FILED AUGUST 8, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **JOSEPH GUY MAIORANO,** **Member No. 113876,** A Member of the State Bar.	**Case Nos.: 12-O-11925, 12-O-14931-DFM** **DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**

INTRODUCTION

Respondent **Joseph Guy Maiorano** (Respondent) was originally charged here with ten counts of misconduct, involving two different client matters. One of those counts was dismissed by the State Bar during the trial. The remaining counts include allegations that Respondent willfully violated (1) rule 4-100(A) of the Rules of Professional Conduct[1] (failure to maintain client funds in trust account) [two counts]; (2) Business and Professions Code[2] section 6106 (moral turpitude - misappropriation) [two counts]; (3) rule 4-100(A) (commingling personal funds in client trust account); (4) rule 3-300 (business transaction with a client); (5) rule 4-100(B)(1) (failure to notify client of receipt of client funds); (6) rule 4-100(B)(4) (failure to pay client funds promptly); and (7) section 6068, subdivision (m) (failure to respond to client

[1] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

[2] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

inquiries). The State Bar had the burden of proving the above charges by clear and convincing evidence. In view of Respondent's misconduct and the aggravating factors, the court recommends, inter alia, that Respondent be disbarred from the practice of law.

PERTINENT PROCEDURAL HISTORY

The first Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on December 14, 2012, in case No. 12-O-11925. The case was initially assigned to Judge Patrice McElroy of this court. On January 3, 2013, the matter was reassigned to the undersigned. On January 8, 2013, Respondent filed his response to that NDC, followed by the filing of an Amended Response on February 11, 2013.

An initial status conference was held in the matter on January 28, 2013. At that time the State Bar notified the court that an NDC would soon be filed in case No. 12-O-14931, and the parties agreed that the new case would automatically be consolidated with the pending matter. The soon-to-be consolidated cases were then given a trial date of May 7, 2013, with a five-day trial estimate.

On February 22, 2013, the State Bar filed the NDC in case No. 12-O-14931. On March 22, 2013, Respondent filed his response to that NDC.

After trailing, trial in the consolidated cases was commenced on May 8, 2013, and was completed on May 10, 2013. The State Bar was represented at trial by Deputy Trial Counsel Anthony J. Garcia and Anand Kumar. Respondent was represented by Edward Lear of Century Law Group LLP.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's responses to the two NDCs, the written stipulation of undisputed facts previously filed by the parties,[3] and the documentary and testimonial evidence admitted at trial.[4]

Jurisdiction

Respondent was admitted to the practice of law in California on June 14, 1984, and has been a member of the State Bar at all relevant times.

Case No. 12-O-11925 (Newsome Matter)

Bruce Newsome, Ph.D (Newsome) is a lecturer in international relations. He is frequently out of the country for long periods of time. He spends part of his time in the San Diego area and maintains a post office box there, to which Respondent would direct mailed correspondence.

On April 7, 2009, in anticipation of hiring Respondent to file civil litigation against Newsome's ex-wife and her new husband for defamation and slander, Newsome paid Respondent an advance fee of £3,537.22 ($5,000 using the bank's exchange rate of 1.397340).

On April 29, 2009, Newsome signed a fee agreement with Respondent, employing Respondent to "assert claims against Christie Ansley and Mark Richards for damages sustained as a result of actions taken in connection with various communications concerning the client's employment, business, and personal reputation … ." Newsome agreed to pay Respondent a

[3] On the first day of trial, the parties filed a written stipulation of facts. At the request of the court, an electronic version of that stipulation was lodged with the court via email. Because that electronic version of the stipulation differs significantly from the executed written stipulation, it is rejected by the court.

[4] On May 30, 2013, the State Bar filed a motion to supplement the record in this matter. No opposition to the motion being made by Respondent, and good cause appearing, the motion is granted.

contingent fee of 30 percent of all sums recovered. In addition, Newsome agreed to pay $10,000 to Respondent as an additional flat fee for attorney time and expenses that would be incurred in the prosecution of Newsome's claims.

On May 6, 2009, Respondent filed a lawsuit, entitled *Bruce Newsome v. Christi Richards and Mark Richards*, in San Diego Superior Court. The defendants in this civil action were insured by United Services Automobile Association (USAA).

On July 13, 2009, the defendants in the civil action filed a cross-complaint against Newsome.

On July 14, 2009, Newsome paid Respondent an additional advance fee of £3,247.91 ($5,000 using the bank's exchange rate of 1.539452).

On November 6, 2009, Respondent informed Newsome that Respondent would require an additional $12,500 to defend Newsome against the counter claims filed in the civil action.

On November 7, 2009, Newsome sent Respondent an e-mail, terminating Respondent and demanding that Respondent refund Newsome's unearned fee and return his file. Respondent received the e-mail and, shortly after that, Respondent and Newsome began to negotiate the terms of Respondent's continued representation.

In January 2010, Newsome re-employed Respondent to represent him in the civil action. Newsome again agreed that Respondent would receive a contingent fee of 30 percent of all sums recovered. In addition, Newsome agreed to pay $16,000 to Respondent as an additional flat fee for attorney time and expenses that would be incurred in the prosecution of Newsome's claims and for the defense of any counterclaims.

On January 15, 2010, Newsome paid Respondent $2,000.

On March 24, 2010, Newsome paid Respondent $2,000.

In July, Newsome informed Respondent that he was having difficulty paying the balance of the $16,000 fee. At that point Respondent understood that they both agreed that no further advance fees would be paid, but instead that all of Respondent's work in defending the cross-claims would be billed at $375 per hour.

In or about October 2010, Respondent settled the civil action with the approval of Newsome.

On October 25, 2010, Respondent talked with Newsome about how the settlement funds were to be disbursed. During that conversation, Newsome authorized Respondent to use all of the settlement funds to pay for the legal fees and costs owed by Newsome to Respondent, but they also agreed that this distribution would be subject to Newsome's subsequent right and ability to review and potentially object to Respondent's bills and costs when Newsome returned to the country.

On October 26, 2010, USAA sent to Respondent a $35,000 settlement check for Newsome. Respondent received the settlement check and deposited the funds into his client trust account (CTA). Thereafter, as a result of his earlier October 25, 2010 conversation with Newsome, Respondent, who was entitled to thirty percent of the $35,000 as his contingency fee for handling the complaint and had incurred fees in excess of $25,000, then withdrew all of the settlement funds from his CTA. On or about November 3, 2010, the balance in Respondent's CTA was $1,861.38.

In October, 2010, Respondent sent copies of his bills to Newsome to substantiate his claimed fees. On or before February 2, 2011, Newsome was then sent by Respondent's office an written accounting of the settlement funds, with a request that Newsome review and sign it. In

response, Newsome protested for the first time Respondent's retention of all of the funds received from the lawsuit. (Exh. 14, p. 1.)

On February 9, 2011, Respondent's office sent Newsome a "revised disbursement authorization."

On May 14, 2011, Respondent's office, in response to an email from Newsome stating that he was awaiting disbursement of some funds, sent Newsome an email, indicating that the office had not yet received back from him a signed disbursement authorization.

On May 17, 2011, Respondent agreed to pay Newsome $24,500 plus $1,633 interest as Newsome's share of the settlement in the civil action.

In August 2011, Respondent's office sent to Newsome a check in the amount of $24,500. The check was mailed to Newsome's post office box in Coronado, California. Respondent was then out of the country.

When Newsome returned to the country, he contacted Respondent's office on January 10, 2012, asking that his funds be disbursed, with interest. In response to Newsome's statement that the August check was not in his post office box when he returned, Respondent's office placed a stop order on the prior check and forwarded a new check on January 23, 2012, this time for $26,133.33 ($24,500, plus $1,633.33 in interest). (Exh. 1002, pp. 3-4.) However, when Newsome attempted to negotiate the check in February, it was returned on February 17, 2012, for insufficient funds.

No sooner than February 25, 2012, Newsome emailed Respondent's office about the bounced check. (Exh. 47, p. 2.) On the same day, Newsome complained to the State Bar about Respondent. His "Complaint 1" was the fact that Respondent had refused in November 2009 to defend the cross-complaint with no other legal fees other than the fees set forth in the original

contingency fee agreement. Newsome complained that Respondent "unfairly exploited the cross complaint and the unwillingness of other lawyers to take on an advanced case and [Newsome's] own willingness [sic] to defend a cross complaint on my own in order to force [Newsome] to pay more than [they] had agreed." (Exh. 47.)[5] As additional complaints, Newsome alleged that he had not been told by Respondent of Respondent's receipt of the settlement funds, but learned of it first from USAA. He claimed that Respondent had failed to respond to his calls and emails; and he complained about the many delays in receiving payment of any portion of the funds, especially the fact that the disbursement check had bounced.

It was not until April 3, 2012, that Respondent paid, by wire transfer, the $26,148.33 to Newsome.

Prior to the time that this matter came to trial, Newsome notified the State Bar that he was withdrawing the complaints that he had previously made against Respondent, and he repudiated some of the factual statements that he had made in his complaint. At trial, he appeared as a witness for Respondent, who is again acting as counsel for Newsome in another matter.

Count 1 – Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]

Rule 4-100(A) provides in pertinent part, "All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import[.]" In Count 1, the State Bar alleges, "By failing to maintain $20,638.62

[5] In this complaint, Newsome reported that he had previously complained to the State Bar about Respondent's demand for additional compensation at the time that Newsome fired Respondent in November 2009, and was purportedly advised at that time that he could re-hire Respondent and complain later "if he was still dissatisfied." This is, of course, precisely what he did.

in his CTA [on] Newsome's behalf, Respondent failed to maintain the balance of funds received for the benefit of a client" in a client trust, in violation of rule 4-100(A).

The evidence fails to provide clear and convincing proof that Respondent's action in October 2010, of withdrawing the settlement funds from his account shortly after they had been received, constituted a breach of rule 4-100(A). Both Respondent and Newsome testified that Newsome authorized Respondent to withdraw the funds at that time. To the extent that the State Bar relied on Newsome's prior complaint about Respondent, Newsome withdrew that complaint prior to the trial and appeared at trial as a witness on Respondent's behalf.

The State Bar argues that this court should find that the testimony of both Respondent and Newsome is untruthful; rely solely on the complaint filed by Newsome with the State Bar; and conclude that Newsome's prior complaint to the State Bar, even though it was not given under oath, constitutes clear and convincing evidence that there was no such authorization.

This court declines to adopt such an approach. Instead, while this court finds that Newsome has been untruthful in the past, this court agrees with the following comment made by the State Bar in its Closing Brief:

> According to an old adage, "A liar begins with making falsehood appear like truth, and ends with making truth itself appear like falsehood." This logic applies squarely to the testimony delivered at trial by Newsome."

(Closing Brief, p. 2.)

Newsome began by making false statements to the State Bar about Respondent, in an obvious effort to avoid paying fees to Respondent for Respondent's work in defending the cross-claims. When Newsome subsequently retracted those false claims (after successfully motivating Respondent to waive most of his claim to fees for defending the cross-claims) and testified

truthfully about what happened, Newsome's truthful statements "now appear like falsehood" to the State Bar.

The fact that Respondent was initially authorized to withdraw all of the settlement funds from his CTA does not resolve completely the issue of whether Respondent has failed to maintain those funds in his CTA. It is undisputed that, after Newsome had an opportunity to review the fees that Respondent had paid to himself, Newsome protested those fees in early February 2011. At that point, Respondent had an obligation to return to his CTA the disputed funds. (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758 [If a client contests fees charged or paid, the disputed funds must be placed in a trust account until the conflict is resolved].) At trial, Respondent acknowledged that he did not return any of the funds to his CTA. This failure to act by Respondent constituted a willful violation by him of rule 4-100(A).

Count 2 –Section 6106 [Moral Turpitude - Misappropriation]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. In Count 2, the State Bar alleges, "By misappropriating $20,638.62 of Newsome's settlement funds, Respondent committed an act involving moral turpitude, dishonesty or corruption" in willful violation of section 6106.

As discussed above, this court does not find that Respondent's disbursement of the settlement funds to himself in October 2011 was without authority from the client. Accordingly, that act was not an act of moral turpitude in violation of section 6106.

Further, while Respondent's failure to return the funds to his CTA was a technical violation during the time that he was negotiating the dispute with Newsome, the evidence is not

clear and convincing that that it was an act of dishonesty, corruption or moral turpitude. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 349.)

This count is dismissed with prejudice.

Count 3 – Rule 4-100(B)(1) [Failure to Notify Client of Receipt of Client Funds]

Rule 4-100(B)(1) requires that a member "shall promptly notify a client of the receipt of the client's funds, securities, or other properties."

In this count, the State Bar alleges that Respondent failed to notify Newsome of his receipt of the settlement funds in October 2010. At trial, both Respondent and Newsome testified to the contrary.

Once again the State Bar asks this court to reject the testimony of Newsome and Respondent and to adopt and rely on the prior unsworn complaint of Newsome to the State Bar as clear and convincing evidence. This court declines to do so. Instead, the court finds that the evidence offered by the State Bar in support of this count was not clear and convincing.

This count is dismissed with prejudice.

Count 4 – Rule 4-100(B)(4) [Failure to Pay Client Funds Promptly

Rule 4-100(B)(4) requires attorneys to "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive." In this count, the State Bar alleges that Respondent's failure to pay any portion of the settlement funds to Newsome until April 2012 constituted a violation of that rule.

Respondent received the settlement funds in October 2010. While his retention of the funds until January 2011 was based on the authorization that he had previously received from Newsome, that authorization disappeared with Newsome's complaint about the legal fees in February 2011. On learning of that complaint, Respondent then became obligated to move with

dispatch to resolve that dispute by settlement or to invoke procedures to have others resolve the matter. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 854.) Then, even after an agreement was reached with Newsome in May 2011, months later, Respondent did not actually pay to Newsome any of the funds to which Newsome was entitled for nearly nine additional months. Such delay violated the requirements of rule 4-100(B)(4). (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 170 [two-month delay violated rule].)

This conclusion is not avoided by the fact that Respondent's office sent Newsome a check for $24,500 in August 2011. Even if that check had been received, it was for less than what Newsome was entitled to receive, as agreed to by Respondent on May 17, 2011. Nor is the conclusion avoided by the sending of the check in January 2012. That check was not supported by sufficient funds. Then, even after being notified in February that the January check had bounced, Respondent did not pay the funds to Newsome until April 2012.

Respondent, at trial, testified on several occasions that he should have paid the settlement funds to Newsome sooner. This court agrees, and it concludes that his failure to do so constituted a violation of Respondent's professional obligation under rule 4-100.

Count 5 – Section 6068, subd. (m) [Failure to Respond to Client Inquiries]

Section 6068, subdivision (m), obligates an attorney to "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

In this count the State Bar alleges that Respondent failed to respond to Newsome's "numerous attempts to contact Respondent regarding the settlement funds." Once again, this allegation was based on Newsome's prior complaint to the State Bar, which complaint was

withdrawn by Newsome prior to the trial and contradicted by the trial testimony of both Newsome and Respondent.

For the reasons discussed above, this court concludes that the State Bar's allegation is not supported by clear and convincing evidence. Accordingly, this count is dismissed with prejudice.

Case No. 12-O-14931 (Negron Matter)

On or about April 25, 2009, a tow truck, owned by RBS Towing (RBS), was the at-fault party in a three-vehicle accident. The RBS truck crossed the center line, forced an oncoming van into a guardrail, and then struck a car head-on.

The driver and the passenger of the car, Kristin Martindale and O'Dean Negron, respectively, were seriously injured in the accident. The occupants of the van, John Miller and William Scanlon, were also injured, albeit less seriously.

RBS was insured by Everest National Insurance Company. (Everest Insurance)

On April 29, 2009, Negron hired Respondent to represent him regarding his personal injury claims against RBS, the owner of the tow truck (RBS claim). Respondent and Negron agreed that Respondent would receive a contingent fee equal to one-third (1/3) of all money recovered for his legal services and that Respondent would be reimbursed for costs that he advanced on Negron's behalf.

On or about June 14, 2009, Miller and Scanlon also hired Respondent to represent them in their claims against RBS. Negron, Miller, and Scanlon all signed releases, acknowledging that each of their interests had the potential to conflict and agreeing that Respondent could jointly represent each of them.

On July 31, 2009, Everest Insurance agreed to settle all of the personal injury claims against RBS for a total of $965,000. The terms of the settlement were that Negron and Martindale would each receive $400,000; that Miller and Scanlon would each receive $15,000; and that the remaining $135,000 would be distributed to Negron and Martindale in amounts to be determined by a mediator.

On August 13, 2009, Everest Insurance issued a settlement check, payable to Respondent in the amount of $965,000, in full settlement of the claims against RBS by Negron, Martindale, Miller, and Scanlon. On August 14, 2009, Respondent deposited the settlement check into his CTA. On August 27, 2009, Respondent disbursed the appropriate amount of funds to Martindale, Miller, and Scanlon.

On August 27, 2009, Respondent prepared a disbursement sheet for Negron's $400,000 in settlement funds and obtained Negron's signature on it. The disbursement sheet stated that Respondent would receive a total of $166,431.05 from the settlement ($133,200 for attorney's fees, and $33,231.05 for advanced costs and expenses). With regard to the remaining $233,589.95, Respondent, pursuant to the signed disbursement sheet, disbursed $140,000 of the settlement proceeds to Negron in the following manner:

Respondent disbursed $20,000 directly to Negron;

Respondent disbursed, via wire transfer, $99,232.57 to Claudette Salmon as directed by Negron; and

Respondent disbursed, via wire transfer, $20,767.43 of Negron's settlement funds to J.P. Morgan as directed by Negron.

After those distributions were made, there should have been approximately $93,568 of the Negron settlement funds remaining in the CTA.

On September 21, 2009, a mediator allocated the remaining $135,000 between Negron and Martindale. The mediator determined that Negron would receive $66,500 and that Martindale would receive the remainder of the funds.

On September 21, 2009, Respondent disbursed all but approximately $355 of Negron's share of the $135,000 ($66,500) as follows:

> Respondent disbursed $22,144.50 to himself as his legal fee (about one-third of $66,500);
>
> Respondent disbursed $24,000 to Negron; and
>
> Respondent, with Negron's written authority, deducted $20,000 for other litigation involving Negron, which funds were thereafter paid by Respondent to individuals claiming money for damages caused by Negron to various former residences.

Adding the $93,568 and the $355 figures, as of September 21, 2009, $93,923 of the Negron settlement funds should have remained in the CTA unless and until disbursed by Respondent to Negron or on his behalf.

On September 21, 2009, the balance of Respondent's CTA was well in excess of the required $94,000 figure. However, on October 23, 2009, the balance in Respondent's CTA was $23,622.20. On November 9, 2009, the balance in Respondent's CTA was $13,394.20.

Respondent is obligated to have maintained records of his CTA for five years after the disbursement of funds from the account. (See Note to Rule 4-100, "Trust Account Record Keeping Standards, as adopted by the State Bar Board of Trustees, effective January 1, 1993.) Based on his records, including information from his check register for the account, Respondent put together, for purposes of this proceeding, an accounting of his payments to or on behalf of Negron after August 27, 2009. This list of payments included payments made from Respondent's CTA and from other sources, including Respondent's general operating account.

(Exh. 1018.) In addition to that accounting, the parties stipulated to certain wire transfers made by Respondent between August 27, 2009, and November 9, 2009, [6] from his CTA, on Negron's behalf, to Montana Resorts Rentals, Inc. (MT Resorts), one of Negron's creditors. The combined list and resulting chronology of all disbursements by Respondent to or on behalf of Negron is as follows:

CTA check	8-27-09	$ 5,000
CTA check	8-27-09	$ 5,000
Gen Acct (cash)	8-27-09	$ 2,500
• Wire transfer	8-28-09	$ 9,000
• Wire transfer	8-28-09	$ 6,750
CTA check	8-27-09	$10,000
CTA check	8-31-09	$ 3,000
Gen Acct	9-17-09	$ 1,000
Gen Acct	9-18-09	$ 350
• Wire transfer	9-25-09	$ 9,000
CTA check	9-29-09	$ 3,000
• Wire transfer	10-5-09	$ 6,750

Subtotal of disbursements as of 10-23-09……..$61,350

Cash	10-28-09	$ 2,000
• Wire transfer	11-9-09	$ 9,000

Total of disbursements by 11-9-09…….$72,350

When the total disbursements ($61,350) from August 27, 2009 through October 23, 2009, are added to the balance of the CTA on that later date ($23,622.20), the total falls approximately $8,951 short of the $93,923 figure, indicating a prior misappropriation of approximately that amount. Similarly, when the total disbursements ($72,350) from August 27, 2009, through November 9, 2009, are added to the balance of the CTA on that later date ($13,394.20), the total

[6] The stipulation also included two disbursements to MT Resorts, totaling $15,750, made by Respondent from his CTA in July 2009, before any settlement monies were deposited into the account. Because those disbursements were not of the settlement funds, but presumably were disbursed from funds previously deposited into the account from the funds loaned by MT Resorts to Negron, they cannot be charged against the balance of the settlement funds to determine whether there was any mishandling of the settlement funds.

falls approximately $8,179 short of the $93,923 figure, indicating a misappropriation of approximately that amount.

Between November 29, 2009, and February 7, 2011, Respondent disbursed $77,710 to Negron as follows:

- On November 29, 2009, Respondent disbursed $10,000 to Negron;
- On January 15, 2010, Respondent disbursed $3,000 to Negron;
- On January 29, 2010, Respondent disbursed $5,000 to Negron;
- On March 2, 2010, Respondent disbursed $7,500 to Negron;
- On April 1, 2010, Respondent disbursed $7,500 to Negron;
- On May 13, 2010, Respondent disbursed $7,500 to Negron;
- On June 23, 2010, Respondent disbursed $15,000 to Negron;
- On October 28, 2010, Respondent disbursed $2,000 to Negron;
- On November 18, 2010, Respondent disbursed $4,800 to Negron (by paying Negron's rent at 1530 Maui Street);
- On November 19, 2010, Respondent disbursed $2,410 to Negron;
- On December 15, 2010, Respondent disbursed $3,000 to Negron;
- On December 23, 2010, Respondent disbursed $5,000 to Negron (by issuing a check to a party named "Pease"); and
- On February 7, 2011, Respondent disbursed $5,000 to Negron (by issuing a check to a party named "Harrison").

In addition, the parties stipulated to the following additional wire transfers made by Respondent after November 9, 2009, from his CTA, on Negron's behalf, to MT Resorts:

Wire transfer	11-12-09	$ 6,750
Wire transfer	11-18-09	$ 9,000
Wire transfer	12-23-09	$ 9,000
Wire transfer	2-10-10	$ 6,750
Wire transfer	3-1-10	$ 9,000
Wire transfer	3-29-10	$50,000
Wire transfer	5-12-10	$ 6,750
Wire transfer	6-1-10	$ 7,000
Wire transfer	6-28-10	$ 6,750
Wire transfer	7-2-10	$ 7,000
Wire transfer	9-3-10	$ 2,000
Wire transfer	9-15-10	$ 6,750

Between April 28, 2010, and September 1, 2010, Respondent deposited personal funds into his CTA, including, but not limited to, the following deposits:

4-28-10	$14,000
6-15-10	$9,500
8-11-10	$15,000
9-1-10	$8,000

Count 1 – Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]
Count 2 –Section 6106 [Moral Turpitude - Misappropriation]

In Count 1, the State Bar alleges, "By failing to maintain $80,302.25 of Negron's settlement funds in his CTA, Respondent failed to maintain the balance of funds received for the benefit of a client" in a client trust, in violation of rule 4-100(A). In Count 2, the State Bar alleges, "By misappropriating $80,302.25 of Negron's settlement funds, Respondent committed an act involving moral turpitude, dishonesty or corruption" in willful violation of section 6106.

As set out in the discussion above, the balance of Respondent's CTA on October 23, 2009, had dipped more than $8,950 below the balance required to be maintained in the account on that date, given the deposits and disbursements at that time. This dipping of the account below the required balance represented a mishandling and misappropriation by Respondent of the funds in that account, in willful violation of both rule 4-100(A) and section 6106.[7] (See, e.g., *Palomo v. State Bar* (1984) 36 Ca1.3d 785, 795-796 [fact that balance of CTA fell below amount required to be held in trust supports finding of willful misappropriation]; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410 ["[A]n attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation."]; *Baca v. State Bar* (1990) 52 Cal.3d 294, 304.)

[7] Because the conduct underlying the rule 4-100(A) violation is essentially the same as that underlying the finding that Respondent is culpable of the more serious misconduct of committing acts of moral turpitude (misappropriation) in willful violation of section 6106, the court finds no need to assess any additional discipline as a consequence of it. (See *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.)

The fact that Respondent eventually paid to Negron all of the funds that he had previously misappropriated does not constitute a defense to his culpability for the prior misappropriation. (*In the Matter of Elliott* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 541, 544.)

The evidence does not support the State Bar's allegation that the amount of the misappropriation was in excess of $80,000. This allegation was based on the State Bar's understanding that the wire transfers to MT Resorts were for Respondent's personal expenses, rather than to one of Negron's creditors. That understanding, at trial, proved to be incorrect.

Count 3 – Rule 4-100(B)(4) [Failure to Pay Client Funds Promptly

During the latter portion of the trial, the State Bar asked that this count be dismissed. To formalize this court's oral order at that time, this count is dismissed with prejudice.

Count 4 – Rule 4-100(A) [Commingling Personal Funds in Client Trust Account]

Rule 4-100(A) prohibits attorneys from depositing personal funds into client trust accounts: "No funds belonging to the member or law firm shall be deposited therein or otherwise commingled." Further, "[t]he rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23; see also *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54 ["Trust accounts, open or closed, are never to be used for personal purposes . . . ."].)

In this count the State Bar first alleges that Respondent paid a series of "personal expenses" to "Mt. Resorts Rentals." Because the evidence at trial revealed that these disbursements were, in fact, for the benefit of Respondent's client, rather than a personal expense, this evidence does not support that particular allegation of a commingling violation.

The State Bar also alleges that Respondent deposited personal funds into his account and, as noted above, Respondent has so stipulated. However, because the evidence indicates that these deposits were for the purpose of replenishing funds that had previously been misappropriated by Respondent from the account, such conduct does not support a finding of a commingling violation under the Rules of Professional Conduct. (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 978-979.)

This count is dismissed with prejudice.

Count 5 – Rule 3-300 [Business Transaction with a Client]

Rule 3-300 provides: A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition

In this count, the State Bar alleges that Respondent violated this rule by loaning money to Negron during the time that he represented Negron without complying with the above requirements of rule 3-300. This court agrees.

Respondent loaned significant funds to Negron during the time that they contemplated that Negron would secure a significant recovery in his lawsuit against the driver of the car in which Negron was traveling at the time of the accident. In fact, that did not happen, due largely to evidence that Negron was faking his injuries. At no time during the time that Respondent was

making these loans did he comply with the rule 3-300 requirements that he advise Negron in writing of the terms of the loans and of Negron's right to seek the advice of an independent attorney. While the loans appear to have been fair, and Respondent ended up being the victim of them by virtue of Negron's failure to repay any of them, Respondent's conduct nevertheless constituted a violation of rule 3-300.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)[8] The court finds the following with regard to aggravating factors.

Prior Discipline

Respondent has been disciplined on one prior occasion. On November 6, 2008, he was suspended by the California Supreme Court for one year, stayed, placed on one year of probation with a 60-day actual suspension. His misconduct in that matter was an act of moral turpitude in violation of section 6106, to wit, representing to an insurance company that he was holding $72,000 in his CTA and agreeing to "freeze" that amount, when the balance in his account at the time was only $4,075.

This prior record of discipline is an aggravating factor, especially since the facts show that some of Respondent's present misconduct occurred during the time that he was still on probation as a result of that prior discipline. (Std. 1.2(b)(i).)

Multiple Acts of Misconduct

The fact that Respondent is culpable of multiple acts of misconduct is an aggravating factor. (Std. 1.2(b)(ii).)

[8] All further references to standard(s) or std. are to this source.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds the following with regard to mitigating factors.

Cooperation

Respondent did not admit culpability in the matter but entered into an extensive stipulation of facts, thereby assisting the State Bar in the prosecution of the case. For such conduct Respondent is entitled to some, albeit limited, mitigation. (Std. 1.2(e)(v); see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50; but see *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts "very limited" where culpability is denied].)

Restitution

Although Respondent misappropriated the funds of his client, he restored the funds in his client trust account and eventually paid more than the amount of the settlement proceeds to Negron or on his behalf. Such conduct is a mitigating factor. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 13, citing *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310; *Weller v. State* Bar (1989) 49 Cal.3d 670, 676; *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1089; *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366-1367; *Waysman v. State Bar* (1986) 41 Cal.3d 452.)

Character Evidence

Respondent presented good character testimony from five individuals, including a banker, two attorneys, and a retired federal magistrate judge. All of these individuals indicated

that they had high regard for Respondent, both as an attorney and as a moral person. Respondent is entitled to mitigation for this good character evidence. (Std. 1.2(e)(vi).)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar*, *supra*, 49 Cal.3d at pp. 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended

sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 2.2(a) which recommends disbarment for willful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is a one-year actual suspension.

Misappropriation of client funds has long been viewed as a particularly serious ethical violation. It breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1035; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) The Supreme Court has consistently stated that misappropriation generally warrants disbarment in the absence of clearly mitigating circumstances. (*Kelly v. State Bar*, *supra*, 45 Cal.3d 649, 656; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.) The Supreme Court has also imposed disbarment on attorneys with no prior record of discipline in cases involving a single misappropriation. (See, e.g., *In re Abbott* (1977) 19 Cal.3d 249 [taking of $29,500, showing of manic-depressive condition, prognosis uncertain].) In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, an attorney with over 11 years of practice and no prior record of discipline was disbarred for misappropriating approximately $29,000 in law firm funds over an 8-month period. In *Chang v. State Bar* (1989) 49 Cal.3d 114, an attorney misappropriated almost $7,900 from his law firm, coincident with his termination by that firm, and was disbarred. (See also *In the Matter of Blum*, *supra*, 3 Cal. State Bar Ct. Rptr. 170 [no prior record of discipline, misappropriation of approximately $55,000 from a single client]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 511 [misappropriation of nearly $40,000, misled client for a year, no prior discipline]; *Kennedy v. State Bar* (1989) 48 Cal.3d 610 [disbarment for misappropriation in excess of $10,000 from

multiple clients and failure to return files with no prior misconduct in eight years]; and *Kelly v. State Bar, supra*, 45 Cal.3d 649 [disbarment for misappropriation of $20,000 and failure to account with no prior discipline in seven years].)

Here Respondent was culpable of misappropriating, as an act of moral turpitude, more than $8,900. That misconduct occurred while he was still on probation for his prior misconduct, also involving an act moral turpitude related to his CTA. In addition, he failed in the Newsome matter to maintain in his client trust account an additional $35,000, in violation of rule 4-100(A).

The amounts of client money being mishandled by Respondent are not insignificantly small. Nor can it be said that the most compelling mitigating circumstances clearly predominate. Accordingly, the guideline of standard 2.2(a) would indicate that a disbarment recommendation should be made.

Nor is there any apparent reason for this court to disregard standard 2.2(a). Respondent has acted inappropriately in a number of different ways, and he continues to dispute his culpability for that conduct. Under such circumstances, it is this court's conclusion that a disbarment recommendation is both appropriate and necessary to protect the profession and the public.

RECOMMENDED DISCIPLINE

Disbarment

The court recommends that respondent **Joseph Guy Maiorano,** Member No. 113876**,** be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

California Rules of Court, Rule 9.20

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.

Costs

The court further recommends 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. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds, and such payment is enforceable as provided under Business and Professions Code section 6140.5.

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Joseph Guy Maiorano,** Member No. 113876, be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 5.111(D)(1).)[9]

Dated: August _____, 2013.

DONALD F. MILES
Judge of the State Bar Court

[9] An inactive member of the State Bar of California cannot lawfully practice law in this state. (Bus. & Prof. Code, § 6126, subd. (b); see also Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice law, or to even hold himself or herself out as entitled to practice law. (*Ibid*.) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any state administrative hearing even if laypersons are otherwise authorized to do so. (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)