PUBLIC MATTER – DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **JAMES STEVEN DAVIS,** A Member of the State Bar.	**96-O-04662** **OPINION ON REVIEW**

This matter presents an unfortunate example of an attorney who disregarded his ethical duties in the course of representing a corporate client. Respondent, James Steven Davis, who was admitted to the practice of law in 1984, seeks our review of a hearing judge's decision finding him culpable, inter alia, of acts of moral turpitude because he misappropriated with gross negligence the proceeds of a $79,875.89 insurance settlement check issued to his client Thermal Remediation Corporation (TRC). The judge also found respondent failed to account for the proceeds to TRC's Chairman of the Board. Respondent denies culpability and appeals the recommendation of the hearing judge that respondent be placed on four years' stayed suspension, with two years' actual suspension, which will continue until respondent pays restitution of $14,938 together with interest thereon and until respondent establishes his rehabilitation, fitness to practice and learning in the law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.[1]

We have independently reviewed the record (*In re Morse* (1995) 11 Cal.4th 184, 207), although we give great weight to the hearing judge's factual findings that resolve issues

[1]The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

pertaining to the credibility of the witnesses. (Rules Proc. of State Bar, rule 305(a); *In re Menna* (1995) 11 Cal.4th 975, 985.) Accordingly, we adopt many of the hearing judge's culpability determinations, as well as aggravation and mitigation findings, as modified *post*. Also, for the reasons discussed herein, we adopt the hearing judge's disciplinary recommendations, with the exception of the amount of restitution to be paid by respondent, which we recommend should equal the $29,875.89 in legal fees (plus interest thereon) that respondent paid himself from the client trust account while these fees were in dispute, and an additional $2,500.00, plus interest, which equals the amount of the sanctions imposed on him by the United States Bankruptcy Court.

I. Factual and Procedural Background

The charges against respondent arose in the context of his representation of TRC, which was a joint venture corporation comprised of two 50 percent shareholders: Robert Ruppert, and a corporate shareholder, CERT Environmental Corporation (CERT). A review of the acrimonious history of TRC is necessary to understand the nature of the misconduct in this case.

A. Formation of the Joint Venture and Its Structure and Operation.

In February 1994, Ruppert and CERT, a wholly-owned subsidiary of the Union Oil Company of California (Unocal), formed TRC to operate a business that specialized in cleaning contaminated soil using a remediation process which Ruppert developed. TRC was a Delaware corporation, with its principal office in Fullerton, California and its soil remediation facility in San Bernardino, California.

At the beginning of the joint venture, Ruppert and CERT entered into several agreements, including a Shareholders Agreement, which restricted their rights to sell or transfer their TRC stock and included a mandatory buy-out provision in case of a deadlock between the shareholders. The Shareholders Agreement also provided CERT with three seats on the Board of Directors and gave Ruppert one seat on the board. CERT elected David Dassler, James Ellis, and Brian Kelly to the board, each of whom were employees of Unocal. Dassler served as Chairman of the Board; Ruppert elected himself to the board. Also, in February 1994, TRC

executed an Employment Agreement with Ruppert employing him as its president and chief operating officer for three years, and specifying various restrictions on his authority to act on behalf of the corporation. Article 2.1 of the Employment Agreement stated that the president was subject to the direction and control of the board. Article 2.3(a) limited Ruppert's power to bind TRC in the absence of a board resolution or approved budget.

Unocal funded the joint venture with a loan of $3.405 million to TRC, secured by liens on the two soil remediation units. Unocal also provided operating loans to TRC totaling more than $630,000. In addition to its extensive funding, in April 1994, Unocal contracted with TRC for soil remediation services over a period of four years, which could have resulted in gross revenues to TRC in excess of $3.5 million.

In 1995, TRC discovered that Ruppert had engaged in several instances of financial impropriety and had repeatedly exceeded his spending authority. Accordingly, at its August 3, 1995 board meeting, TRC's directors voted to reduce Ruppert's spending authority from $25,000 to $100 per transaction except for routine operating expenses.

B. Dissolution of the Joint Venture

TRC was unable to operate at a profit or to repay its loans, and by fall 1995 CERT had lost faith in Ruppert's ability to operate the company. CERT thus decided to sell its 50 percent interest and notified Ruppert of this fact in a letter dated September 12, 1995. Ruppert wanted to purchase CERT's half interest, but he and CERT were unable to reach agreement, and CERT was unable to locate any other suitable buyer. Accordingly, CERT decided to dissolve TRC, and advised Ruppert of its intention to do so in December 1995. Ruppert opposed dissolution of the

joint venture, but CERT decided to proceed without his approval, which it was entitled to do as a shareholder under the Delaware General Corporation Law.[2] TRC's board passed a resolution at its December 6, 1995 meeting to wind up TRC's operations and instructed Ruppert to effectuate the winding up process. On December 7, 1995, CERT served Ruppert with a copy of its petition to dissolve TRC, which it filed the next day in the Delaware Court of Chancery. Initially, Ruppert cooperated with the board in winding up TRC's operations. For example, Ruppert signed a form letter dated February 8, 1996, addressed to all of TRC's vendors notifying them that, effective January 15, 1996, TRC had closed its operations and instructing them to submit their final invoices to TRC for payment as soon as possible. However, at some point, Ruppert decided not to cooperate, but never informed the board of his decision.

C. Respondent's Involvement with Ruppert and TRC

Concerned about how he could protect Unocal's four-year soil remediation contract with TRC, Ruppert met with respondent on February 8, 1996. Respondent had been in practice for 12 years and was an experienced insolvency, bankruptcy and corporate attorney. At the initial meeting, Ruppert advised respondent that he was the president of TRC, a 50 percent shareholder, and a member of the board. Ruppert also advised respondent about his serious disagreements with the other three members of TRC's board over the dissolution of the corporation. Based on this conversation, respondent concluded "Unocal was trying to dodge the $3,000,000.00 [soil remediation] contract it had with TRC, and that the reason it was trying to destroy TRC was to dodge that liability." Respondent advised Ruppert "that the best way to stop Unocal and [CERT] from destroying TRC was -- and primarily breaching the contracts, was to file a Chapter 11 bankruptcy petition."

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[2]Delaware Code, title 8, section 273, provides for "a stockholder's right to protect his investment in a [joint venture] corporation, the operations of which have become paralyzed by corporate deadlock." (*In re English Seafood (USA) Inc.* (D.Del. 1990) 743 F.Supp 281, 286.) "[A] shareholder in such an evenly-divided corporation has the right to assert control over the disposition of his investment in the assets of that corporation *without the agreement of the other shareholder*." (*Id.* at p. 288, italics added.)

Ruppert hired respondent to file the bankruptcy petition without the knowledge and approval of the other three members of the board. Respondent nevertheless signed a fee agreement on February 16 (which Ruppert had previously signed) expressly designating TRC as respondent's client and authorizing him to act as "corporate counsel." Pursuant to the fee agreement, respondent required $20,000 as a deposit against his future legal fees.[3] Respondent accepted two personal checks from Ruppert: a $5,000 check, which respondent promptly deposited into his office operating bank account, and a $15,000 check, which respondent did not deposit, knowing that it was insufficiently funded. Respondent agreed to go forward with his representation without cashing Ruppert's $15,000 check, because Ruppert said he would pay the legal fees from an insurance settlement check that was to arrive shortly arising from damage to one of the remediation units.

Prior to filing the bankruptcy petition, respondent reviewed TRC's Articles of Incorporation, Bylaws, Minutes of the directors' meetings, and the various corporate and shareholder agreements, as well as the applicable federal and state law. Notwithstanding the express restrictions on Ruppert's authority to act for TRC contained in the corporate documents, respondent filed the Chapter 11 petition on behalf of TRC on February 12, 1996. Neither respondent nor Ruppert notified the other members of the board of their intentions before filing the petition. Indeed, the three board members did not learn that Ruppert had even consulted with respondent until after the petition was filed. Respondent's explanation for proceeding without the authorization or knowledge of the other three board members was that, in his opinion, those members were "hopelessly conflicted" over the bankruptcy matter because they were employees

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[3] The fee agreement uses the terms "deposit" and "retainer" interchangeably, but it was not intended as a classic "true"retainer agreement whereby "a sum of money paid by a client [is intended] to secure an attorney's availability over a given period of time. . . . [S]uch a fee is earned by the attorney when paid . . . ." (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4.) Rather, the fee agreement in this case was intended as an arrangement whereby the fees would be billed against the $20,000 deposit as the services were performed. Respondent's invoices to TRC conformed with this fee arrangement.

of Unocal, which was both a creditor and debtor of TRC. In respondent's view, only Ruppert could speak for the corporation because Ruppert was the least conflicted member of the board since he was not an employee of a creditor.

The reaction by the other three TRC board members to the filing of the bankruptcy petition was swift and unequivocal. On February 12th, at a scheduled and noticed meeting of TRC's board (which Ruppert chose not to attend), Ruppert was suspended as president, he was removed as a signatory on all TRC accounts, and his authority to sign payroll checks was revoked. Two days after the filing of the petition, on February 14, 1996, Robert Kehr, an attorney who represented CERT's interest in TRC as a 50 percent shareholder, faxed a letter to respondent, which respondent received the same day, notifying him that the board had suspended Ruppert as TRC's president and "revoked any authority that he might otherwise have had to represent, speak for, or act for TRC in any way." Kehr's letter also advised respondent that "any commitment [Ruppert] might purported to have made on behalf of TRC to pay your fees and costs also was in excess of his spending authority which was limited to $100. . . ." Kehr further advised respondent that CERT intended to file a motion to dismiss the bankruptcy proceedings as soon as possible, and until then Kehr demanded that respondent "cease and desist from any attempt to represent TRC or to act contrary to the instructions of the TRC Board of Directors."[4] Finally, Kehr requested "the promptest possible dismissal of the bankruptcy petition."

CERT's newly hired bankruptcy attorney, Mark Fields, followed the next day with another faxed letter to respondent, reiterating the demands of attorney Kehr. Respondent was undeterred by Kehr's or Fields' demands. To the contrary, respondent immediately sent a return letter to Kehr, advising that he would seek injunctive relief "to stop all unlawful interference with

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[4]The hearing judge found that respondent received notice of Ruppert's suspension on February 14, 1996. We adopt this finding and also find that as of this date, respondent had notice that the majority of the board objected to his representation of TRC and had limited Ruppert's spending authority to $100, effective August 3, 1995. Accordingly, as of February 14, 1996, respondent had knowledge that his status as corporate counsel and his right to incur fees in excess of $100 were in serious question.

the reorganization effort." Respondent also sent a letter to attorney Fields threatening to file a federal RICO action against the three TRC directors individually and CERT and Unocal, as well as sue the attorneys, for wire fraud and mail fraud if they continued to oppose the bankruptcy proceeding.

D. Respondent Obtains Possession of the Insurance Check

On February 14th, without the knowledge of the other three TRC board members, Ruppert picked up the settlement check from the insurance company and gave it to respondent. The check was in the amount of $79,875.89, dated February 13, 1996, and made payable to "Thermal Remediation Corp." Ruppert endorsed the check, signing it as "President TRC." Even though respondent knew that "Ruppert did not have access to corporate funds at the time, as the [three other] directors had denied him access," respondent deposited the settlement check immediately into his client trust account,[5] and his office manager, Mr. Brayshaw, returned Ruppert's uncashed $15,000 personal check to him. On February 20, 1996, when the settlement check cleared and the $79,875.89 was deposited in his trust account, respondent instructed his office manager to sign and deliver a $50,000 check made out to Ruppert, individually, drawn against respondent's trust account.[6] Ruppert, in turn, deposited the $50,000 check in a bankruptcy debtor-in-possession bank account, which respondent claimed he instructed Ruppert to do.[7]

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[5]When the bank was advised by respondent of the dispute over control of TRC, the bank agreed to accept TRC's settlement check only if respondent deposited the check into his client trust account.

[6]Respondent testified that he instructed Brayshaw to make the $50,000 check payable to TRC, but Brayshaw testified that respondent instructed him to make it payable to Ruppert. The hearing judge expressly found Brayshaw's testimony more believable than respondent's testimony. We adopt the hearing judge's credibility determination in favor of Brayshaw. (Rules Proc. of State Bar, rule 305(a).)

[7]Ruppert quickly disbursed almost all the $50,000 without the consent or knowledge of TRC's board, with much of the funds going to himself and family members as payroll or as reimbursement for expenses.

The next day, February 21st, the TRC board held a duly noticed meeting. Both respondent and Ruppert attended this meeting, but neither one told the other TRC board members at the meeting about the $79,875.89 insurance check or that respondent had already disbursed $50,000 of the proceeds to Ruppert from his trust account.[8] At this meeting, the board passed a resolution closing the Fullerton office and ordering Ruppert to immediately cease and desist all of his business management responsibilities. Also, at the meeting Chairman Dassler once again advised respondent that he was not authorized to act as the attorney for TRC and demanded that he withdraw. The same demands to cease his representation were reiterated in a letter from Dassler to respondent on February 26th. Respondent nevertheless continued to disregard the directions of the majority of the board, again relying on his theory that the three board members were disabled from acting for the corporation due to their conflict as employees of Unocal.

Chairman Dassler discovered that Ruppert had intercepted the settlement check five weeks after it was deposited into respondent's client trust account. Dassler wrote to respondent demanding an accounting on behalf of TRC. Attorney Kehr also wrote to respondent in April, demanding an accounting and notifying respondent that Unocal had a lien on all of TRC's assets, including the insurance proceeds. Kehr also asked that the balance of the insurance funds remaining in the client trust account be returned to TRC. Respondent refused to accede to these demands. In addition, Chairman Dassler wrote to respondent's bank, requesting information about the insurance proceeds. This elicited a scathing letter from respondent to Dassler on June 4, 1996, threatening that "any further attempts to obtain information will result in immediate suit and injunction being filed against you. . . . [B]y implication, you are accusing me of felony bank fraud and interfering with my relationship with my bank. This constitutes libel, slander and interference with a business relationship. I will happily sue you immediately if you make any

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[8]The following day, February 22, 1996, respondent wrote to attorney Kehr, misrepresenting that Ruppert, not TRC, had paid his retainer.

further allegations of this type to anyone. . . ." Dassler responded by letter on June 18th, asking again for an accounting of all of TRC's funds that had come into respondent's possession. Once again, respondent ignored Dassler's request.

On numerous other occasions, respondent was equally unresponsive to Dassler's requests for an accounting and return of the insurance proceeds, resorting instead to playing "hide and seek" with the insurance proceeds. For example, respondent directed Dassler to make his inquiries about the check to Ruppert even though respondent knew Dassler could not locate Ruppert, who had moved out of the state. Respondent also obfuscated his receipt of the insurance proceeds by noting them as a credit on his billing statement without explanation, and he disguised the disbursement of the proceeds to Ruppert by listing them in his statement as "out of pocket expenses for retainer refund." To further exacerbate the situation, he sent his billing statements to TRC's Fullerton office after he knew it had been closed.

E. Dismissal of Bankruptcy Petition and Sanctions Award Against Respondent

CERT obtained a dismissal of the bankruptcy petition one month after it was filed, on March 11, 1996. The court also granted leave to CERT to file a motion for sanctions against respondent and Ruppert for bringing a frivolous action. On September 30, 1996, the bankruptcy court imposed $5,000 in sanctions against respondent and Ruppert, with each liable for one-half of the amount, finding that respondent's petition was frivolous because it "was not warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law" within the meaning of the Federal Rules of Bankruptcy Procedure, rule 9011 (FRBP). Respondent failed to perfect his appeal, and the order became final and binding. There is no evidence that respondent paid the sanctions to CERT.

Subsequent to the dismissal of the bankruptcy case, TRC was dissolved by order of the Delaware Court on May 29, 1996.[9] In spite of the sanctions order and the order of dissolution of

[9]Notwithstanding the Dissolution Order, Respondent attempted to prove at trial in this case that TRC was still a viable corporation because of its registration as a foreign corporation in California. Such a registration could not breathe life into TRC once it was dissolved, since TRC

TRC, respondent continued to incur legal fees on behalf of TRC and to send his billing statements to the corporation for two more years.

F. Proceedings in the State Bar Court

Dassler filed a complaint with the State Bar, and after an investigation, a Notice of Disciplinary Charges (NDC) was filed on November 16, 1999. An eight-day trial was held over an extended period of months and concluded on March 29, 2001. The hearing judge filed his decision on July 19, 2001, finding that respondent wilfully violated rule 4-100(A) of the Rules of Professional Conduct of the State Bar of California[10] by improperly disbursing the proceeds from the insurance check to himself as attorneys fees; wilfully violated rule 4-100(B)(3) by failing to properly account to TRC's Board of Directors in spite of their demands for such an accounting; and committed acts of moral turpitude in violation of Business and Professions Code section 6106[11] by misappropriating, through gross negligence, the $29,875.89 in proceeds that respondent disbursed to himself as attorneys fees.[12]

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was strictly a statutory creation of the laws of Delaware, which controlled its very existence as a corporation.

[10]Unless otherwise indicated, all further references to rules are to these Rules of Professional Conduct.

[11]Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

[12]In the Notice of Disciplinary Charges the State Bar charged respondent with three additional counts of professional misconduct with respect to the same client: count 1 alleged a violation of rule 3-600(A) [failure to represent an organization through its highest body]; count 2 alleged a violation of section 6104 [appearing without authority of a party]; and count 6 alleged a violation of rule 3-700(B)(2) [failure to withdraw from employment]. Two weeks before trial, the State Bar moved to dismiss counts 1, 2, and 6 in the interests of justice as authorized by rule 262(e) of the Rules of Procedure of the State Bar. Respondent filed a statement of non-opposition to the motion to dismiss, and the hearing judge granted the motion and dismissed the three counts, provisionally without prejudice. In his decision after trial, the hearing judge modified his prior dismissal so that the three counts were dismissed with prejudice. The dismissal of these counts has not been raised as an issue on appeal, and we adopt the recommendation of the hearing judge in this regard.

The hearing judge also found serious aggravation surrounding the charged misconduct. Specifically, the judge found that respondent was culpable of harming his client (std. 1.2(b)(iv)); overreaching (std. 1.2(b)(iii)); and indifference towards atonement or rectification (std. 1.2(b)(v)). In addition, the hearing judge found numerous counts of uncharged but proved misconduct as further aggravation. On appeal, respondent urges us to exonerate him of all misconduct or, in the alternative, to recommend "the mildest form [of discipline] available." The State Bar asks us to adopt the hearing judge's findings, conclusions and discipline recommendations.

II. Culpability

The underpinning of the misconduct in this case is best described by the hearing judge, who observed that respondent "acted with unabashed hubris in assuming that he was the appointed guardian of TRC's best interests. . . ." Respondent concedes that TRC was his client, yet from the very outset of his retention as "corporate counsel" he dealt with Ruppert as his client and considered the three-person majority of the board, led by Chairman Dassler, as "the enemy." (See *post*, p. 14.) As a consequence, the hearing judge found that respondent refused "to give the TRC board majority its due or to recognize its directives." Respondent thus arrogated to himself the authority to choose sides between the Board's competing factions, and in the course of his single-minded prosecution of the bankruptcy proceeding on behalf of Ruppert, he utterly failed to consider, much less protect, the interests of TRC as expressed through a majority of the board.

A. Failure to Maintain Client Funds in Trust Account (Rule 4-100(A))

At its essence, rule 4-100(A) requires that "[a]ll funds received or held for the benefit of clients by a member [of the State Bar] 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." Rule 4-100 "is violated where the attorney commingles funds or fails to deposit or manage the funds in the manner designated by the rule, even if no person is injured. [Citations.]" (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 976.) The rule "leaves no room for inquiry into attorney intent. [Citation.]" (*Ibid.*) Accordingly, good

faith is not a defense to a rule 4-100 violation. (*Ibid.*; *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9-11.)

When respondent deposited TRC's insurance check into his trust account, he knew of the intractable dispute between Ruppert and the board over control of TRC and even advised the bank about it. When he in turn distributed the $50,000 to Ruppert individually, he also knew that: 1) the settlement check was payable to TRC; 2) TRC's board had suspended Ruppert; and 3) the board had denied Ruppert access to TRC's funds. Since the settlement check was payable to TRC, respondent became a fiduciary of *all* of the members of TRC's board who were asserting a claim to the insurance funds on behalf of the corporation. (See *Silver v. State Bar* (1974) 13 Cal.3d 134, 142; cf. *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795; see also *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156.) Respondent therefore owed the other board members "the same high duty of honesty and obedience to fiduciary duty as if he were acting as their attorney. [Citations.]" (*In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 80.) Respondent utterly failed to exercise this duty when he distributed the insurance proceeds to Ruppert without the knowledge or consent of the other three board members.

Moreover, respondent was expressly required by rule 4-100(A)(2) not to withdraw the remaining $29,875.89 from the trust account as his legal fees until the dispute over his fees was resolved. Yet in the face of his certain knowledge of the dispute over his fees, respondent distributed $29,875.89 to himself. He also ignored the explicit directives of the board majority to immediately cease his representation of TRC, claiming that he had the ability to decide who could act as TRC's corporate counsel.[13] Rule 4-100(A)(2) requires that "when the right of the

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[13]Respondent cites no cases demonstrating that the board majority was without authority to decide that respondent should cease his representation of TRC. In fact, it has long been settled that "[a]n attorney has no general authority to act for his client." (*Woerner v. Woerner* (1915) 171 Cal. 298, 299.) Nor can the attorney make unilateral decisions that affect his clients' substantive rights. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 403-407.) Thus, "[t]he board of directors, not corporate counsel, has the right to control the affairs of the corporation. [Citations]" (*Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 623.) "The board of directors thus has the power to retain and discharge corporate counsel." (*Ibid.*)

member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved." Concomitantly, when the right of a member to receive a portion of trust funds that has already been withdrawn is disputed, the member must place the funds back into his client trust account until the dispute is resolved. (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758.) Faced with the intractable dispute among the Board of Directors, respondent could have interpled the funds in the bankruptcy action or asked the bankruptcy court or the Delaware Chancery Court to appoint a trustee over a separate trust account and the debtor-in-possession (DIP) account. (See *In the Matter of Feldsott* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754.) Accordingly, we find on this record that there is clear and convincing evidence that respondent wilfully violated rule 4-100(A) as charged in count 3 of the NDC when he withdrew the disputed funds as his attorney's fees.

B. Failure to Account (Rule 4-l00(B)(3))

It is an attorney's fiduciary duty to properly account for trust funds. (See *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020-1021.) Rule 4-100(B)(3) expressly requires an attorney "to maintain complete records of all funds . . . coming into the possession of the member or law firm and render appropriate accounts to the client regarding them. . . ." Respondent utterly ignored this duty. The record establishes that respondent violated rule 4-100(B)(3) when he failed to accede to Chairman Dassler's repeated demands for an accounting of the proceeds of the insurance settlement check, and instead, responded with: 1) evasion by directing Dassler to ask Ruppert about the whereabouts of the check when respondent knew that Dassler did not know where to reach Ruppert; 2) deceit in stating that Ruppert had paid his fees personally; 3) obfuscation by using his billing statements to conceal the insurance proceeds and the disbursement to Ruppert; and 4) intimidation and threats of lawsuits against the directors and attorneys individually because of Dassler's efforts to locate the records of the check and the proceeds. Respondent testified at trial that he was unwilling to disclose the records of the $79,875.89 insurance proceeds and the disbursements to Ruppert and himself because he

regarded Dassler as "the enemy" and he "thought to [himself], why would the enemy want to see the fee statement. And I came to the conclusion that they want to know how long we can fight, that it was a tactic on their behalf to attempt to see could we afford the battle, and that is the only reason why they'd want to know."

The record amply supports a finding that respondent wilfully failed to account for the insurance proceeds in violation of rule 4-100(B)(3) as charged in count 4 of the NDC. (Cf. *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 123-124; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 513; *Brody v. State Bar* (1974) 11 Cal.3d 347, 350.)

C. Misappropriation; Moral Turpitude (Section 6106)

The hearing judge found that respondent "misappropriated corporate funds because of his grossly negligent misreading of the facts and incorrect interpretation of the law." We agree with this finding as it applies to the distribution of the $50,000 to Ruppert. Although we are troubled by the evidence that respondent instructed his office manager to disburse the proceeds to Ruppert personally rather than to TRC, on the day respondent distributed the money, Ruppert still was president of TRC (although suspended from his duties). As such, Ruppert arguably had a colorable (although highly disputed) claim to act on behalf of TRC as of that date. The fact that Ruppert subsequently deposited the $50,000 into a DIP bank account for TRC corroborates respondent's testimony that he instructed Ruppert to do so. But, this does not alter our finding of respondent's grossly negligent misappropriation.

Respondent had a fiduciary duty to protect the funds in the client trust account on behalf of all of TRC's board members, regardless of whether he considered them as authorized to act for TRC. (Cf. *Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.) Almost immediately after Ruppert deposited the funds in the DIP account, he depleted the account without the knowledge or approval of the majority of the board, disbursing much of the $50,000 to himself and his family

as payroll and expenses.[14] "With proper supervision of the operation of [his client trust] account, petitioner would have been able to monitor . . . the use of account funds, and been able to guard against misuse of those funds." (*Ibid.*) Accordingly, we find there is clear and convincing evidence in the record that respondent wilfully misappropriated $50,000 of the insurance proceeds in his trust account by his gross negligence because he "was responsible for the funds in that account, and it was a breach of his professional duties to give complete control of the account to [Ruppert]." (*Ibid.*)[15]

Not every misappropriation that is wilful is equally culpable. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357,1367.) This court often uses the term to describe acts involving moral turpitude or dishonesty (see, e.g., *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26; accord, *Resner v. State Bar* (1960) 53 Cal.2d 605, 612), especially when, as here, the misappropriation is the result of gross carelessness in handling and accounting of the trust funds. (*Lipson v. State Bar, supra*, 53 Cal.3d 1010, 1020-1021; see also *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].) Respondent's gross negligence violated his "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds. [Citations.]" (*Palomo v. State Bar, supra*, 36 Cal.3d at p. 795.) We therefore find there is clear and convincing evidence that respondent's conduct in distributing $50,000 to Ruppert involved moral turpitude in violation of section 6106 as charged in count 5 of the NDC.

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[14]We are unable to determine from our independent review whether the disbursements from the DIP account were in satisfaction of valid claims against the corporation, even though Ruppert's authority to sign payroll checks had been revoked at the time he withdrew the funds. This does not affect our finding of grossly negligent misappropriation by respondent, but does affect our computation of restitution, as we discuss, *post*.

[15]To be deemed a wilful misappropriation, "all that is required is 'a general purpose or willingness to commit the act or permit the omission.' [Citation.]" (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.)

As to the remaining $29,875.89, we find there is clear and convincing evidence that respondent misappropriated these funds knowingly and intentionally. Respondent knew with a certainty at the time he withdrew the funds from the trust account as his attorney's fees that Ruppert could authorize only $100 of respondent's legal fees. He also knew that his right to represent TRC and to incur legal fees on the corporation's behalf was vigorously disputed by a majority of the board. "An attorney may not unilaterally determine his own fee and withhold trust funds to satisfy it even though he may be entitled to reimbursement for his services. [Citation.]" (*Crooks v. State Bar* (1970) 3 Cal.3d 346, 358; accord, *Jackson v. State Bar* (1979) 25 Cal.3d 398, 404; *Brody v. State Bar*, *supra*, 11 Cal.3d 347, 350, fn. 5.)

Not only was respondent aware of the board majority's opposition to the payment of his fees, he acknowledged under penalty of perjury that he did not have the right to withdraw his fees without the approval of the bankruptcy court, whose very jurisdiction he had invoked. In his Declaration in Support of Debtor's Application for Appointment of Attorney, filed on March 5, 1996, respondent attested that he had placed TRC's "retainer" which was to be used to "guarantee payment of the Firm's services" in an "interest bearing client trust account, [which] will be applied to fees and costs *only upon approval of the Court*. (Italics added.)" Respondent further attested that at the conclusion of the bankruptcy proceedings he would "file an appropriate application seeking allowance of all fees and costs, regardless of whether interim compensation has been paid." There is no evidence that respondent ever obtained court approval prior to paying himself his attorneys fees.[16]

Moreover, respondent's acts of deceit in misleading TRC's chairman and his legal counsel about the existence and whereabouts of the insurance proceeds are evidence that his misconduct involved moral turpitude. Respondent committed additional acts of concealment when he refused to provide his records of the insurance check and proceeds to the State Bar

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[16]Respondent's first billing statement was issued on April 10, 1996, five days after he submitted his Fees Declaration to the bankruptcy court. As of April 23, 1996, respondent had billed $28,939.60 in fees and expenses.

investigator in July 1996, and again in August 1997.[17] These acts are persuasive evidence of a lack of honest belief in his right to the funds and "justify attorney discipline as conduct involving moral turpitude. . . ." (*In the Matter of Wyshak, supra*, 4 Cal. State Bar Ct. Rptr. 70, 80; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 462-467, 469-471.)

Although an attorney's honest belief, even if mistaken and unreasonable, that he has a right to entrusted funds may be asserted as a defense to a charge of misappropriation involving moral turpitude or dishonesty (*In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 662.), we are unable to find on our independent review of the record any basis to conclude that respondent held such an honest belief. To the contrary, this record amply demonstrates that respondent intentionally misappropriated $29,875.89 for his own purposes, and that these actions involved moral turpitude. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034; *Bate v. State Bar* (1983) 34 Cal.3d 920, 923.); *Grim v. State Bar* (1991) 53 Cal.3d 21, 30.) Notwithstanding respondent's "'disavowal of any dishonest intent'. . . 'the means used by [respondent] to further his position were dishonest and involved moral turpitude within the meaning of . . . section 6106 . . . ." (*Coppock v. State Bar, supra*, 44 Cal.3d 665, 679.)

III. Mitigation

A. Good Faith (Std. 1.2(e)(ii).)

Respondent asserts in his defense and as mitigation that he acted reasonably and in good faith. (std. 1.2(e)(ii).) Respondent contends that even if his analysis of the facts and the law in this matter are "without merit, or even frivolous . . . lawyers must be free to assert unpopular positions on behalf of their clients if they believe in good faith they are correct." Based on the

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[17]Respondent used the State Bar investigation as another opportunity to threaten Dassler with dire legal consequences. In a letter to the State Bar in August 18, 1997, he said: "When this matter is concluded and it is determined that the "Complaint" filed against me is false, the State Bar will bring criminal charges against Mr. Dassler. . . . In another letter to a State Bar deputy trial counsel, dated February 28, 1998, respondent reiterated his "demand" that the State Bar "act to have [Dassler] prosecuted. . . ." We consider these threats to be evidence of overreaching which we address *post* in our discussion of aggravation.

record, we find his contention is implausible at best, and disingenuous at worst. "In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held *and* reasonable. [Citation.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) To conclude otherwise would reward an attorney for his unreasonable beliefs and "for his ignorance of his ethical responsibilities." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427.) Our previous finding of lack of honest belief alone vitiates respondent's assertion that he acted in good faith. But we also find no basis in this record to conclude that respondent's conduct was reasonable.

Respondent argues that the testimony of his expert, James Bovitz, a certified bankruptcy specialist, provided uncontradicted evidence that respondent's conduct in representing TRC was within the standard of care of a bankruptcy practitioner and therefore reasonable. We disagree. As a bankruptcy expert, Bovitz may well have been qualified to opine on the ultimate issues within his expertise (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 277, fn. 7), but respondent failed to establish that Bovitz had any special knowledge of or experience with State Bar disciplinary matters, or the rules and regulations governing professional responsibility. Accordingly, we give Bovitz's testimony minimal weight, particularly since this case does not involve the standard of care of bankruptcy practitioners, but rather involves the failure to adhere to the ethical duties and fiduciary obligations to maintain client trust funds under the rules and statutes governing professional conduct. "The purposes of a disciplinary proceeding are quite different from those of a civil proceeding (see, e.g., *In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 327), and the body of law is accordingly different." (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.)

Moreover, much of Bovitz's testimony was contradicted by the findings and conclusions of the bankruptcy court in its sanctions order. While not dispositive, the court's findings and conclusions are entitled to a strong presumption of validity if supported by substantial evidence.

(*In the Matter of Lais, supra*, 4 Cal. State Bar Ct. Rptr. at p. 117.)[18] The court's conclusion that the filing of the petition was frivolous and "was not warranted by existing law or by a *good faith argument for the extension, modification, of reversal of existing law*" (italics added) was based on an objective standard of reasonableness. Indeed, the bankruptcy court went beyond its finding of frivolousness with respect to the filing of the petition, and made specific findings rejecting the very same legal theories that respondent asserts here to establish the reasonableness of his conduct.

The court dismissed respondent's argument that Ruppert was the only director without a conflict and therefore the only one authorized to act for the corporation. The bankruptcy judge stated that this theory made "no sense" because Ruppert could not act unilaterally for TRC in the absence of a decision by a majority vote of the directors taken at a meeting or a fully executed unanimous written directors' consent.[19] The judge thus applied a basic rule of corporate law: "[T]he board of directors *acting as a board* must be recognized as the only group authorized to speak for 'management' in the sense that under [8 Del. C. § 141(a)] they are responsible for the management of the corporation." (*Campbell v. Loew's, Inc.* (Del.Ch. 1957) 134 A.2d 852, 862, italics added.) Thus, directors have no power as individuals. "Their power is collective only." (Practising Law Institute, Corporate Law and Practice (2d ed. 1999) [hereafter Corporate Law and Practice], § 8:3, p. 155.) "The theory behind the traditional rule that directors may act only as a group, and only while assembled at a meeting, is that the give and take of a group discussion will help ensure the best corporate decisions." (Corporate Law and Practice, § 8:3.) In fact, any

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[18]The bankruptcy judge's imposition of sanctions required an extremely high showing. (FRBP 9011.) Rule 9011 sanctions are warranted only when "'it is clear that: (1) a *reasonable inquiry* into the basis for a pleading has not been made; (2) under existing precedents there is no chance of success; and (3) no *reasonable argument* has been advanced to extend, modify or reverse the law as it stands.' [Citations.]" (*In re Frankel* (S.D.N.Y. 1995) 191 B.R. 564, 575, italics added.)

[19]Article 6 of the Bylaws provided that the corporation could only act through a decision of a majority of a quorum of the board. In the absence of such a meeting, corporate action could only be taken by unanimous written consent of the board.

action taken by directors at a board meeting without a quorum being present would be *void* even if the meeting were duly noticed. (*Drob v. National Memorial Park, Inc.* (Del.Ch. 1945) 41 A.2d 589, 595-596; *Olincy v. Merle Norman Cosmetics, Inc.* (1962) 200 Cal.App.2d 260, 273.)

Directors who are disqualified from voting on a matter due to a conflict of interest are nevertheless counted in determining the presence of a quorum at any meeting of the board called to authorize corporate action. (8 Del.C. § 144(b); Cal. Corp. Code, § 310, subd. (c).) What is more, the fact that there was a struggle for control of the corporation "must not obscure the real principle that the actions of the board of directors, *speaking through the majority of its members*, must be recognized no matter which particular faction may be in control." (*Empire Southern Gas Co. v. Gray* (Del.Ch. 1946) 46 A.2d 741, 748, italics added.)

The bankruptcy judge also rejected respondent's interpretation of section 4.3 of the Shareholders Agreement as precluding the three directors from voting on the filing of the petition as a "transaction" between TRC and any person which was an affiliate of CERT. The court found that "the filing of the Petition does not involve a transaction let alone a transaction covered by section 4.3. Any argument to the contrary is frivolous."[20]

Finally, the judge refused to adopt respondent's legal theory under Delaware's conflict of interest laws as precluding any action by the three board members because of their employment by Unocal, which was a creditor of TRC. The bankruptcy judge characterized this legal theory as "absurd" because, "if [respondent's] interpretation of the law is correct, it would likewise preclude Ruppert from voting on the issue because he would also be affected by the bankruptcy filing. Additionally . . . [TRC] would never be able to avail itself of the bankruptcy laws."

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[20]Respondent has cited no case, and we are aware of none, applying the term "transaction" under Delaware Code, title 8, section 144 to the filing of a bankruptcy petition. Rather this term has been applied to business or financial transactions between a corporation and its directors. (See, e.g., *Marciano v. Nakash* (Del. 1987) 535 A.2d 400 [loans to a corporation by interested directors]; *Parfi Holding AB v. Mirror Image Internet, Inc.* (Del.Ch. 2001) 794 A.2d 1211 [stock subscription and preferred stock offered by interested directors] revd. on other grounds (Del. 2002) 817 A.2d 149.)

We agree with respondent that attorneys have a duty to zealously represent their clients and assert unpopular positions in advancing their clients' legitimate objectives. However, as officers of the court, attorneys also have a duty to the judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness. (Rule 3-200(B).) We are persuaded that the bankruptcy court's findings, and the applicable Delaware law, vitiates respondent's assertion that his conduct was reasonable and therefore taken in good faith.

B. Absence of Prior Discipline (Std. 1.2(e)(i).)

The hearing judge found that respondent practiced law for 12 years with no prior disciplinary record, and gave weight to this factor as mitigation. We agree. (Std. 1.2(e)(i).) Although the present misconduct is serious, the lack of a prior record of discipline may be considered as a mitigating factor. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13 [many years of practice without a prior record may be considered as a mitigating circumstance even if the present misconduct is serious].)

C. Good Character Testimony (Std. 1.2(e)(vi).)

The hearing judge also found the testimony of respondent's good character witnesses as a mitigating factor, but did not ascribe it "significant" weight because there were only three witnesses and they did not reflect "a wide range of references in the legal and general communities." (Std.1.2(e)(vi).) We are inclined to give greater weight to the good character testimony. Each of the witnesses had a basic understanding of the charges against respondent and the hearing judge's tentative culpability determinations. Attorney Sylvia Paoli had known respondent for approximately 10 years. They met each other while they were serving in the Judge Advocate Group (JAG) to the California Civil Air Patrol (CCAP). Eventually, Paoli became the chief JAG officer in the CCAP, and she selected respondent to serve as her chief deputy. Paoli spoke with respondent on the telephone intermittently and saw him at weekly CCAP meetings. Paoli testified that respondent "is incredibly honest, totally moral, and has an integrity that – as a matter of fact, those characters are basically why I chose him as my chief

deputy, because I had seen that throughout my close association with him and everything that we did."

Attorney Stephen Stewart testified that he and respondent were law partners for about one year from 1985 to 1986 and had worked together since then "off and on over the years." In addition, they worked together with the Fraternal Order of Police, since Stewart was the state counsel and respondent was the assistant state counsel. During the five years prior to his appearance in the hearing department, Stewart spoke with respondent over the telephone on a weekly basis, and thus "would have lunch together just socially to discuss cases about every month or so." Stewart opined that respondent's skills as an attorney were superb and that respondent's moral character, honesty, integrity, trustworthiness, and candor were very high. Stewart would trust respondent with his money and with his life as a fellow peace officer.

Finally, Tom Wilson, who is a part-time assistant fire chief/fire marshal at Barstow Fire Protection District, a retired fire chief of the Manhattan Beach Fire Department, and a former reservist with the San Bernardino County Sheriff's Department, testified on respondent's behalf. Wilson met respondent in 1985 when respondent applied to be a reservist with the San Bernardino County Sheriff's Department in the arson/bomb unit. Wilson conducted respondent's "background check." After respondent joined the arson/bomb unit, he and Wilson "became good friends and close working associates." Respondent also employed Wilson as an expert witness and investigator in four or five cases involving police or fire issues. At the time of trial, Wilson saw respondent about once or twice a week. Wilson trusted respondent implicitly and very much admired him. The testimony of acquaintances, neighbors, friends, associates, employers, and family members on the issue of good character, with reference to their observation of the respondent's daily conduct and mode of living, is entitled to great weight. (Cf. *In re Andreani* (1939) 14 Cal.2d 736, 749-750.) While not an extraordinary showing of good character (*In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 490), we accord significant weight to respondent's character witnesses, due to their familiarity with him and their knowledge of his good character, work habits and professional skills.

D. Community Service

Respondent presented evidence of extensive community service, which the hearing judge found to be a strong mitigating factor. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521.) In addition to the community activities, which we previously discussed, respondent served as reservist in the Barstow Fire Protection District until he was placed on retired status because of physical injuries. We find that respondent's significant community service "is a mitigating factor that is entitled to 'considerable weight.' " (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785, quoting *Schneider v. State Bar* (1987) 43 Cal.3d 784, 799.)

IV. Aggravation

In aggravation, the hearing judge found that respondent harmed his client, TRC (std. 1.2(b)(iv)); that his misconduct was surrounded by overreaching (std. 1.2(b)(iii)); and that he was indifferent towards atonement for the consequences of his misconduct (std. 1.2(b)(v)). We adopt these findings in aggravation. But first and foremost, we find as additional uncharged but proved misconduct, that respondent's representation of TRC involved multiple conflicts of interest which is an additional aggravating factor. (Std. 1.2(b)(iii); *Edwards v. State Bar*, *supra*, 52 Cal.3d 28, 35-36 [uncharged misconduct may not be used as an independent ground of discipline, but may be considered, in appropriate circumstances, for other purposes such as aggravation].)

A. Multiple Conflicts of Interest

While condemning the Dassler-led faction of the board as "hopelessly conflicted," respondent steadfastly failed to recognize his own serious conflicts.[21] A corporation's legal advisor must abstain from taking part in controversies among the corporation's directors and shareholders "to avoid placing the . . . practitioner in a position where he may be required to

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[21]The record discloses that at various times (and sometimes simultaneously) respondent represented TRC; Ruppert, individually; two other individuals (Graham and Muni) who were interested in buying the assets of TRC; and his own interests in defending himself against the sanctions order and the State Bar complaint.

choose between conflicting duties or attempt to reconcile conflicting interests. [Citations.]" (*Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 936.) Without question, respondent owed a duty of undivided loyalty to his client, TRC, which was sadly lacking in this case. As corporate counsel to TRC, respondent's professional obligations were to the entity and not to its officers, directors, or shareholders in their representative or individual capacities. (Rule 3-600(A); *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248, 254.) That being said, a corporation is a statutory person that can speak only through its constituent officers, directors, shareholders and agents.

Faced with a dispute over who was authorized to speak for TRC, respondent should have first looked to the corporation's organizational documents and other pertinent agreements. (See, e.g., Rest.3d Law Governing Lawyers, § 96, subd. (1)(a) ["the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to *the organization's decision-making procedures*." (italics added)].) Respondent testified this is precisely what he did. That being the case, respondent cannot now reasonably claim that he relied on Ruppert's implied powers as president of TRC since Ruppert's powers were expressly limited by the Articles of Incorporation, Bylaws, Shareholder Agreement, and Employment Contract. Ruppert clearly did not posses the ostensible authority that corporate presidents ordinarily possess, much less the express authority to retain legal counsel and authorize the filing of the bankruptcy.[22] (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 779-780, 783.)

From the outset, respondent's proper course of conduct was to obtain the informed written consents of each of the board members. (Rule 3-310(B) & (C).) Moreover, given that there was an actual conflict, as opposed to a potential conflict, respondent was obliged to

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[22]Even though "the office of president carries with it certain implied powers of an agency....without special authority or explicitly delegated power he may [only]...enter into a contract and bind his corporation in matters arising from and concerning the usual course of the corporation's business." (*Joseph Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co.*, (Del.Super.Ct. 1931) 156 A. 350, 352.)

withdraw from his representation of the corporation if he was unsuccessful in obtaining the informed consent of the board. (Rule 3-700(C).)[23]

The Supreme Court many years ago articulated the policy which underlies the proscription against representation of adverse interests found in rule 3-310: "By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation]." (*Anderson v. Eaton* (1930) 211 Cal. 113, 116.)

To here condone respondent's conduct would greatly diminish this important policy. Respondent should not have represented the corporation without first obtaining the informed written consent of all of the directors. (Rule 3-310(B) & (C).) Instead, respondent chose to join the fray, asserting only Ruppert's interests, which were antithetical to the business judgement of the remaining board members. Moreover, in his rush to file the Chapter 11 petition as directed

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[23] Parenthetically, several alternatives could have been presented to the board, which were designed to break the intra-corporate deadlock. (See, e.g., 8 Del.C. § 226(a)(2) [providing for the appointment of a custodian or receiver upon the application of any shareholder when "the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained."]; *Campbell v. Pennsylvania Industries, Inc.* (D.Del. 1951) 99 F.Supp. 199 and *Drob v. National Memorial Park, Inc., supra*, 41 A.2d 589 [dissolution by courts in equity as the result of intra-corporate dissension or business paralysis]; *Giuricich v. Emtrol Corp.* (Del. 1982) 449 A.2d 232 [appointment of a temporary custodian or manager of the corporate assets to run the business as a going concern]; *In re North European Oil Corp.* (Del.Ch. 1957) 129 A.2d 259 [new corporation formed where majority of stockholders could not be located]; see generally, Annot., Relief Other Than by Dissolution in Cases of Intracorporate Deadlock or Dissension (1984) 34 A.L.R.4th 13; Annot., Dissolution of Corporation on Ground of Intracorporate Deadlock or Dissension (1978) 83 A.L.R.3d 458.)

by Ruppert, respondent ignored the specific procedures which TRC had put into place to deal with shareholder and board disputes. Article II of the Shareholder Agreement expressly provided procedures for a mandatory buyout "in the event of an irreconcilable dispute between the parties . . . to minimize the business disruption," and there was a mandatory obligation to arbitrate all claims and controversies by Ruppert against TRC found in the Employment Agreement "whether or not related to his employment."

As a consequence of his multiple conflicts, respondent lost any claim to objectivity or neutrality, and in so doing he gravely compromised his duty of loyalty to TRC, which we consider to be a serious aggravating circumstance. The hearing judge found that respondent's conflicts of interest resulted in numerous violations of rule 3-310.[24] While we agree that respondent had numerous conflicts of interest, we do not believe that each of the violations of rule 3-310 should be considered as a separate and independent basis of aggravation since, to a great extent, all of the violations arise out of the same misconduct, and therefore are duplicative. The appropriate level of discipline does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

B. Harm to Client (Std. 1.2(b)(iv).)

The hearing judge found that respondent's misconduct caused significant client harm. (Std. 1.2(b)(iv).) We agree. Respondent's misappropriation of $79,875.89 of the insurance proceeds significantly harmed TRC, which was the payee of the settlement check, and also

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[24]The judge found respondent violated: 1) rule 3-310(F)(3) because he accepted personal checks from Ruppert without his informed consent; 2) rule 3-310(B)(1) and (3) arising from his failure to disclose his financial and professional relationship with Ruppert to TRC; 3) rule 3-310(C)(1) because of his failure to obtain the informed consents of Ruppert and TRC to respondent's representation of their conflicting objectives; 4) rule 3-310(C)(2) because of respondent's failure to obtain TRC and Ruppert's informed consent to his continued representation after he received the insurance settlement check; and 5) rule 3-310 (B)(1) and (3) and (C) because of respondent's representation of TRC, Mr. Poole, Ruppert and TRC's unsecured creditors, without obtaining their informed consents to his joint representation of all of these divergent interests.

harmed a third party, Unocal, which had a lien on the insurance proceeds. In addition, CERT was significantly harmed because it was required to retain bankruptcy counsel to obtain the dismissal of the Chapter 11 petition. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 379.) In the declaration of Attorney Fields filed in the bankruptcy court in support of CERT's motion for sanctions, he averred that CERT's attorney's fees were at least $8,125 in obtaining the dismissal of the petition. The $5,000 sanction award thus would not fully compensate CERT for the harm directly caused by respondent's misconduct.

C. Overreaching (Std. 1.2(b)(iii).)

In further aggravation, the hearing judge found that respondent's misconduct was surrounded by overreaching. (Std. 1.2(b)(iii).) Again, we agree, and view as evidence of respondent's overreaching his abusive and threatening letters to Chairman Dassler, as well as those to Attorneys Kehr and Fields. Respondent's billing statements to TRC are additional evidence of overreaching, since he improperly charged TRC for legal services that he provided to himself in appealing the sanctions order, responding to the State Bar's investigation, and conducting legal research in response to the State Bar complaint against him. He also billed TRC for the legal services he provided to two acquaintances of Ruppert, Mr. Graham and Mr. Muni, who consulted respondent about buying the assets of TRC.

D. Indifference towards atonement or rectification (Std.1.2(b)(v).)

The hearing judge correctly found that respondent's "continued claim, in the face of overwhelming facts and legal authority, that his conduct was justified demonstrates an indifference toward rectification or atonement for the consequences of his misconduct." (Std.1.2(b)(v).) We agree and find this is additional aggravation. (*In re Morse, supra*, 11 Cal.4th 184, 197-198, 206, 209.) Respondent refuses to accept the findings and conclusions of the bankruptcy court, even though those findings are final and binding on him. (See *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958 [Meritless defenses show lack of insight in the wrongfulness of one's actions].) "The law does not require false penitence. [Citation.] But it does require that

the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

Respondent's acts of defiance against the board's authority, even after Ruppert had long been terminated and the corporation dissolved, are additional evidence of his lack of insight into his misconduct. As late as June 2000 at the trial in the Hearing Department, respondent testified that he need not accede to the requests of the three board members to step down as legal counsel to TRC because he "felt it was not in the best interests of TRC for me to follow the instructions of the usurpers, especially in light of their failure to follow my advice."

Respondent, "like any attorney accused of misconduct, had the right to defend himself vigorously." (*In re Morse, supra,* 11 Cal.4th at p. 209.) However, his conduct, "reflects a seeming unwillingness even to consider the appropriateness of his [legal analysis] or to acknowledge that at some point his position was meritless or even wrong to any extent. Put simply, [respondent] went beyond tenacity to truculence." (*Ibid.*) His demonstrated lack of insight into the seriousness of his misconduct is particularly troubling to this court because it suggests that it may reoccur. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 781-782.) Accordingly, we find that the record amply establishes respondent's failure to understand the nature of his wrongdoing, which is a serious aggravating factor.

E. Additional Uncharged Misconduct (Std. 1.2(b)(iii).)

The hearing judge found respondent culpable of additional acts of uncharged but proved misconduct, which he also considered for purposes of establishing aggravation under standard 1.2(b)(iii). Specifically, the hearing judge found that respondent: 1) violated rule 4-100(B)(1) by failing to advise the TRC board for more than two months of his receipt of the insurance check; 2) violated rule 4-100(B)(4) when he failed to return the proceeds after Dassler requested them; and, 3) violated rule 3-600(E) by improperly representing the corporation. We do not adopt these findings of aggravation. Although the evidence is clear and convincing as to the violations of rule 4-100(B)(1) and rule 4-100(B)(4), these violations arise out of the same misconduct that provided the bases for our culpability determinations with respect to the charged misconduct.

Accordingly, we give no additional weight as aggravation in determining discipline. (*In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406, 411; see *In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 435, fn. 4.) We also do not adopt the hearing judge's finding of a violation of rule 3-600(E) as aggravation, although this violation is supported by clear and convincing evidence. As we noted *ante* at footnote 12, the State Bar moved to dismiss the charges relating to respondent's improper representation of TRC as an organization in violation of rule 3-600(A), and at the outset of the trial the State Bar represented to the hearing judge that it did not intend to assert the dismissed charges as uncharged aggravation. Therefore, we find it would be unfair to now look to evidence of the same misconduct alleged in count one of the NDC as a violation of rule 3-600 in support of a finding in aggravation since respondent may well have relied on the State Bar's representation to the hearing judge.

V. Discipline Discussion

The hearing judge recommended that respondent be actually suspended from the practice of law for two years, and the State Bar asks us to adopt this discipline recommendation. We are mindful that the Supreme Court has repeatedly held that the "usual" discipline for wilfully misappropriating client funds is disbarment. (*Edwards v. State Bar*, *supra*, 52 Cal.3d 28, 37; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221; see also *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656 [intentional misappropriation generally warrants disbarment]; *Friedman v. State Bar* (1990) 50 Cal.3d 235, 244-245 [disbarment generally is warranted].) Wilful misappropriation "covers a broad range of conduct varying significantly in the degree of culpability." (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 38.) We find respondent's conduct to be on the more serious end of the continuum. "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." (*Ibid.*)

Standard 2.2(a) provides for disbarment for wilful misappropriation of trust funds unless the amount of the funds involved is insignificant or compelling mitigating circumstances clearly predominate. The amount here in question is substantial and respondent's mitigation evidence is outweighed by serious aggravating circumstances. We are particularly troubled by his failure to make any restitution. The significance of restitution is its probative value as evidence of rehabilitation, not the repayment of the underlying obligation. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr, 302, 312.)

Finally, respondent's various acts of concealment and duplicity offend "the fundamental rule of [legal] ethics – that of common honesty – without which the profession is worse than valueless . . . . [Citation.]" (*Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053.) Standard 2.3 provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward . . . a client or another person or of concealment of a material fact to . . . a client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." Respondent's misconduct was closely aligned with his practice.

In spite of the cases that impose disbarment for intentional misappropriation, we do not believe such severe discipline is needed in this case. Each case should be resolved on its own facts (*In re Young* (1989) 49 Cal.3d 257, 268), and the standards are to be used as guidelines rather than as "mandatory" sentences. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Respondent's misconduct was serious, but it was directed towards a single client and respondent has no other record of discipline. (*Boehme v. State Bar* (1988) 47 Cal.3d 448, 451-452; *Edwards v. State Bar*, *supra*, 52 Cal.3d at pp. 36-37, 39.) We are also impressed with the strength of his good character testimony and his extensive community service. We note, too, that the misconduct occurred more than five years ago without any evidence of additional misconduct, which may be considered as a factor in deciding the appropriate discipline. (*Chefsky v. State Bar*, *supra*, 36 Cal.3d 116, 132.)

In addition to the standards, we look to the decisional law for guidance. (*In re Morse*, *supra*, 11 Cal.4th 184, 207.) There is precedent under these circumstances for actual suspension of two years, which we here recommend. A comparable case is *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, which involved the grossly negligent and/or intentional misappropriation of $20,000 where mitigating circumstances did not clearly predominate. In *McCarthy,* we were troubled, as we are here, "by respondent's lack of recognition of wrongdoing, lack of remorse, and failure to make any restitution. . . ." (*Id.* at p. 385.) Nonetheless, we rejected disbarment and instead recommended two years' actual suspension because the misconduct appeared to be "aberrational." (*Ibid.*) We also focused on the evidence of good character and the attorney's community service in arriving at its disciplinary recommendation.

We also consider as apt the case of *In the Matter of Hertz*, *supra*, 1 Cal. State Bar Ct. Rptr. 456. In *Hertz*, the attorney was found culpable of disbursing without authorization $15,000, which was to be held in trust for his client and the client's ex-spouse. Respondent disbursed $10,000 to the client for paying community debts and he took $5,000 for his own fees, without the knowledge or consent of the ex-spouse or her attorney. (*Id.* at p. 462.) *Hertz* involved a single client matter, but there was protracted deceit perpetrated against opposing counsel and the courts as to the whereabouts of the funds. There was also substantial mitigation evidence in the form of six character witnesses (including three judges) who attested to his high standing in the community, his diligence, and his substantial community service and pro bono activities. (*Id.* at pp. 467, 471.) This court imposed a two-year actual suspension even though 1) the funds paid to the client were later determined to have been properly reimbursable; 2) he later replaced the funds he had withdrawn as his fee; and, 3) there was a finding of acts of moral turpitude based only on Hertz's misrepresentations. (*Id.* at pp. 462, 471.)

In *Lipson v. State Bar*, *supra*, 53 Cal.3d 1010, the court imposed two years' actual suspension for wilful misappropriation involving acts of moral turpitude based on gross negligence. The attorney had an unblemished record of 42 years of practice and there was no

evidence in aggravation. (*Id.* at p. 1021.) The court found "two years' actual suspension takes into account both the serious nature of [the] misconduct and the substantial evidence in mitigation." (*Id.* at p.1022.)

We also find the case of *Most v. State Bar* (1967) 67 Cal.2d 589 to be instructive. In that case, the attorney failed to advise his client of the receipt of a settlement check for more than $30,000, and he unilaterally took his legal fees from the insurance proceeds in his client trust account. He also refused to account for the funds in spite of repeated requests by his client. Although finding the attorney culpable of intentional misappropriation, the court imposed two years' actual suspension. (*Id.* at p. 599.) Finally, in the case of *Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23, the Supreme Court imposed two years' actual suspension when the attorney commingled client funds in violation of the trust accounting rules, and also deliberately and dishonestly misappropriated more than $20,000 in settlement proceeds that he held in trust for a client. Doyle misappropriated the funds for his personal use for about 10 months and did not remit them to his client until after the client retained a second attorney who made repeated demands for the funds and after the client filed a complaint with the State Bar. (*Id.* at pp. 17, 24.) Unlike respondent in the instant case, Doyle had a prior disciplinary record for misappropriation. (*Ibid.*) But there were also mitigating circumstances in *Doyle* not present here in that the attorney suffered severe financial and family problems during the time period in question and, most importantly, he remitted the misappropriated funds before the disciplinary proceeding actually began. (*Ibid.*) We therefore conclude after our *de novo* review of the record, that the two-year actual suspension recommended by the hearing judge will adequately serve the discipline goals of the protection of the public, the courts and the profession provided in standard 1.3.

However, we believe the hearing judge's decision falls short in his recommendation of the amount of restitution. Many of the Supreme Court's cases require restitution when a matter involves misuse of client funds and unearned fees (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044), or court ordered sanctions (see, e.g., *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 367,

374). In *Sorensen,* the Supreme Court extended the protective and rehabilitative principles of restitution to cover specific out-of-pocket losses directly resulting from an attorney's violation of his duties. (*Sorensen v. State Bar, supra*, 52 Cal.3d at p. 1044.) In the instant case, the judge determined that $14,938 plus interest was the appropriate amount of restitution by dividing by one-half the $29,785.89 in fees respondent improperly paid to himself, based on CERT's fifty percent ownership of TRC (the other fifty percent having been owned by Ruppert). The judge did not wish to enrich Ruppert's estate, due to his unclean hands. But we believe the judge's calculation of restitution unjustly enriches respondent. "[A]n attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility . . . ." (*Goldstein v. Lees*, supra, 46 Cal.App.3d 614, 618.) Moreover, the funds from the insurance settlement belonged to TRC, not its individual shareholders, and therefore any repayment should be made to the successor in interest of TRC in the manner discussed below. Where an attorney improperly withdraws fees from a trust account, restitution to the client or the client's estate is appropriate. (See *In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. 752, 765.)

We agree with the hearing judge in not recommending as restitution the $50,000 that respondent distributed from his client trust account to Ruppert personally, notwithstanding our finding of clear and convincing evidence that respondent misappropriated by gross negligence these additional funds when he ceded dominion and control over them. But we cannot ascertain from this record if the $50,000 was used to satisfy legitimate corporate claims after it was placed in the DIP account by Ruppert, and therefore we are unable to conclude whether or not TRC was denied the benefit of these funds.

Accordingly, we recommend that respondent make restitution to the successor of TRC in the amount of $29,875, which equals the entire amount he improperly withdrew from his trust account as his fees without client authorization. (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 168.) Payment of the restitution should be made to the successor in interest to TRC and in accordance with the final Order of Dissolution of the Delaware Chancery

Court, or, if distribution of the restitution is not provided for in that order, pursuant to a new order of the chancery court upon application of CERT or its successor. If the successor in interest to TRC or the appropriate recipients of the assets cannot be identified pursuant to an order of the Delaware Chancery Court, then such restitution shall be paid to the State Bar Client Security Fund. (*In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 231.)

Furthermore, we recommend additional restitution in the amount of $2,500 plus interest be paid to CERT or its successor in interest, which equals the amount of the sanctions it was awarded by order of the bankruptcy court in September 1996. "Without question, sanction orders are for specific out-of-pocket losses directly resulting from respondent's misconduct and, therefore, proper subjects of a restitution order. [Citation.]" (*In the Matter of Katz*, *supra*, 3 Cal. State Bar Ct. Rptr. 430, 440.) Moreover, for purposes of determining restitution, it is immaterial whether or not the sanctions were discharged in respondent's personal bankruptcy case. (See, e.g., *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674 [because of an attorney's professional responsibilities, he may "be required to make restitution as a moral obligation even when there is no legal obligation to do so"].) There is no evidence that respondent has paid these sanctions, which is troubling to this court, since the 1996 sanctions order is final and binding.

We further recommend that respondent be ordered to take and pass a Professional Responsibility Examination, that he be ordered to comply with the provisions of rule 955 of the California Rules of Court and that he be ordered to pay the costs incurred by the State Bar in this matter.

VI. Discipline Recommendations

From the inception of his representation of TRC, respondent knew of the serious intra-corporate dispute. Yet he argues that faced with "battling factions," he made the best call he could "on the front line." He asserts that to now discipline him, *post facto*, will send an ominous message to attorneys who represent corporate clients that they proceed at their peril whenever

they are called upon to make a judgement call among competing claimants in the heat of battle. We disagree. This was a protracted matter which afforded respondent numerous warnings that he was in deeply conflicted territory. Nevertheless, he repeatedly and resolutely refused to heed these dire warnings, including those provided to him by the United States Bankruptcy Court, opposing counsel and the various members of the Board of Directors, who acted with notable restraint. The hearing judge found, "Respondent's refusal to recognize his multiple conflicts led to his remaining in the fray rather than withdrawing, as he should have done." In so doing, respondent seriously compromised the interests of his client, TRC.

Accordingly, we recommend that respondent James Steven Davis be suspended from the practice of law in the State of California for a period of four years; that execution of the four-year period of suspension be stayed; and that he be placed on probation for a period of four years on the following conditions:

1. Respondent shall be actually suspended from the practice of law in the State of California during the first two years of this probation and (1) until he makes restitution to Thermal Remediation Corporation, or its successor in interest, in accordance with an order of the Delaware Chancery Court or, if no order is obtained, to the Client Security Fund, in the amount of $29,875 plus interest thereon at the rate of 10 percent simple interest per annum from February 14,1996, until paid; plus restitution to CERT Environmental Corporation, or its successor in interest, in the amount of $2,500 plus interest thereon at the rate of 10 percent simple interest per annum from September 30,1996, until paid and provides satisfactory proof of payment of such restitution amounts to the State Bar's Probation Unit in Los Angeles and (2) until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

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

3. Subject to the assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Probation Unit that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

4. Respondent must report, in writing, to the State Bar's Probation Unit in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of respondent's probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable

portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. During each calendar quarter in which respondent receives, possesses, or otherwise handles client funds or property in any manner, respondent must submit, to the State Bar's Probation Unit in Los Angeles with the probation report for that quarter, a certificate from a Certified Public Accountant certifying:

(a) whether respondent has maintained a bank account that is designated as a "Trust Account," "Clients' Funds Account," or words of similar import in a bank in the State of California or, with the written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction;

(b) whether respondent has, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintained:

(1) a written ledger for each client on whose behalf funds are held that sets forth:

(a) the name of such client,
(b) the date, amount, and source of all funds received on behalf of such client,
(c) the date, amount, payee, and purpose of each disbursement made on behalf of such client, and
(d) the current balance for such client;

(2) a written journal for each bank account that sets forth:

(a) the name of such account,
(b) the date, amount, and client affected by each debit and credit, and
(c) the current balance in such account;

(3) all bank statements and cancelled checks for each bank account, and
(4) each monthly reconciliation (balancing) of (1), (2), and (3); and
(5) whether respondent has, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintained a written journal that specifies each item of security and property held; the person on whose behalf the security or property is held; the date of receipt of the security or property; the date of distribution of the security or property; and, the person to whom the security or property was distributed. If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of

perjury in the report filed with the Probation Unit for that reporting period. In this circumstance, respondent need not file the accountant's certificate described above.

6. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Probation Unit in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Probation Unit in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, 6002.1, subd. (a)(5).) Respondent's home address and telephone number shall *not* be made available to the general public. (Bus. & Prof. Code, 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Probation Unit of any change in any of this information no later than 10 days after the change.

7. Within the period of his actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) provide satisfactory proof of completion of the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

8. Within the period of his actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Client Trust Accounting and Record Keeping Course; and (2) provide satisfactory proof of completion of the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from respondent's MCLE requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

9. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if he has complied with the terms and conditions of probation, the Supreme Court order suspending him from the practice of law for four years shall be satisfied, and the suspension shall terminate.

Professional Responsibility Examination, Rule 955 and Costs.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within the period of his actual suspension and to provide satisfactory proof of his passage of that examination to the State Bar's Probation Unit in Los Angeles within that same time period. Additionally, we recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court 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. Finally, we recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business

and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

EPSTEIN, J.

We Concur:

STOVITZ, P. J.
WATAI, J.

Case No. 96-0-04662

In the Matter of James Steven Davis

Hearing Judge

Michael D. Marcus

Counsel for the Parties

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CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 August 6, 2003, I deposited a true copy of the following document(s):

OPINION FILED AUGUST 6, 2003

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

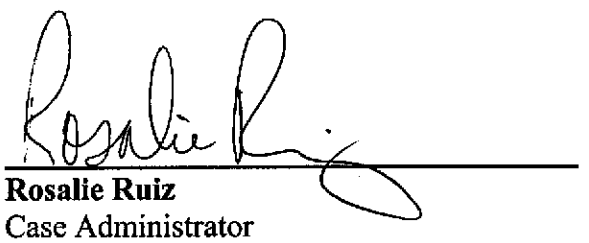
[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

R GERALD MARKLE
PANSKY & MARKLE
1114 FREMONT AVE
SOUTH PASADENA, CA 91030

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

ALAN B GORDON, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **August 6, 2003**.



Rosalie Ruiz
Case Administrator
State Bar Court