PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **WILLIAM ANDRAI ACOSTA,** **Member No. 207377,** A Member of the State Bar.	**Case No.: 14-O-02844-WKM** **DECISION**

Introduction

The Office of the Chief Trial Counsel of the State Bar of California (OCTC) charges respondent **WILLIAM ANDRAI ACOSTA** with six counts of misconduct involving his client trust account (CTA). Specifically, in counts one and three, OCTC charges that respondent failed to maintain client funds in a trust account as required by rule 4-100(A) of the State Bar Rules of Professional Conduct.[1] In counts two and four, OCTC charges that "respondent dishonestly or grossly negligently [sic] misappropriated" client funds in willful violation of Business and Professions Code[2] section 6106's proscription of acts involving moral turpitude, dishonesty, or corruption. In count five, OCTC charges respondent with commingling in violation of rule 4-100(A) because he caused the issuance of two CTA checks totaling $10,000 that were used to

[1] Except where otherwise indicated, all further references to rules are to the State Bar Rules of Professional Conduct.

[2] Except where otherwise indicated, all further statutory references are the Business and Professions Code.

pay respondent's personal expenses with funds belonging to respondent. Finally, in count six, OCTC charges that respondent caused the issuance of three NSF checks (i.e., checks drawn on accounts with insufficient funds) and withdrew $460 from his CTA when there was no money in the account, all in willful violation of section 6106's proscription of acts involving moral turpitude.

For the reasons set forth *post*, the court will (1) consolidate counts one and three and find respondent culpable on a single count of failing to maintain $6,861.62 out of $7,890.44 in client funds in a trust account in willful violation of rule 4-100(A); (2) consolidate counts two and four and find respondent culpable on a single count of misappropriating $6,861.62 in client funds through gross negligence in willful violation of section 6106's proscription of acts involving moral turpitude; and (3) dismiss counts five and six with prejudice for want of proof. Furthermore, in the absence of any aggravating circumstance and the presence of compelling mitigating circumstances, including instantaneous restitution, this court recommends that the appropriate level of discipline for the found misconduct be two years' stayed suspension and two years' probation with conditions, including a sixty-day period of actual suspension.

Pertinent Procedural History

OCTC filed the notice of disciplinary charges (NDC) in this matter on June 18, 2015. Thereafter, respondent filed his response to the NDC on June 25, 2015.

On the first day of trial, October 27, 2015, the parties filed a partial stipulation of facts and admission of documents. A second day of trial was held on October 28, 2015. Both parties filed posttrial briefs. The court took the matter under submission for decision on November 17, 2015.

At trial, the State Bar was represented by Deputy Trial Counsel Diane J. Meyers. Respondent was represented by Anthony Radogna, Esq.

Findings of Fact and Conclusions of Law

The following findings of fact are based on the parties' partial stipulation of facts and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 6, 2000. He has been a member of the State Bar of California since that time.

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Facts

Respondent, who lives in the Los Angeles area, frequently goes to Las Vegas, Nevada, where he stays and gambles at The Mirage Hotel & Casino (The Mirage).[3] When playing in The Mirage's casino, respondent often obtains casino chips by executing casino markers. Under Nevada law, a marker represents a casino patron's legal obligation to pay for the chips that the casino advanced to the patron. Notably, a marker is a negotiable credit instrument, which is tied to a bank account (or other liquid asset) from which a casino can obtain payment if a patron fails to pay a marker within the agreed upon time for payment. (*Nguyen v. State* (Nev. 2000) 14 P.3d 515, 518.) Thus, a marker is akin to a counter check. If a patron fails to pay a marker within the time for payment, the casino may present the marker to the patron's bank for payment as a check drawn on the patron's bank account.

Respondent obtained marker signing privileges by applying to open a marker account at The Mirage in 2008. The Mirage's customary business practice in establishing such an account is to have a patron/hotel guest complete its marker account application form. Through the account application, the patron provides the casino with his or her personal financial information (e.g., the name of the patron's bank, the bank's American Bankers Association (ABA) routing

[3] The Mirage is owned by MGM Resorts International. Accordingly, all references to The Mirage and to MGM Resorts International implicitly include a reference to the other.

number, and the patron's bank account number). When determining whether to open a marker account for a patron, The Mirage not only reviews the patron's account application, but it also obtains and reviews the patron's credit report as well as a bank report on the patron's bank account, which shows the date the account was opened, the average daily balance in the account, and the current balance in the account.

In the initial marker account application that respondent submitted to The Mirage in 2008, respondent provided the requested information, including his home address, business address, and banking information on two bank accounts that he had at the time, one account at Wells Fargo Bank, and the other account at Citibank. Based upon a review of the information provided in respondent's initial application, The Mirage approved respondent for a marker account with a $10,000 limit. Respondent activated that account by signing a signature card at The Mirage on July 25, 2008.

Sometime in 2012, respondent simultaneously opened three new bank accounts (a checking account, a savings account, and a CTA) at the J.P. Morgan Chase Bank located at 6300 Van Nuys Boulevard in Van Nuys, California. At some point, respondent's marker account at The Mirage was deactivated because the bank accounts that were tied to the account were no longer valid. Subsequently, on November 18, 2013, respondent updated the bank account information in his marker account during a telephone conversation with Bernard Ilagan, a casino credit clerk at The Mirage. In that telephone conversation, respondent notified Ilagan that respondent's bank was now Chase Bank, and respondent provided Ilagan with Chase Bank's ABA routing number and with the account numbers for two of respondent's three bank accounts at Chase Bank. One of the two account numbers that respondent provided to Ilagan was the account number of respondent's CTA, which respondent identified as the primary bank account for his marker account.

While gambling at The Mirage on Sunday, November 24, 2013, respondent obtained $7,500 in casino chips from the casino by executing marker number 11847462 (the $7,500 marker). Respondent did not pay the $7,500 marker before he departed The Mirage and returned to Los Angeles.

On November 30, 2013, the information respondent provided to Ilagan and that Ilagan recorded on November 18, 2013, was transferred to a printed marker account application. Respondent signed the application that same day at The Mirage.

On Monday, December 2, 2013, respondent obtained an additional $2,500 in casino chips from The Mirage by executing marker number 11847912 (the $2,500 marker). Respondent did not pay the $2,500 marker before he departed The Mirage and returned to Los Angeles. Sometime after December 2, 2013, a collection clerk for The Mirage unsuccessfully attempted to contact respondent regarding the two unpaid markers.

On January 17, 2014, in accordance with (1) Nevada Revised Statutes section 463.368,[4] (2) the express authorization in the updated signature card that respondent signed on November 30, 2013, and (3) the express authorization on the face of each of the two markers signed by respondent, The Mirage inserted additional information on the $7,500 marker and the $2,500 marker to make them presentable to Chase Bank as checks drawn on respondent's CTA. The Mirage then presented the markers to Chase Bank for payment. On January 17, 2014, both of the markers were returned to The Mirage unpaid because sufficient funds did not exist in respondent's CTA to pay them.

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[4] Under Nevada Revised Statutes section 463.368, a licensed casino may, inter alia, complete a marker as is necessary for the marker to be presented to and paid by the patron/maker's bank as a check, so long as the marker is signed by the patron and the marker states the dollar amount of the debt in figures.

On January 21, 2014, both of the markers were again presented to Chase Bank for payment as CTA checks. They were again both returned unpaid because sufficient funds did not exist in respondent's CTA to pay them.

On January 22, 2014, Geico Insurance issued a $10,000 draft payable to respondent and respondent's client, M. Salcedo, in settlement of a personal injury claim. On January 27, 2014, respondent deposited that $10,000 draft into his CTA, along with a $6,109.44 settlement draft that respondent received on behalf of another client, L. Olguin, for a total deposit of $16,109.44. From the $10,000 draft, Salcedo was entitled to $3,000 and her medical provider was entitled to $2,267, totaling $5,267. From the $6,109.44 draft, Olguin was entitled to $1,221.44 and her medical provider was entitled to $1,402, totaling $2,623.44.

On January 28, 2014, respondent withdrew $5,363 from the CTA as his fees for representing Salcedo and Olguin in their respective cases. Therefore, respondent was required to maintain at least $7,890.44 ($5,267 plus $2,623.44) in his CTA for the benefit of Salcedo, Olguin, and their medical provider. Additionally, on January 28, 2014, The Mirage again presented the $7,500 marker and the $2,500 marker to Chase Bank for payment as CTA checks. This time, Chase Bank paid both markers. The balance in the CTA then dropped to $1,028.82, which was significantly below the $7,890.44 respondent was required to maintain in his CTA for Salcedo, Olguin, and their medical provider.

On or about January 29, 2014, respondent issued check no. 1089, drawn on his CTA, in the amount of $3,000 to Salcedo. Further, respondent also issued check no. 1090, drawn on his CTA, to Olguin in the amount of $1,221.44. These checks were for the clients' share of the settlement proceeds. The medical provider was entitled to receive the remaining $3,669 out of the $7,890.44.

On January 30, 2014, Salcedo presented her $3,000 check to Chase Bank for payment. However, her check was returned unpaid as the balance in the CTA on that date was only $1,228.82.[5]

On January 31, 2014, Salcedo again presented her $3,000 for payment, and it was again returned unpaid as the balance in the CTA was still only $1,228.82. At this point, Salcedo called respondent and told him that the $3,000 check he gave her had not been paid due to insufficient funds in his CTA account. Once respondent learned from Salcedo that there was a problem with his CTA, respondent immediately transferred $4,000 from his business account into his CTA, bringing the balance in the CTA to $5,228.89. Later that same day, Olguin presented her $1,221.44 check to Chase Bank for payment, and it was paid, bringing the balance in the CTA to $4,007.38.

On February 3, 2014, when respondent was under a reasonable, mistaken belief that some unauthorized access to his CTA had occurred, respondent closed his CTA at Chase Bank and opened a new CTA at the same location (the second CTA). In the course of closing his first CTA, respondent made two withdrawals, $4,007 and $460, from his CTA. Those two withdrawals caused the closed CTA to be overdrawn by $459.62 ($4,007.38 less $4,007 less $460).[6] On the same day, respondent deposited the $4,467 ($4,007 plus $460) he withdrew, plus an additional $746.25, into the second CTA.

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[5] A $200 deposit was made into the CTA on January 30, 2014.

[6] On February 4, 2014, respondent deposited $460 in cash into the closed CTA, bringing the balance in that CTA to $ 0.38 (-$459.62 plus $460).

On February 4, 2014, respondent issued a new check to Salcedo, check no. 7513, in the amount of $3,000 from the second CTA; this check was paid on February 6, 2014.[7] Also, on February 4, 2014, respondent issued two checks drawn on the second CTA totaling $3,669 to Salcedo's and Olguin's medical provider. Both checks written to the medical provider were paid from the second CTA on February 5, 2014.

Conclusions of Law

Counts One and Three -- Rule 4-100(A) (Maintain Funds in Trust Account)

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions not relevant here. In count one, OCTC charges respondent with violating rule 4-100(A) because, on January 28, 2014, the balance in respondent's CTA fell to $1,028.82, which was significantly less than the $5,267 that respondent was to hold in trust for his client Salcedo and Salcedo's medical provider. Similarly, in count three, OCTC charges respondent with a second, separate violation of rule 4-100(A) based on the fact that on January 28, 2014, the balance in respondent's CTA fell to $1,028.82, which was significantly below the $2,623.44 that respondent was to hold in trust for his client Olguin and Olguin's medical provider.

"An attorney violates [rule 4-100(A)] when he or she fails to deposit and manage funds in the manner delineated by the rule, even if this failure does not harm the client. [Citation.]" (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.) Any conversion of client funds violates rule 4-100(A). A conversion of client funds is established whenever the actual "balance in an

[7] Based on the parties' partial stipulation of facts, and a review of the record, check no. 1089 drawn on the first CTA in the amount of $3,000 was also paid from the second CTA on February 5, 2014. Thus, it appears that respondent paid Salcedo her settlement proceeds twice.

attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust." (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474.)

The record clearly establishes that respondent is culpable of one count of willfully violating rule 4-100(A) because, on January 28, 2014, the balance in respondent's CTA fell to $1,028.82, which was well below the $7,890.44 that respondent was required to hold in trust for his clients Salcedo and Olguin, and their medical provider. In other words, respondent violated rule 4-100(A) because $6,861.62 in client funds were converted from his CTA on January 28, 2014, by The Mirage. The record, however, does not clearly establish two separate rule 4-100(A) violations as charged in counts one and three. Accordingly, as noted *ante*, the court consolidates counts one and three and finds that respondent is culpable of a single violation of rule 4-100(A) based on The Mirage's conversion of $6,861.62 in client funds from respondent's CTA.

Counts Two and Four – Section 6106 (Moral Turpitude)

In count two, OCTC charges respondent with violating section 6106 because, on January 28, 2014, respondent dishonestly or through gross negligence misappropriated $4,238.18 out of the $5,267 that respondent was required to hold in trust for his client Salcedo and Salcedo's medical provider ($5,267 less $1,028.82 equals $4,238.18). Similarly, in count four, OCTC charges respondent with a second, separate violation of section 6106 because on January 28, 2014, respondent dishonestly or through gross negligence misappropriated $1,594.62 out of the $2,623.44 that respondent was required to hold in trust for his client Olguin and Olguin's medical provider ($2,623.44 less $1,028.82 equals $1,594.62).

Even though not alleged in the NDC, OCTC now contends not only that respondent deliberately provided the account number of his CTA at Chase Bank to The Mirage so that respondent could thereafter use or rely on the client funds in his CTA to obtain casino chips on

his marker account, but also that respondent deliberately deposited the two settlement checks totaling $16,109.44 into his CTA on January 27, 2014, so that Chase Bank would pay the $7,500 marker and the $2,500 marker with client funds from his CTA. Of course, OCTC has the burden of proving all of its contentions by clear and convincing evidence. (Rules Proc. of State Bar, rule 5.103.) In that regard, the court must always resolve all reasonable doubts in respondent's favor. In State Bar Court disciplinary proceedings, it is axiomatic that all reasonable doubts are resolved in the respondent's favor and that, "if equally reasonable inferences may be drawn from a fact, the inference which leads to a conclusion of innocence will be accepted." (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216; see also *In re Aquino* (1989) 49 Cal.3d 1122, 1130; *Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794.)

No direct evidence exists, much less credible direct evidence, to support OCTC's contentions. Short of an admission from respondent, proving that respondent deliberately provided The Mirage with the account number of his CTA or that respondent deliberately deposited the two settlement checks into his CTA on January 28, 2014, so that the $7,500 marker and the $2,500 marker would be paid with client funds on deposit in respondent's CTA with direct evidence is extremely difficult. (Cf. *In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 237.) Of course, "an attorney's culpability is not required to be established by direct evidence; circumstantial evidence is sufficient so long as it is clear and convincing. [Citations.]" (*Ibid.*)

In its posttrial brief, OCTC contends that the following circumstantial evidence establishes respondent's culpability:

> Ten days after Chase sent the insufficient funds notice to respondent, respondent deposited his clients' settlement funds into the CTA, knowing that the markers remained unpaid; knowing that he had authorized The Mirage to obtain payment of the markers from the CTA; knowing that he had signed the marker application which warned respondent that willfully drawing or passing a credit instrument with the intent to defraud, including knowing that there were

> insufficient funds in an account upon which it may be drawn, was a crime in the State of Nevada which may result in criminal prosecution in addition to civil proceedings to collect the outstanding debt; and knowing that The Mirage would ultimately obtain payment from the CTA once sufficient funds were available in the CTA to honor the markers. Respondent is thus culpable of intentionally and dishonestly misappropriating funds, in willful violation of Business; and Professions Code section 6106 as charged in Counts Two and Four of the NDC.

A number of the "circumstantial facts" that OCTC argues in support of its contentions have not been proved by clear and convincing evidence. In addition, the probative value of some of the circumstantial facts OCTC relies on has been significantly reduced, if not vitiated, by undisputed facts or by respondent's credible testimony regarding the relevant events occurring in January and February 2014. For example, the fact that respondent deposited the $16,109.44 in settlement proceeds into his CTA 10 days after Chase Bank sent the insufficient funds notice to respondent is irrelevant because OCTC failed to prove, by clear and convincing evidence, that respondent actually received and read the notice from Chase Bank. OCTC also failed to prove, by clear and convincing evidence, that respondent knew that he had authorized The Mirage to obtain payment of the markers from his CTA, that respondent read the warnings on the marker application/signature card he signed on November 30, 2013, or that respondent knew that The Mirage would ultimately obtain payment from his CTA.[8]

In short, the court finds that there is no clear and convincing circumstantial evidence that respondent deliberately provided the account number of his CTA to The Mirage with the intent to or for the purpose of using the CTA or the client money in it to obtain casino chips on his casino marker account. The court further finds that there is no clear and convincing circumstantial evidence that respondent deliberately deposited the two settlement checks totaling

[8] The court finds, based on respondent's credible testimony, that respondent did not know or understand, until sometime in February 2104, that a casino marker is, in effect, a counter check that the casino agrees to hold and not to negotiate (e.g., cash) so long at the patron executing the marker pays the marker within the agreed time period for payment. Respondent's testimony on this issue is supported by the credible testimony of respondent's expert witness, Linda Dunn.

$16,109.44 into his CTA on January 28, 2014, so that the $7,500 marker and the $2,500 marker would be paid with client funds on deposit in respondent's CTA. Indeed, OCTC's circumstantial case is all but belied by the facts that, after depositing the $16,109.44 in settlement proceeds into his CTA on January 27, 2014, respondent not only promptly withdrew his attorney's fees of $5,363, but he also promptly issued a $3,000 CTA check to his client Salcedo and a $1,221.44 CTA check to his client Olguin.

Even though the record does not clearly establish that respondent intentionally authorized The Mirage to convert $6,861.62 in client funds from respondent's CTA on January 28, 2014, the record clearly establishes that respondent did, in fact, provide the account number of his CTA to The Mirage in his November 18, 2013, telephone conversation with Ilagan, and that respondent signed the marker account application/signature card on November 30, 2013, which listed and tied respondent's CTA to respondent's casino marker account.[9]

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[9] At trial, respondent testified that he could not recall having a conversation with Ilagan, or any employee over the phone regarding updating his marker application information. Additionally, respondent testified his recollection was that a casino employee came to him while he was playing in the casino to have him sign the marker application after that employee requested respondent provide updated financial information. In response to the casino employee's request, respondent recalls providing the employee with his bank name, social security number, and date of birth. Respondent could not recall giving that employee or any other casino employee his CTA account number. Respondent further testified he could not recall any information typed on the marker account application/signature card at the time he signed it, except his name and social security number on the left side of the form.

After carefully observing respondent testify and after carefully considering, inter alia, respondent's demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome in this proceeding; his capacity to perceive, recollect, and communicate the matters on which he testified; and, after carefully reflecting on the record as a whole, the court finds that the foregoing portions of respondent's testimony lack credibility. (See, generally, Evid. Code, § 780; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737.) Furthermore, the court's limited adverse credibility determination is supported by The Mirage's business records. The court notes that "[t]here is a clear distinction between credibility and candor. [Citation.]" *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282.) OCTC contends that portions of respondent's testimony lacks candor. The court, however, rejects OCTC's contentions.

The court finds that respondent's disclosure of the account number of his CTA to Mirage and that respondent's signing the marker account application/signature card on November 30, 2013, constitute "gross negligence amounting to moral turpitude for discipline purposes." (*In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 334.) The record clearly establishes that, as a result of respondent's gross negligence and carelessness in fulfilling his fiduciary duties to properly handle and account for client funds, respondent authorized The Mirage to withdraw and The Mirage did, in fact, withdraw $10,000 from respondent's CTA, resulting in the misappropriation of $6,861.62 in client funds from respondent's CTA. Thus, even though respondent did not engage in an act of dishonesty or deliberate wrongdoing, his conduct involved moral turpitude in willful violation of section 6106. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38 ["If [a] misappropriation was caused by serious and inexcusable violations of an attorney's duties to oversee client funds entrusted to his care and to keep detailed records and accounts thereof, the [misappropriation] is deemed willful even in the absence of deliberate wrongdoing."]; *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020-1021; *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729 [an attorney's gross carelessness and negligence in performing fiduciary duties involves moral turpitude even in the absence of evil intent].)

Count Five – Rule 4-100(A) (Commingling)

In count five, OCTC charges respondent with violating rule 4-100(A) by commingling his personal funds in his CTA. More specifically, OCTC charges that "respondent caused the issuance of two checks [totaling $10,000 to Mirage] for personal expenses from respondent's [CTA], which checks were paid on January 28, 2014 [sic] *with funds belonging to respondent*, in willful violation of Rules of Professional Conduct, rule 4-100(A)...." (Italics added.) No such rule 4-100(A) violation was proved because OCTC did not establish that any funds belonging to

respondent were in the CTA on January 28, 2014. Accordingly, count five is DISMISSED with prejudice for want of proof.

Count Six – Section 6106 (Moral Turpitude)

In count six, OCTC charges that, during an 18-day period in January and February 2014, respondent made one withdrawal and "caused the issuance [of three] checks drawn upon respondent's [CTA], when respondent knew or was grossly negligent in not knowing that there were insufficient funds in the [CTA to pay] them, and thereby committed an act involving moral turpitude... in willful violation of ... section 6106." The withdrawal at issue was the $460 that respondent withdrew on February 3, 2014 (and immediately re-deposited in the second CTA), when he was under a reasonable, but mistaken, belief that someone had improperly gained access to his CTA. The three subject checks were the $7,500 marker, the $2,500 marker, and the $3,000 CTA check that respondent issued to Salcedo on January 29, 2014.

Even assuming that count six states a disciplinable offense, no such offense was proved by clear and convincing evidence. First, no evidence exists in establishing that respondent knew or was somehow grossly negligent in not knowing that there was not $460 in his CTA. Presumably, respondent's bank knew or should have known that there was no money in the CTA when it permitted respondent to withdraw the $460. Second, no evidence exists in establishing that respondent was somehow grossly negligent in not knowing that there were insufficient funds in his CTA to pay the $3,000 check he issued to Salcedo. Third, no evidence exists in establishing that respondent caused, authorized, or directed the issuance of the $7,500 check or the $2,500 check. To the extent that OCTC contends that respondent's gross negligence permitted The Mirage to modify the $7,500 marker and the $2,500 marker in order to present them to Chase Bank as checks drawn on his CTA, the charge is duplicative of the found section

6106 violation in consolidated counts two and four. In short, count six is DISMISSED with prejudice for want of proof and as duplicative.

Aggravating Circumstances

OCTC bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.) OCTC failed to establish any aggravating circumstances.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.5.) As set forth *post*, respondent established compelling mitigation, which greatly reduces the necessary level of discipline.

No Prior Record (Std. 1.6(a).)

Respondent is entitled to extensive mitigation for his more than 13 years of misconduct free practice because the court finds that the present misconduct is not likely to recur.

Lack of Harm (Std. 1.6(c).)

At most, Salcedo was inconvenienced by not having access to her settlement proceeds for six days. The lack of any real harm is a very significant mitigating circumstance in this case.

Candor/Cooperation to Victims/State Bar (Std. 1. 6(e).)

Respondent's instant and complete rectification of the consequences of his misconduct on January 31 and February 4, 2014, and respondent's cooperation with OCTC in entering into an extensive partial stipulation of facts are significant mitigating circumstances.

Good Character (Std. 1. 6(f).)

Respondent has established that he possesses extraordinary good character through his overall credible testimony and through the very credible testimony of 20 additional witnesses (7 of respondent's witnesses testified by declaration, and 13 of his witnesses testified in person at trial) from a wide range of references in the general and legal communities. The court finds that

respondent's testimony and the testimony of his 20 witnesses collectively establish compelling mitigation based on respondent's exceptional good moral character.

A number of respondent's witnesses are individuals of high repute. And all of respondent's witnesses are well acquainted with respondent. In addition, all of them possess an adequate knowledge of the serious allegations of misconduct against respondent in this proceeding. Nevertheless, all of them hold respondent in high regard and their testimony establishes that he possesses exceptional good character.

Many of them have observed respondent and his daily mode of living for an extended period of time. (*In re Menna* (1995) 11 Cal.4th 975, 988 [Testimonials from acquaintances, friends, family members, and employers regarding their observation of the daily conduct of an attorney are also entitled to great weight.].) The good character testimony also establishes that respondent is a dedicated, hard-working, and competent attorney. (*Kwasnik v. State* Bar (1990) 50 Cal.3d 1061, 1065, 1069 [diligent and competent performance of legal services is evidence of good moral character].) With respect to the seven witnesses who testified by declaration, one is an attorney, one is a medical doctor, two are business owners, one is an employee of respondent's law office, one is an insurance agent, and one is a bail enforcement agent.

With respect to the 13 individuals who testified at trial in person, many of them are lifelong friends of respondent, most for more than 20 years. One of the 13 witnesses, who is not a close friend but who knows respondent professionally, is a retired California workers' compensation judge, who attested to respondent being a good attorney and someone who is dedicated to helping his clients. The second was a fireman who has known respondent since they were in junior high school and considers respondent a very good friend; respondent has been a role model for his two children and has helped him with family issues over the years. The third is an attorney who has been friends with respondent for more than 14 years; when this

attorney was hospitalized in 2010 and out of his practice for a long time, respondent ran his law office for him, including dealing with clients. The fourth is a construction manager who regards respondent like a brother because respondent helped him with multiple legal matters. The fifth is a distant relative; respondent also helped her in a legal matter. The sixth is a business owner who has known respondent for 19 years; respondent helped her on personal legal and non-legal issues, including a difficult custody battle involving multiple court appearances. The seventh is an insurance appraiser, respondent has helped him and his family on legal issues. The eighth is a security guard, who has known respondent for about 18 years; this witness was once homeless, and when respondent found out, allowed him to live in a trailer that respondent owns for a year so he could get back on his feet. The ninth is a general contractor, who is related to respondent by marriage; this contractor hired respondent to represent him in a contract dispute over the sale of his share of a company to another partner. Respondent recovered $400,000 for him (three times the amount the other partner offered in settlement), but respondent did not take an attorney fee. The tenth is a project manager, who has known respondent for 30 years; respondent provided free legal assistance to this witness in a home construction dispute.

The remaining three witnesses who testified in person were respondent's attorney father, respondent's attorney sister, and an employee of respondent's law office. Respondent's father testified that respondent has always helped others in need; even as a child respondent looked out for and helped other kids, including a blind girl who became one of his good friends.

Respondent's sister testified as to the help respondent provided to her while she was in law school. She recalled how respondent helped one of her friends whose kitten got stuck inside of the walls of a house. Respondent opened the wall, got the kitten out, and paid to have the wall closed again because his sister's friend could not.

The employee from respondent's law office testified about how he took good care of the employees and his clients. She has worked for other attorneys, and believes that respondent is one of the best. She has turned down offers of employment with other attorneys because she likes working with respondent so much. The employee's daughter is now in law school because she wants to be like respondent.

The most compelling testimony came from this respondent's employee, and was attested to by respondent's attorney friend of more than 14 years. The employee testified that, when she and respondent were travelling to a deposition one day, they came upon a house that was on fire. Respondent, who was talking on his cell phone with the friend at the time, gave his cell phone to the employee and asked her to call 911 and report the fire. Respondent then ran to the house, broke a window out, entered the burning house, and saved the life of a little girl who was trapped inside. Everyone in the family other than the little girl died in the fire. The family members were in the back of the house, and respondent could not get to them. Regrettably, respondent bore a tremendous amount of unwarranted guilt because he could not rescue the other family members. In sum, the court finds that respondent has clearly established compelling mitigation based on his extraordinary good moral character alone.

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. 1.1; *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 two decades 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 Silverton* (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; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.7(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. The most severe of the sanctions that applies in this case is set forth in standard 2.1(b), which provides that the presumed sanction for misappropriation of client funds involving gross negligence is actual suspension, not disbarment.

Standard 2.1(b) provides *very* little guidance. Likewise, the parties provide little assistance to the court on the issue of discipline. Singularly seeking respondent's disbarment, OCTC cites only disbarment cases. Respondent does not cite any relevant case on the issue of the appropriate level of discipline.

The court notes that respondent's 13 years of misconduct free practice, the lack of harm to any client, the public, the profession, or the courts, and respondent's exceptional good character are strong evidence that respondent's misconduct was aberrational and will not recur. Therefore, it is appropriate to recommend a lesser sanction than that would otherwise be needed for the found misconduct in order to fulfill the primary purposes of attorney discipline.

The court finds *Edwards v. State Bar, supra*, 52 Cal.3d 28, *Brockway v. State Bar* (1991) 53 Cal.3d 51, and *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113 instructive on the issue of discipline for this case. The court in *Edwards v. State Bar* noted:

> In discussing the appropriate discipline for an attorney who has willfully misappropriated client funds, this court has stated that the "usual" discipline for this misconduct is disbarment [citations]....
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> Examination of cases in which this court has not disbarred an attorney found to have willfully misappropriated client funds reveals a variety of "extenuating circumstances" that we have deemed sufficient to warrant a lesser punishment. In some cases, the attorney has presented evidence of compelling mitigating circumstances relating to the attorney's background or character or to unusual difficulties the attorney was experiencing at the time of the misconduct, which tended to prove that the misconduct was aberrational and hence unlikely to recur. (E.g., *Howard v. State Bar, supra*, 51 Cal.3d 215, 222... [rehabilitation from alcoholism and drug dependency]; *Weller v. State Bar, supra*, 49 Cal.3d 670, 675... [emotional strain, character testimonials]; *Friedman v. State Bar, supra*, 50 Cal.3d 235, 245... [stress of marital problems, long unblemished record of legal practice]; *Chefsky v. State Bar, supra*, 36 Cal.3d 116, 132, ... [long unblemished record, illness, relocation of practice].)
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> We have also recognized extenuating circumstances relating to the facts of the misappropriation. As the term is used in attorney discipline cases, "willful misappropriation" covers a broad range of conduct varying significantly in the degree of culpability. An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception. Although lack of evil intent does not immunize an attorney's conduct from discipline (see *Murray v. State Bar, supra*, 40 Cal.3d 575, 582...), the attorney's good faith is an important consideration in determining the degree of discipline to be imposed. Disbarment would rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of [unintentional] misappropriation, unaccompanied by acts of deceit or other aggravating factors.
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(*Edwards v. State Bar, supra*, 52 Cal.3d at pp. 37-38.)

In *Brockway v. State Bar, supra*, 53 Cal.3d 51, the court placed the attorney on one year's stayed suspension and two years' probation on conditions, including a 90-day period of actual suspension. The attorney in that case was found culpable of willfully misappropriating $500 through gross negligence and failing to refund funds to the client in one client matter and of

acquiring an adverse interest in client property without the required disclosures in a second client matter. There the misconduct was mitigated by the attorney's 13 years of discipline-free practice and favorable character evidence, but was aggravated by questionable candor and indifference.

In the Matter of Bleecker, supra, 1 Cal. State Ct. Rptr. 113, the attorney was placed on two years' stayed suspension and two years' probation on conditions, including a 60-day actual suspension. The attorney in that case was found culpable of violating section 6106, not only by misappropriating $240 in client funds through gross negligence, but also by using his CTA to conceal his assets from the Internal Revenue Service, which concealment involved dishonesty.

On balance, after considering the lack of any aggravating circumstances, the numerous mitigating circumstances, and the limited nature and extent of respondent's misconduct, the court finds that the appropriate level of discipline is two years' stayed suspension and two years' probation on conditions, including a 60-day actual suspension.

RECOMMENDATIONS

Discipline

The court recommends that respondent **WILLIAM ANDRAI ACOSTA,** State Bar member number 207377, be suspended from the practice of law in California for two years, that execution of the two-year suspension be stayed, and that he be placed on probation for two years subject to the following conditions:

1. Respondent WILLIAM ANDRAI ACOSTA is suspended from the practice of law for the first 60 days of probation.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and

telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

4. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

6. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of (1) the State Bar's Ethics School and (2) the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

Professional Responsibility Examination

The court also recommends that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

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Costs

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

Dated: February 4, 2016

W. Kearse McGill

W. KEARSE McGILL
Judge of the State Bar Court

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 February 4, 2016, I deposited a true copy of the following document(s):

DECISION

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:

ANTHONY P. RADOGNA
LAW OFFICES OF ANTHONY RADOGNA
1 PARK PLZ STE 600
IRVINE, CA 92614

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

Diane J. Meyers, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 4, 2016.

Julieta E. Gonzales
Case Administrator
State Bar Court