of rule 1–300(B) and ordered to refund fees].)

**III. AGGRAVATION OUTWEIGHS MITIGATION**

OCTC must establish aggravating circumstances by clear and convincing evidence under standard 1.5. Ferko has the same burden to prove mitigation. (Std. 1.6.) The hearing judge found in aggravation that Ferko committed multiple acts of misconduct and significantly harmed Alma. In mitigation, the judge found that Ferko displayed remorse and recognized his wrongdoing, had no prior discipline record and established community service. We adopt the multiple acts, significant harm, lack of discipline record, and community service findings, as modified below, and reject the hearing judge’s finding that Ferko displayed remorse and recognition of wrongdoing. As additional aggravating factors, we find Ferko was dishonest and overreached, and he lacked insight into his wrongdoing.

**A. Aggravating Factors**

**1. Multiple Acts of Misconduct (Std. 1.5(b))**

Ferko asserts that the hearing judge erred by assigning aggravation for this factor because his misconduct “arose from the mishandling of a single settlement.” (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 839 [two counts of misconduct arising from one transaction did not constitute multiple acts of misconduct].) His argument is misplaced because multiple acts of misconduct are not limited to the number of client matters involved. Ferko failed to maintain Alma’s settlement in trust, intentionally misappropriated her money,

concealed that he received and disbursed her funds, and engaged in numerous acts of UPL. His actions constitute multiple acts of wrongdoing, which we view as a significant aggravating factor. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].)

## **2. Significant Client Harm (Std. 1.5(f))**

The hearing judge correctly concluded that Ferko's misconduct caused significant harm. Alma was a stock clerk at Walmart. Although the record does not reveal her full financial situation, it does establish that after a two-and-a-half year delay, Alma was required to retain and pay a second attorney a portion of her settlement proceeds to recover the \$51,000 she was entitled to receive from Ferko. We assign moderate weight to this aggravating factor.

## **3. Dishonesty, Concealment and Overreaching (Std. 1.5(d))**

Although the hearing judge did not find this factor, we conclude that Ferko's misconduct is surrounded by concealment, dishonesty and overreaching. Ferko repeatedly deceived Alma. After receiving the settlement funds, he concealed that he collected \$53,000 on her behalf. Later he intentionally misrepresented that he only received \$3,000 in settlement proceeds when he actually received \$53,000, and he sent her a false accounting misrepresenting the amount he collected and disbursed. Finally, he advised the insurance company that he witnessed Alma sign the release of all claims against Progressive, which was untrue.

In addition to his deceit, Ferko engaged in overreaching with Alma, who did not speak English and was distraught over the death of her son. He induced her to sign a contingency fee agreement without disclosing that he had already obtained a \$53,000 settlement. Moreover, he unilaterally collected and misappropriated his fee before Alma signed a fee agreement. We assign significant weight to Ferko's acts of deceit and overreaching. (See, e.g., *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [dishonesty and overreaching

found where attorney misappropriated funds from vulnerable client with limited English speaking ability and made misrepresentations to conceal wrongful actions].)

#### **4. Lack of Insight (Std. 1.5(g))**

Lack of remorse and failure to acknowledge wrongdoing are aggravating factors in attorney discipline cases. (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506.) Although the hearing judge did not find this factor, the record provides clear and convincing evidence that Ferko lacks insight and remorse.

Ferko does not recognize his ethical obligations as an attorney. He testified that sending a release to a client, the client sending it back, and his “sign off as a witness . . . suffices as far as the witness requirements on the release is concerned.” He fails to acknowledge that falsely indicating he witnessed a signature reflects a “disregard of the fundamental rule of ethics — that of common honesty — without which the profession is worse than valueless in the place it holds in the administration of justice. [Citation.]” (*Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053.)

Additionally, Ferko blames Alma for his conduct. He repeatedly stated she should not have waited over two years to inquire about her money, which ignores the fact that he misled her about the status of her insurance claim and that he had an affirmative duty to notify her that he received the settlement funds. (See rule 4-100(B)(1).) Finally, to avoid culpability, Ferko denied he represented Alma and her son’s estate since he represented neither in court. This testimony directly contradicts the signed fee agreement he had with Alma stating she was his client. We do not find Ferko’s statement of remorse that he could have done a better job in handling Alma’s claim to be persuasive. We assign considerable weight to his lack of insight as it makes him an ongoing danger to the public.

## **B. Mitigating Factors**

### **1. No Prior Discipline Record (Std. 1.6(a))**

The hearing judge assigned significant weight to Ferko's 30 years of discipline-free practice. We afford only some weight to this factor because Ferko's misconduct was serious and lasted for nearly three years. Moreover, his misappropriation was intentional and surrounded by dishonesty and overreaching. And he fails to recognize his ethical obligations as an attorney and to his clients. Thus, we have no assurance that his misconduct is aberrational and unlikely to recur. (See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [years of discipline-free practice is mitigating if serious misconduct occurred during "single period of aberrant behavior" and is unlikely to recur].)

### **2. Pro Bono Work and Community Service**

Ferko's cursory testimony regarding his pro bono work and providing information to community groups about debt collection is entitled to minimal mitigative weight. We know little about the nature and extent of his involvement, and the record contains no other evidence about his pro bono or community service activities. (See *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 287 [little mitigation for minimal testimony regarding pro bono activities].)

### **3. No Mitigation for Remorse or Recognition of Wrongdoing (Std. 1.6(g))**

The hearing judge assigned Ferko some mitigating credit for showing remorse and accepting responsibility for his misconduct. Since we have found he lacks insight, Ferko is not entitled to any mitigative credit for this factor. We also note that he is not entitled to credit for the \$51,000 he paid to Alma since it was not spontaneous. He paid the funds almost three years after they should have been distributed to Alma and then only after her subsequent attorney

demanded payment and OCTC contacted him. (*Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 709 [restitution under threat or force of disciplinary or civil proceedings not mitigating].)

#### IV. DISBARMENT IS WARRANTED

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession, to maintain high standards for attorneys, and to preserve public confidence in the profession. (Std. 1.1.) There is no fixed formula to determine the appropriate discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) In order “[t]o impose discipline consistent with the goal of protecting the public, we ‘balance all relevant factors including [aggravating and] mitigating circumstances on a case-to-case basis.’ [Citation.]” (*Sugarman v. State Bar* (1990) 51 Cal.3d 609, 618.) We begin our discipline analysis with the standards.

Standard 2.1(a) is most apt because it deals specifically with misappropriation. It states that disbarment is appropriate for intentional misappropriation “unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate.” Here, Ferko intentionally misappropriated over \$35,000, which is a significant amount. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367-1368 [misappropriation of \$1,355.75 deemed significant].) And his two factors in mitigation (discipline-free record and pro bono work) are not compelling nor do they clearly predominate when weighed against his overall misconduct and four aggravating factors (multiple acts, dishonesty and overreaching, client harm, and lack of insight).

In reaching her discipline recommendation, the hearing judge departed from the standards and relied on *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364. In *McCarthy*, a general partner misappropriated over \$20,000 of a limited partner’s funds.

McCarthy concealed the misappropriation by sending the limited partner forms reflecting that his share of the funds were available. McCarthy's misconduct was aggravated by concealment, significant harm, lack of remorse and recognition of wrongdoing, and the failure to make restitution after the limited partner obtained a judgment against him for the misappropriated funds. His 40-year "unblemished career" was a significant mitigating circumstance. (*Id.* at p. 383.) Good character, community service activities, and good faith were also mitigating. We did not find disbarment necessary because McCarthy's 40 years of practice without discipline showed that the misappropriation was aberrational.

The hearing judge found Ferko's misconduct more serious than the attorney in *McCarthy*, but reasoned that Ferko should not be disbarred because he demonstrated remorse and recognition of his wrongdoing, paid Alma restitution, and his misconduct stemmed from a series of "misguided decisions." The judge concluded that since Ferko's misconduct was "limited to a single client and aberrational to [his] 30 years of discipline-free practice," a two-year suspension and until he provided proof of his rehabilitation and fitness to practice was appropriate.

Ferko asserts that he should receive even less discipline than in *McCarthy*; we find it should be greater. Ferko misappropriated client, not partnership, funds and did not prove good faith mitigation, as did the attorney in *McCarthy*. Rather, Ferko's case is aggravated by dishonesty and overreaching, and we do not find, as the hearing judge did, that his misconduct was merely misguided decision making. In fact, due to his lack of insight, there is a great risk it may recur.

The Supreme Court has instructed that "misappropriation generally warrants disbarment" and "[e]ven a single 'first-time' act of misappropriation has warranted such stern treatment." (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656–657; see also *Edwards v. State Bar* (1990) 52 Cal.3d 28, 38 [misappropriation is grave misconduct for which disbarment is usual form of

discipline].) Ferko misappropriated significant funds from a non-English speaking mother who was distraught over her son's death. Moreover, he committed other serious misconduct and fails to recognize his ethical responsibilities as an attorney. We conclude that disbarment is both necessary and appropriate, as provided under standard 2.1(a) and in the relevant decisional law, to protect the public, the courts and the legal profession.<sup>11</sup>

## V. RECOMMENDATION

We recommend that Richard Thomas Ferko be disbarred and that his name be stricken from the roll of attorneys.

We further recommend that he must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

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

## VI. ORDER

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Richard Thomas Ferko is ordered enrolled inactive. The order of

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<sup>11</sup> See *Kelly v. State Bar, supra*, 45 Cal.3d 649 (disbarment for misappropriation of almost \$20,000, moral turpitude, dishonesty, and improper communication with adverse party with no prior record in mitigation and no aggravation); *In re Abbott* (1977) 19 Cal.3d 249, 253-254 (disbarment for \$29,500 misappropriation in single client matter with restitution efforts discounted because made after placed on criminal probation; 13 years' discipline-free practice and emotional problems undergoing treatment deemed mitigating); *In the Matter of Blum, supra*, 3 Cal. State Bar Ct. Rptr. 170 (disbarment for \$55,000 misappropriation and failure to report sanctions with mitigation for 10 years of discipline-free practice, but no credit for partial restitution of \$21,000 and aggravation for indifference toward rectification, client harm, dishonesty, and overreaching client with limited English); *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 (disbarment for attorney with no prior disciplinary record, whose misappropriation was isolated incident, but who made no effort to reimburse, and lacked candor).



inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 5.111(D)(1).

EPSTEIN, Acting P. J.

WE CONCUR:

PURCELL, J.

HONN, J.\*

\*Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.