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STATE BAR COURT  
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STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

**PUBLIC MATTER**

In the Matter of	)	Case Nos.: 12-O-12244 (12-O-17355)-DFM
	)	
<b>DIANE BERNADETTE CAREY,</b>	)	<b>DECISION INCLUDING DISBARMENT</b>
	)	<b>RECOMMENDATION AND</b>
<b>Member No. 171543,</b>	)	<b>INVOLUNTARY INACTIVE</b>
	)	<b>ENROLLMENT ORDER</b>
<u>A Member of the State Bar.</u>	)	

**INTRODUCTION**

Respondent **Diane Bernadette Carey** (Respondent) is charged here with willfully violating: (1) rule 4-100(A) of the Rules of Professional Conduct<sup>1</sup> (commingling personal funds in trust account); (2) rule 4-100(A) (failure to maintain client funds in trust account); (3) section 6106 of the Business and Professions Code<sup>2</sup> (moral turpitude - misappropriation); (4) section 6106 (moral turpitude - issuing NSF checks); (5) section 6068(o)(3) (failure to report judicial sanctions) [two counts]; and (6) section 6103 (failure to obey court order)[two counts]. She has stipulated to culpability to all of these counts except the two moral turpitude counts. As set forth below, the court finds culpability on those disputed counts as well. In view of Respondent's misconduct, prior record of discipline, and other aggravating factors, the court recommends, *inter alia*, that she be disbarred from the practice of law.

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<sup>1</sup> Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

<sup>2</sup> Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

## **PERTINENT PROCEDURAL HISTORY**

A Notice of Disciplinary Charges (NDC) in case No. 12-O-12244 was filed by the State Bar of California on December 4, 2012. On January 14, 2013, an initial status conference was held in the matter, at which time the case was scheduled to commence trial on March 27, 2013.

Thereafter, on January 24, 2013, an NDC was filed in case No. 12-O-17355.

On January 28, 2013, Respondent made a request for referral to the Alternative Discipline Program (ADP). On January 29, 2013, a status conference was held in the cases, at which time the cases were consolidated and referred to an ADP Program Judge for evaluation for possible inclusion in the ADP. The referral order specifically stated that the cases would nonetheless remain scheduled to go to trial as previously scheduled.

On February 15, 2013, Respondent filed her response to the NDCs.

On March 15, 2013, the Program Judge issued an order, concluding that Respondent was not eligible for participation in the ADP and referring the matter back to standard proceedings.

Trial was commenced and completed on March 27, 2013. Prior to the commencement of trial, the parties executed an extensive stipulation of undisputed facts covering virtually all of the underlying facts in the cases. Then, when the consolidated cases were called for trial, Respondent stipulated to culpability for all but the two moral turpitude counts. The State Bar was represented at trial by Deputy Trial Counsel Kim Kasreliovich. Respondent was represented at trial by Rizza Gonzales of the Century Law Group.

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

The following findings of fact are based on the extensive stipulation of undisputed facts and conclusions of law filed by the parties, on the admissions contained in Respondent's response to the NDC, and on the documentary and testimonial evidence admitted at trial.

**Jurisdiction**

Respondent was admitted to the practice of law in the State of California on August 11, 1994, and has been a member of the State Bar of California since that time.

**General Background**

Respondent practices law primarily in the lower income areas of Los Angeles. Much of her work involves the defense of eviction cases. She works for rates and fees below those charged by most other attorneys, allowing her to provide legal representation to low income citizens who might otherwise be unable to afford an attorney.

In addition to her commitment to helping low income people, Respondent is also extraordinarily dedicated to providing "rescue" services to stray dogs, both in this state and in Mexico. To provide those services she has, among other efforts, created a non-profit corporation that maintains four separate "rescue dog" facilities, three of which are in Mexico (because of the lower costs there). When stray dogs are secured, they are provided with any required veterinary medical attention and then put up for adoption. While awaiting adoption, the dogs must, of course, be fed, watered, and otherwise maintained by the facility. Respondent testified that the foundation is currently holding about 110 dogs.

Respondent is effectively the sole source of money to pay for the expenses of the non-profit corporation, including the rental cost of its four these facilities, the salaries of the hired help and the costs of caring for the dogs. These expenses total each month well more than \$5,000. Unfortunately, the cash flow from Respondent's law practice, which is the only source of money for Respondent to use for her charitable activities, is sometimes insufficient to cover the ongoing costs of the foundation. As will be set out in greater detail below, on some of those occasions, Respondent found funds to pay for the foundation's expenses by resorting to

inappropriate means, including the misuse of her client trust account, her general operating bank account, and even the money of a client.

**Case No. 12-O-12244**

At all times in the past relevant herein, Respondent maintained a client trust account (CTA) at the Bank of America and a general operating account at Citibank. Under the bank's courtesy policy for the CTA, when a check was deposited into the CTA, the bank would allow Respondent to withdraw cash based on that deposit, even though the deposited check had not yet cleared.

One of the methods Respondent used to generate short-term funds for the foundation was to write checks on her general operating account, even though there were not sufficient funds in the account at the time, and then deposit those checks into her CTA. Taking advantage of the bank's courtesy policy, Respondent would then promptly withdraw cash from the CTA, before the Bank of America would learn that the deposited check was "NSF," and then use that cash to pay expenses of the foundation. At trial, this process was referred to by the prosecuting Deputy Trial Counsel, with considerable justification, as a "kiting" scheme. If new funds then became available to Respondent before the deposited NSF check bounced, she would hurriedly deposit those new funds into her general operating account, where they would then be used by the bank to cover the previously deposited check and, hence, be transferred into Respondent's CTA. Each such transfer of funds, however, resulted in a deposit by Respondent of her personal funds into her CTA which Respondent had then used for non-client purposes, an act of commingling prohibited by rule 4-100(A). On the other hand, when new funds did not become available quickly enough for Respondent to cover a deposited NSF check, the deposited check would then end up "bouncing." Because there were always client funds in the CTA, when the bounced check was charged back against the CTA (in situations where Respondent had previously

withdrawn cash based on the deposit), that charge back would be levied against the client funds in the account. In other words, Respondent's cash withdrawal had ultimately been from the funds of her clients, a misappropriation of client funds in violation of rule 4-100(A) and, potentially, section 6106.

As previously noted, Respondent and the State Bar reached an extensive stipulation as to the facts surrounding the above transactions. Based on that stipulation and the evidence received at trial, the details of Respondent's many resorts to the above "kiting" scheme are as follows:

On August 12, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On August 22, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On August 26, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On August 29, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On September 20, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On October 5, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On October 6, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On October 20, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On November 7, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On November 8, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On December 9, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$100.

On or about December 22, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$160.

On December 23, 2011, Respondent wrote and deposited a check of personal funds from her general account to her client trust account in the amount of \$200.

Because Respondent was successful in covering each of the above checks with her own personal funds, she deposited a total of approximately \$1,460 in personal funds from her general account into the CTA between August 12, 2011 and December 23, 2011.

In addition, eight other checks issued by Respondent from her general account to the CTA were eventually returned by the bank for insufficient funds. At the following times, the balance of the CTA was actually reduced to a negative balance:

On August 31, 2011, Respondent's actions, as described above, caused the balance in the CTA to fall to [-\$222.11].

On October 7, 2011, Respondent's actions as described above, caused the balance in Respondent's client trust account to fall to [-\$111.11].

On November 10, 2011, Respondent's actions, as described above, caused the balance in Respondent's client trust account to fall to [-\$125.11].

On December 30, 2011, Respondent's actions, as described above, caused the balance in Respondent's client trust account to fall to [-\$158.97].

At all of the above times, Respondent was supposed to be holding the funds of various clients in her CTA. As a result, each time that the balance of the CTA reached zero, it meant that Respondent had misappropriated client funds from her account.

In addition, on one occasion Respondent consciously withdrew more than \$4,600 of money entrusted by a client to her for safekeeping and used those funds to pay non-client expenses. She has stipulated to the following details regarding that conduct:

On September 21, 2011, Respondent's client, Premier PCS of TX LLC/Richard Ahn (Ahn), who was the defendant in *Ji Moon v. Richard Youngho Ahn, et. al.*, was ordered to pay

sanctions individually to the plaintiff in the amount of \$4,675 for misuse of the discovery process.

On October 24, 2011, Respondent deposited a check from Ahn into her client trust account in the amount of \$4,675 to pay the court-ordered sanctions. As a result of that transaction, Respondent was required to maintain a balance of at least \$4,675 in the CTA until payment of the sanctions.

By November 10, 2011, without any disbursements made to pay the sanctions, the balance in Respondent's CTA had dropped to [-\$125.11].

On January 20, 2012, Bank of America closed the CTA. At no time prior to January 20, 2012, did Respondent disburse any funds to pay the sanctions. Instead, Respondent eventually ended up using personal funds from another source to pay the sanctions.

**Count 1 – Rule 4-100(A) [Commingling Personal Funds in Client Trust Account]**

Rule 4-100(A) prohibits attorneys from depositing personal funds into a client trust account. “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 . . .”].)

Respondent has admittedly improperly deposited personal funds into her CTA. (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 426.) She stipulated at trial that her conduct constituted a willful violation of rule 4-100(A).

**Count 2 – Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]**

Rule 4-100(A) requires that “funds received or held for the benefit of clients” shall be deposited in a CTA. It is well-established that “an attorney has a ‘personal obligation of

reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds.’ [Citation.] These duties are non-delegable. [Citation.]” (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 411.) Under this non-delegable duty, an attorney must maintain client funds in the CTA until outstanding balances are settled. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal State Bar Ct. Rptr. 113, 123.)

The fact that the balance of Respondent’s CTA repeatedly fell below the amounts required to be held in trust for her clients supports a finding of willful misappropriation in violation of rule 4-100(A). Respondent stipulated at trial that her conduct violated rule 4-100(A). (See ,e.g., *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 504.)

**Count 3 – Section 6106 [Moral Turpitude – Misappropriation]**

Section 6106 of the Business and Professions Code prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, a finding of gross negligence will support such a charge where an attorney’s fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum, supra*, 4 Cal. State Bar Ct. Rptr. at p. 410.) An 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; *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034 [attorney who withdrew CTA funds under mistaken belief that client had authorized use of funds for fees culpable of willful misappropriation and moral turpitude]; *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 830.)

Respondent consciously used \$4,675 of her client’s money for purposes other than that for which those funds were entrusted to Respondent. That conduct constituted a misappropriation by Respondent of those funds and an action of moral turpitude, in willful

violation of section 6106. The fact that Respondent eventually paid the sanctions for the client with other funds does not constitute a defense to her culpability for the prior misappropriation.

*(In the Matter of Elliott (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 541, 544.)*

**Count 4 – Section 6106 [Moral Turpitude – NSF Checks]**

The State Bar alleges that the above “kiting” scheme undertaken by Respondent constituted an act of moral turpitude. This court agrees. The only stated purpose of the NSF checks was to obtain the use of the bank’s cash during the processing of the checks. Worse, whether or not Respondent was subsequently able to obtain cash to cover the checks before the checks bounced, each of the transactions resulted in a violation by Respondent of her ethical duties under the Rules of Professional Conduct. While no harm actually resulted to any of her clients, such conduct created a substantial risk of such harm, is absolutely prohibited, and cannot be condoned.

**Case No. 12-O-17355**

June 27, 2012 Sanction Order - Hernandez vs. Cabrera

On January 11, 2012, Respondent became the attorney of record for Gil Cabrera (Cabrera) in a marriage dissolution action filed in Los Angeles Superior Court and entitled *Maria C. Hernandez vs. Gil Cabrera (Hernandez vs. Cabrera)*.

On January 11, 2012, an Order to Show Cause hearing regarding child support was held. The next hearing date was set for April 24, 2012. Respondent was present at the January 11, 2012 Order to Show Cause hearing and had actual notice of the April 24, 2012 hearing.

On April 24, 2012, Respondent failed to appear at the hearing in *Hernandez vs. Cabrera*. The court issued an order to show cause why Respondent should not be sanctioned for her failure to appear. The hearing on that order to show cause was scheduled for June 27, 2012. Respondent received notice of the order to show cause and the hearing.

On June 27, 2012, the court issued an order requiring Respondent to pay sanctions in the amount of \$1,250 for her failure to appear at the hearing on April 24, 2012. Respondent received notice of the sanctions order. However, she failed to report the sanctions to the State Bar in writing within 30 days or at any time thereafter. To date, she has also failed to pay any portion of the sanctions.

April 11, 2012 Sanction Order - *Hernandez vs. Herndandez*

On November 2, 2011, Respondent filed in the Los Angeles Superior Court a quiet title action on behalf of Reyna Hernandez, entitled *Reyna Hernandez vs. Manuel Hernandez, Marilyn Hernandez, and Michelle Darlene Hernandez (Hernandez vs. Hernandez)*.

On December 12, 2011, the court clerk filed and served on Respondent a Notice of Case Management Conference. The Notice of Case Management Conference scheduled a case management conference on March 7, 2012, and ordered Respondent to provide notice of such to all parties to the action. Respondent received this Notice of Case Management Conference.

On March 7, 2012, Respondent failed to appear at the case management conference in *Hernandez vs. Hernandez*. The superior court then issued an order to show cause why Respondent should not be sanctioned for: (1) failing to timely file a case management conference statement; (2) failing to timely serve the summons and complaint; (3) failing to give notice of the March 7, 2012 case management conference; and (4) failing to appear at the March 7, 2012 case management conference. The court set the hearing on the order to show cause for April 11, 2012.

On April 11, 2012, the court issued an order requiring Respondent to pay sanctions in the amount of \$1,200, consisting of \$300 for each of the four violations listed above. The court also ordered that Respondent serve and file proof of payment of those sanctions by April 15, 2012. Respondent was present at the hearing and had actual notice of the order to pay sanctions.

Nonetheless, Respondent failed to report the sanctions to the State Bar in writing within 30 days or at any time thereafter. She also did not pay the sanctions by the April 15, 2012 deadline. Instead, she only paid the sanctions on or about September 17, 2012.

**Count 1 and 3 – Section 6068(o)(3) [Failure to Report Judicial Sanctions]**

Section 6068(o)(3) requires an attorney to report to the State Bar any imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000). That report must be in writing and must be made within 30 days of the time the attorney has knowledge of the sanctions. The sanctions order must be reported even though it is or will be appealed. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 866-867.) The willful violation of this duty does not require a bad purpose or an evil intent. (*Id.*)

Respondent testified that she failed to notify the State Bar of the sanction orders of April 11, 2012 and June 27, 2012, because the court had indicated in the sanction orders that it intended to do so. As a result, she felt that she had no duty to provide any duplicative notifications. In that belief she was mistaken. As a result, she stipulated at trial that her failures to report those two sanction orders constituted willful violations by her of section 6068(o)(3).

**Count 2 and 4 – Section 6103 [Failure to Obey Court Order]**

Section 6103 provides, in pertinent part: “A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, ... constitute causes for disbarment or suspension.”

On June 27, 2012, the court in *Hernandez vs. Cabrera* ordered Respondent to pay sanctions in the amount of \$1,250 for her failure to appear at the hearing on April 24, 2012. She has never done so.

On April 11, 2012, the court in *Hernandez vs. Hernandez* ordered Respondent to pay sanctions in the amount of \$1,200 by April 15, 2012. She did not do so. Instead, she only paid the sanctions on or about September 17, 2012.

Respondent stipulated at trial that her failure to pay the above sanctions, as required by the two orders, constituted willful violations by her of section 6103.

**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).)<sup>3</sup> The court makes the following findings with regard to possible aggravating factors.

**Prior Discipline**

Respondent has been disciplined on two prior occasions.

On February 15, 2000, Respondent was privately reprovved by this court in case No. 99-O-12766. Her misconduct included the commingling of her personal funds in her client trust account, in violation of rule 4-100(A), and issuing NSF checks on her client trust account, acts of moral turpitude in violation of section 6106.

On March 24, 2005, the Supreme Court issued an order, disciplining Respondent in cases Nos. 03-O-04800 and 04-O-10726. The discipline consisted of a two-year stayed suspension and a three-year probation, with no actual suspension. Her misconduct again included repeated acts of commingling her personal funds in her client trust account, in violation of rule 4-100(A), and issuing NSF checks on her client trust account, acts of moral turpitude in violation of section 6106.

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<sup>3</sup> All further references to standard(s) or std. are to this source.

This prior record of discipline, involving misconduct substantially similar to that involved here, is an extremely serious aggravating circumstance. (Std. 1.2(b)(i).)

### **Multiple Acts of Misconduct**

Respondent has been found culpable of multiple acts of misconduct in the present proceeding.<sup>4</sup> The existence of such multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

### **Mitigating Circumstances**

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

#### **Cooperation**

Respondent entered into an extensive stipulation of facts and freely admitted of most of the counts in this case, for which conduct she is entitled to mitigation credit. (Std. 1.2(e)(v); see also *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443.)

#### **Restitution**

Although misappropriated the funds of her client for her personal use, she also repaid all of such funds on behalf of that client prior to any complaint to the State Bar or the initiation of disciplinary proceedings. Such conduct is a mitigating factor. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 13; *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.)

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<sup>4</sup> Although the court concludes that Respondent violated rule 4-100(A) in counts 1 and 2 of case No. 12-O-12244, those violations arose from the same misconduct that provided the basis for the more serious findings of culpability for violating section 6106. Accordingly, no additional weight is given those rule 4-100(A) violations in determining the appropriate discipline. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.)

### **Character Evidence**

Respondent presented good character testimony from five individuals, including a former client and another attorney. Respondent is entitled to mitigation for this good character evidence. (Std. 1.2(e)(vi).)

### **Community Service/Pro Bono Work**

Respondent presented significant evidence of community service and pro bono work, which is “a mitigating factor that is entitled to ‘considerable weight.’ [Citation.]” (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785; see also *Rose v. State Bar* (1989) 49 Cal.3d 646, 665; *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 305 [10-15 hours per month of volunteer community and church work, counseling people in crisis.]; *In the Matter of Crane and DePew* (Review Dept 1990) 1 Cal. State Bar Ct. Rptr. 139, 158.)

### **Emotional Difficulties**

The court declines to provide any mitigation credit for Respondent’s emotional and financial difficulties.

Extreme emotional difficulties may be considered mitigating where it is established by expert testimony that they were responsible for the attorney’s misconduct. (Std. 1.2(e)(iv); *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.) The evidence offered by Respondent regarding the emotional difficulties she had in the past did not provide clear and convincing evidence that her problems are a mitigating factor here. There was no expert testimony, or other convincing evidence, showing the required nexus between Respondent’s claimed emotional problems and her misconduct. Nor was there sufficient evidence for this court to conclude that any emotional problems suffered by Respondent in the past have now been satisfactorily resolved; indeed, Respondent’s own testimony was to the contrary.

Nor does the evidence of Respondent's financial problems constitute a mitigating factor. Her ongoing financial difficulties resulted from circumstances that were substantially within her ability to control. Further, there is no evidence that she ever sought relief from the courts' sanction awards based on that financial hardship.

### DISCUSSION

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

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The court then looks to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than 20 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silvertown* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) 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.)

The State Bar contends that disbarment of Respondent is called for by both the case law and the standards and that such is necessary to protect both the public and the profession. Sadly, this court agrees.

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 standards 1.7(b) and 2.2(a).

Standard 1.7(b) provides that when an attorney has two prior records of discipline, the degree of discipline in the current proceeding is to be disbarment unless the most compelling mitigating circumstances clearly predominate.

Standard 2.2(a) 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.

Turning to the case law, misappropriation of client funds has long been viewed by the courts as a particularly serious ethical violation. Misappropriation 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, supra*, 53 Cal.3d at p. 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*; *Waysman v. State Bar* (1986) 41 Cal.3d 452, 457; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.)

Where the misappropriation results from an intentional misuse by the attorney of the client's funds, as was the case here, the danger to the public and profession is viewed as particularly great and a recommendation of disbarment becomes much more appropriate and necessary. In such situations, the Supreme Court has even 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]; *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]; *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].)

Respondent's misappropriation of client funds was not limited to a single instance. Instead, it was repeated and ongoing. Further, on at least the one occasion, it was demonstrably intentional. Finally, the amount of client funds being misappropriated cannot be characterized as insignificantly small.

Nor is there any compelling reason to deviate from the disbarment guideline of standard 1.7(b). To the contrary, the need for such a strong measure is especially warranted here because of Respondent's continuing misuse of her client trust account despite her two prior disciplines for comparable misconduct. Rather than learning from those prior disciplines, Respondent's most recent misconduct not only repeated her past misbehavior but also included actual acts of moral turpitude.

When the sanctions and educational efforts of the disciplinary system will not dissuade an attorney from mishandling his or her client trust account and the client funds in it, removing that individual from the practice of law is required. Such is the situation here.

### **RECOMMENDED DISCIPLINE**

#### **Disbarment**

The court recommends that respondent **Diane Bernadette Carey**, Member No. 171543, be disbarred from the practice of law in the State of California and that her name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

#### **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.<sup>5</sup>

#### **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.

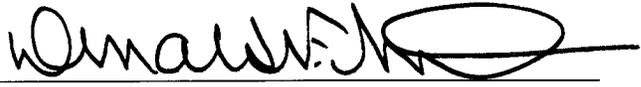
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<sup>5</sup> Respondent is required to file a rule 9.20(c) affidavit even if she has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

**ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **Diane Bernadette Carey**, Member No. 171543, 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).)<sup>6</sup>

Dated: May 1, 2013.

  
DONALD F. MILES  
Judge of the State Bar Court

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<sup>6</sup> 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.)

**CERTIFICATE OF SERVICE**

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on May 1, 2013, I deposited a true copy of the following document(s):

**DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**RIZZA D. GONZALES  
CENTURY LAW GROUP LLP  
5200 W CENTURY BLVD STE 345  
LOS ANGELES, CA 90045**

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

**KIMBERLY KASRELIOVICH, Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on May 1, 2013.

  
\_\_\_\_\_  
Tammy Cleaver  
Case Administrator  
State Bar Court