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STATE BAR COURT  
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**REVIEW DEPARTMENT OF THE STATE BAR COURT**

In the Matter of )  
 )  
**CLIFFORD BERNARD MALONE, JR.,** )  
 )  
A Member of the State Bar. )  
\_\_\_\_\_ )

**97-O-12631**

**OPINION ON REVIEW**

In this original disciplinary proceeding, respondent Clifford Bernard Malone, Jr., requests review of the hearing judge's decision finding him culpable of multiple acts of serious misconduct in one client matter and recommending his disbarment. The hearing judge determined that respondent was culpable of nine of the twelve charged acts of misconduct: (1) improperly soliciting clients; (2) scheming to defraud clients; (3) failing to respond to clients' reasonable status inquiries; (4) failing to keep clients reasonably informed of significant developments; (5) failing to render accounts of client funds; (6) misappropriating \$54,540 of client funds for respondent's own use; (7) misappropriating \$365,200 of client funds by diverting the funds to another, rather than using the funds for clients' benefit; (8) charging and collecting an unconscionable fee; and (9) accepting or continuing to represent clients without written disclosure of respondent's adverse interests.

Upon our independent review (*In re Morse* (1995) 11 Cal.4th 184, 207), we agree with most, but not all, of the hearing judge's findings and conclusions, as discussed more fully below. Moreover, as required, we give great weight to the credibility determinations made by the hearing



judge, who saw and heard the parties testify.<sup>1</sup> (*Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.) Indeed, our independent review has led us to conclude that the following statement of the hearing judge in her decision, cogently and accurately characterizes the most serious misconduct found in this case: “. . . [T]he Court finds that there is clear and convincing evidence that [r]espondent engaged in an elaborate scheme to defraud [his clients]. Throughout trial, [r]espondent presented an incredible array of reasons, excuses and stories as self-defense: he was the victim; the clients gave him hundreds of thousands of dollars ‘out of the blue’; the Carribbean drug cartel and a Colombian hit man threatened his and his family’s lives; his family had to escape to Greece, New York City and Disneyworld for protection; his home and office were ransacked; and fearing that the phone was not safe to use, his wife and [another] drove 30 hours to Chicago in a truck, which also transported a BMW car, to warn his daughter that her life was in danger. The Court rejects each of these fabrications.” We reject them as well.

Based upon all relevant circumstances, including the Standards for Attorney Sanctions for Professional Misconduct<sup>2</sup> and guiding case law, we conclude that the hearing judge’s disbarment recommendation is necessary to protect the public, the courts and the profession.

### **I. PROCEDURAL HISTORY**

Respondent was admitted to the practice of law in California in December 1975 and has no record of prior discipline. On October 3, 2002, the State Bar started this proceeding by filing a 12-count Notice of Disciplinary Charges (NDC). On October 28, 2002, respondent filed his response to the NDC.

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<sup>1</sup>The hearing judge stated in the decision that she found respondent’s testimony to be “self-serving, inconsistent and not credible” and that “Respondent was not forthright in his testimony and his recollection of events is faulty.”

<sup>2</sup>All further references to “standards” are to these Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

At a July 21, 2003, pretrial conference, the parties stipulated to some of the facts underlying the State Bar's charges, memorialized in a Partial Stipulation for Trial.

An 11-day trial was held August 12-15, 18-22 and 26-27, 2003. Following receipt of closing briefs from the parties, the hearing judge took this proceeding under submission. On December 30, 2003, the hearing judge issued a decision finding culpability as indicated above and recommending disbarment. Respondent thereafter sought our review.

## **II. FINDINGS OF FACT**

### **A. Respondent's Initial Contacts with the Clients**

Dr. Harvey and Christel Chin, among others, invested money in fraudulent certificates of deposit (CDs) with First Surety Bank, Ltd. (FSBL) of Carmichael, California. Lonnie G. Schmidt was chief executive officer of FSBL and had employed Lynois Biesecker as a paralegal, but her employment terminated in May 1990. Before her employment with FSBL, Lynois had worked for respondent as a paralegal, but had been terminated by him.

In September 1990, Lynois contacted respondent and informed him about the fraudulent CD transactions involving FSBL and Schmidt. Respondent then met with Lynois and her husband, Bob Biesecker, to map out some general strategy and to determine Schmidt's available assets.

On September 19, 1990, before meeting with the Chins and other investors who eventually became the plaintiffs, respondent stated in a memo to his file that he would "draft a retainer agreement with Bob as a private investigator" at \$45 an hour and that Lynois would "be retained as a paralegal at \$40.00 per hour." Respondent noted that Bob had "already made a verbal arrangement with Harvey [Chin] for the payment of \$10,000.00 for investigative services," of which amount \$5,000 had already been paid. He also stated that, "The seven clients we are targeting have been interviewed extensively by Bob and are apparently squeaky clean." Respondent intended to utilize the Bieseckers' services if respondent were hired by the plaintiffs

even though (1) he had previously terminated Lynois's employment and (2) Bob was not a licensed investigator.

The Bieseckers arranged for respondent to meet with the potential FSBL plaintiffs for the first time on September 27, 1990, at a restaurant in Sacramento. Neither the Chins nor the other FSBL plaintiffs had a family or prior professional relationship with respondent at the time of their meeting with him. As a result of that meeting, respondent was hired by the FSBL plaintiffs. In November 1990, upon respondent's request, the plaintiffs advanced litigation costs.

Also in November 1990, respondent opened a trust account at Bank of the West, account number 136005220, entitled "Litigation Trust Account 'Chin v. FSBL'" (Chin Trust Account). The purpose of the account was to maintain advanced costs in trust for the FSBL litigation. From November 1990 through September 1995, respondent also maintained a general account at Bank of the West, account number 136003696 (general account).

In December 1991, respondent filed a complaint on behalf of the FSBL plaintiffs in Sacramento Superior Court, case number 517849, entitled *Cunningham, et al. v. First Surety Bank, Ltd., et al.* After a jury trial in May 1993, the jury awarded the FSBL plaintiffs a \$7.8 million judgment against Schmidt and FSBL. By Special Verdict, the jury awarded the Chins \$1,071,280.77 of the total judgment.

#### **B. Hiring Mark Graham as Investigator**

The clients hired and paid private investigators Stan Witten, Delta Special Investigative, Phillips and Associates, and Jesse Williams to try and locate FSBL assets in order to collect on the judgment.<sup>3</sup> However, collection proved to be very difficult. For example, although Witten

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<sup>3</sup>The contract with Witten was solely in the names of Witten, Harvey Chin and Hal Cunningham. Hal Cunningham was the adult child of the Cunninghams, who were plaintiffs in the FSBL lawsuit. Cunningham and Dr. Chin had become the spokespersons for the plaintiffs.

received \$28,000 for his services, he and his associates<sup>4</sup> were unable to collect on any assets.

In the fall of 1994, respondent told the Chins that he had found a high-level investigator named Mark Graham who could be helpful to the case. Respondent was introduced to Graham by Bob Blamey, respondent's subcontractor who had installed tiles in his home.<sup>5</sup> Blamey told respondent that Graham was a former Drug Enforcement Administration (DEA) agent. Blamey had met Graham at a recreational vehicle convention where Graham mentioned to Blamey that he was in the food business and that he might be coming out to the Bay Area for his business. Graham later contacted and hired Blamey to do delivery for his food business. Graham owned a company called Creative Crane Concepts (CCC), which is also part of Rainforest Food Products (Rainforest). Graham was the vice-president and chief executive officer of the company, and his wife was the president. CCC was primarily a food importer and distribution business selling Rainforest products. According to Blamey, CCC also engaged in other business activities, including boat repossession. Blamey testified at trial that as far as he knew, CCC did not engage in investigations or surveillance, although while he worked at Rainforest, he heard Graham state on occasion that he was going out to perform investigative work.

After Blamey introduced respondent to Graham, respondent interviewed Graham on more than one occasion<sup>6</sup> and paid Graham to do some preliminary investigation work regarding the FSBL assets. After Graham reported back on some possible FSBL assets, respondent decided to introduce Graham to the clients to propose hiring him as an investigator to recover on the FSBL judgment, notwithstanding that Graham was not a licensed investigator or that respondent had

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<sup>4</sup>One of Stan Witten's associates was Bob Biesecker.

<sup>5</sup>Blamey at one time had practically lived with respondent and considered himself a very good friend of respondent's family. Blamey had no prior investigative experience.

<sup>6</sup>Graham represented himself as having been an ex-undercover DEA agent in the Caribbean and a former helicopter pilot.

not called any of Graham's references at this point to verify Graham's ability as an investigator. In November 1994, respondent met with the Chins to discuss hiring Graham to recover on the FSBL judgment. It appeared to the Chins that the meeting was geared toward selling them on the fact that Graham should be hired. Respondent encouraged the Chins to hire Graham by telling them that Graham was formerly a government undercover agent who could locate and retrieve offshore assets and who usually worked for city governments to recover monies. At that meeting, respondent stated that the plaintiffs were a few months away from getting their money back and that hiring Graham could be the best investment they ever made. Respondent informed the Chins that Graham had Schmidt under 24-hour surveillance and that they were "close to hitting a home run." Also at that meeting, respondent told the Chins that Graham needed \$75,000 to fund the investigation cost of recovering assets.<sup>7</sup>

Sometime after the November 1994 meeting, the Chins and Cunningham agreed to hire Graham to locate and seize FSBL assets. On December 20, 1994, the FSBL plaintiffs and Graham entered into a contingent fee agreement under which Graham was to be paid 15 percent of any gross recovery obtained. The agreement included, among others, a provision that the "Investigator may not incur costs for travel, lodging, rental car(s), meals, or entertainment, without the prior written consent and authorization of [the FSBL plaintiffs'] representative, Clifford B. Malone." Respondent signed the agreement as the plaintiffs' representative. However, respondent did not show this fee agreement to his clients. The Chins did not see this agreement until the hearing in this matter.

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<sup>7</sup>Although respondent testified at trial that the November meeting never took place and that he and Graham never requested the \$75,000, the hearing judge resolved this testimonial dispute in favor of Dr. Chin based upon the relative credibility of the parties and various documents, including respondent's response to the NDC, his letter to the State Bar of March 14, 2000, and the parties' stipulation. Respondent acknowledged in these documents that he met with the Chins in November 1994 to discuss hiring a new private investigator, that he introduced the Chins to Graham, and that he and the Chins discussed that Graham's services would be expensive.

Notwithstanding that the investigation contingent fee agreement was not signed until December 20, 1994, on December 2 and 9, 1994, respondent advanced to CCC \$2,500 and \$4,200, respectively, in investigation costs from his general account.

### **C. Payments for Investigation**

Between February and August 1995, the Chins paid respondent a total amount of \$387,000 for the purpose of recovering on the FSBL judgment.

On January 31, 1995, Chin called respondent to ask some questions. Among other things, respondent informed Chin that the odds were good of obtaining eight million dollars in assets. Shortly thereafter, in early February 1995, the Chins made their first of several large payments. On February 6, 1995, respondent received from the Chins and deposited into the Chin Trust Account a check dated February 4, 1995, for \$125,000.

By April 17, 1995, there was a balance of \$2,159.87 in the Chin Trust account. In April 1995, respondent told Dr. Chin that all of the money in the Chin Trust Account had been spent. Following that conversation, Graham and respondent met with Chin a second time at Chin's office. Respondent said he needed an additional \$75,000 in investigation costs and stated that they were "literally weeks away" from asset recovery and that they were "close to hitting a home run." Dr. Chin told respondent that he did not have the money and would have to borrow it. Respondent furnished the forms so that Dr. Chin could get a secured loan, and on April 18, 1995, after obtaining a loan secured by Dr. Chin's dental practice, the Chins provided respondent with a check for \$100,000. On April 20, 1995, respondent deposited it into the Chin Trust Account and provided CCC with \$50,000 out of that account.<sup>8</sup>

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<sup>8</sup>Respondent denied soliciting funds from the Chins or stating that Graham was close to "hitting a home run" in seizing Schmidt's assets. Again, however, the hearing judge resolved the testimonial dispute in favor of Dr. Chin and found that respondent actively encouraged Dr. Chin to give him \$100,000 in April by telling Dr. Chin that he was close to retrieving Schmidt's assets. The hearing judge found that the primary reason Dr. Chin borrowed \$100,000 to pay Graham was that respondent told him that Graham was weeks away from "hitting a home run."

On June 12, 1995, respondent deposited into the Chin Trust Account a check from the Chins dated May 3, 1995, for \$62,000.

On August 22, 1995, the Chin Trust Account contained a balance of \$380.79. In August 1995, respondent told the Chins that the money in the trust account had been spent and more money, approximately \$50,000 to \$75,000, was needed to fund the investigation. At that time, respondent stated that he was "weeks to days away from writing checks" to them to reassure the Chins that Graham was close to getting their money back. The Chins borrowed \$50,000 on August 25, 1995, and on August 28, 1995, the Chins provided respondent with \$100,000, which respondent deposited into the Chin Trust Account on the same day.

Between January 1 and September 25, 1995, respondent paid Graham (or CCC) from the Chin Trust Account a total of \$385,400.<sup>9</sup> On September 25, 1995, the balance in the Chin Trust Account fell to \$2,380.79.

At trial, respondent testified that Graham never sought and he never provided any written authorization to incur any expenses for travel, lodging, rental car(s), meals, or entertainment pursuant to their retainer agreement. As of the time of trial in this matter, none of the FSBL plaintiffs had received any money from their judgment in the FSBL case. Respondent has not returned any of the advanced funds to the Chins.

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The hearing judge found respondent to be lacking in credibility in part because respondent initially testified that he was surprised when he received the \$100,000 check in April, but then he admitted that he helped Dr. Chin obtain the loan by furnishing to him the loan and deed of trust forms. Respondent then changed his testimony to state that he was instead surprised only when he received the February 1995 payment from the Chins.

<sup>9</sup>It appears that the NDC's calculation of the total amount paid to CCC, based on the figures in the NDC, is wrong. Using those figures, respondent paid CCC a total of \$411,400 during that time period. The record supports all of those figures in the NDC but one; the Chin Trust Account bank records establish that the check to CCC for \$26,000 issued on April 10, 1995, was returned for insufficient funds. Therefore, we do not include that amount in our calculation of the funds paid to CCC.

The following chart summarizes the Chins' payments to respondent of \$387,000 for the purpose of finding and seizing Schmidt's assets between February 4 and August 28, 1995:

<i>Date (1995)</i>	<i>Amount</i>
2/6	\$125,000
4/20	100,000
6/12	62,000
8/28	<u>100,000</u>
<i>Total</i>	<i>\$387,000</i>

Respondent testified Graham informed him in late 1994 or early 1995 that Graham had discovered through his surveillance of Schmidt that there were threats to respondent and his family. Therefore, during that time Graham began to give respondent and his family advice regarding how to protect themselves. Respondent intended to pay Graham for this advice beginning February 1995 at the rate of \$16,000 per month once respondent recovered his fees in the case. He also claimed that his family, fearing for their lives, had to leave the Bay Area in late January and travel to Greece, New York and Florida. At respondent's deposition, he testified that his home was broken into and damaged in mid- to late-January 1995, before his family left for Greece. However, at trial he testified that his home was broken into in late January or February, while he was hiding out in the Bay Area and his wife and family were hiding out in Greece, New York and Florida. Sometime in the spring of 1995, respondent called the Chins and stated that he and his family needed to hide due to threats from Schmidt and/or his cohorts. Dr. Chin testified that because respondent feared for his family members' lives, the Chins authorized him to spend \$20,000 out of the Chin Trust Account to pay the cost of hiding and protecting respondent's family. Respondent never reported these threats to law enforcement nor did he file an insurance claim as a result of the damage to his house.

#### **D. Chins' Requests for an Accounting and Case Status**

During 1995, respondent did not provide to the Chins a complete accounting of the \$387,000 paid by the Chins.

In September 1995, respondent met with the Chins' accountant, Wayne Reeves, ostensibly to discuss the tax consequences of a distribution of the judgment. According to Reeves, the other reason he wanted to meet with respondent was that he did not trust respondent because respondent had not provided any accounting regarding the large sums of money being spent. During that meeting, respondent opined that the Chins were greedy and that the chances of recovery of offshore assets were slim to none. After meeting with respondent, Reeves advised the Chins of his inability to get accounting information from respondent.

After speaking with Reeves about his meeting with respondent, the Chins telephoned and faxed respondent on numerous occasions from September 27 through the end of October 1995 to obtain a status update. Respondent failed to return these calls or faxes or provide a status update.

On November 20, 1995, respondent wrote to the Chins, claiming that he was "exceedingly occupied" through the beginning of 1996 and that, therefore, he would not give status reports until the beginning of 1996. He also asserted that Graham was similarly busy and had nothing new to report but would let respondent know right away if there were something new. In that letter, respondent also asked Chin not to call him at home during evenings or weekends, as he had very little time with his family.

On December 5, 1995, respondent wrote to all FSBL plaintiffs and informed them that he was planning to dismiss some lawsuits. He did not state that he had not collected any money or that all of the costs that had been advanced to perform collection efforts had been expended, although he did state that he would let the plaintiffs know "if something significant occurs as to recovery."

In January and February 1996, Dr. Chin attempted several more times to contact respondent and asked respondent to communicate with him and give a status update. On February 27, 1996, respondent sent a letter to all FSBL plaintiffs, claiming that Graham was still working on the case but cautioning the plaintiffs to be realistic and recognize that "the longer it takes, the least [sic] likely the recovery." He suggested a meeting with Graham within a month to get Graham's assessment of the ability to collect the judgment.

On March 4, 1996, Dr. Chin wrote to respondent, again requesting that respondent provide information about the collection efforts. On March 19, 1996, respondent sent Dr. Chin a letter in reply along with a list of outgoing expenses from the Chin Trust Account from October 1990 through September 22, 1995. Respondent did not explain the particular services Graham provided to justify the payments to CCC, which totaled \$385,400.

On March 26, 1996, Dr. Chin wrote respondent requesting a more detailed accounting of the money respondent had paid Graham: "I need an accounting of where all of my costs went so I may explain to the IRS (where every penny went). This includes Mark Graham for private investigative collection costs etc." Respondent failed to provide any further accounting.

On April 12, 1996, respondent wrote to Dr. Chin and stated that he had "already sent out a complete accounting as to all the payments made for costs and expenses on this case" and that he was "puzzled as to your request for further information. Is this something the Internal Revenue Service wants or that you want?" Respondent further stated that he did not have a breakdown of how Graham spent the money, paid to CCC, that he received from the Chin Trust Account: "I am not [Graham's] accountant and I do not monitor his internal affairs. I do not have any records as to his internal operations, field operative, and sources of information, including those related costs and expenses." Although the Chins had paid \$387,000 during 1995 for collection expenses at respondent's behest and were about to file for bankruptcy, respondent chastised Dr. Chin for seeking a more detailed accounting: "Why are you bringing this matter up

now when no one even faintly discussed such a request before? We all knew whom we were hiring and how Mr. Graham worked from the very beginning.”

On April 19, 1996, Dr. Chin again wrote to respondent and requested that respondent provide a status update on the collection efforts. Respondent again failed to respond.

In about June 1996, Graham vacated his Oakland office and left town. Respondent claims that he then began to suspect that Graham had perpetrated a fraud upon him, the Chins and the other FSBL plaintiffs. But he did not inform the Chins at that time of Graham's disappearance or his suspicion about being defrauded.

On September 16, 1996, attorney Howard Nevins wrote to respondent on behalf of the Chins and informed him that the Chins had retained his law firm for advice regarding a possible workout arrangement with creditors or the filing of a Chapter 7 bankruptcy. Nevins requested, among other things, an accounting of the funds the Chins paid respondent, a breakdown of the costs advanced by the other FSBL plaintiffs, and the disposition of those funds. On October 15, 1996, respondent responded to the letter but did not provide a detailed accounting, instead explaining to Nevins that Graham had kept no formal ledgers, that Graham had used mostly cash for his transactions, and that respondent had already detailed the payments to Graham in his last letter to Dr. Chin. Respondent stated that he was attaching to this letter his “office disbursement journal and back-up invoices.” In that letter, respondent also stated for the first time that Graham and his wife had disappeared, that respondent suspected they may have perpetrated a fraud upon respondent and the FSBL plaintiffs, and that he saw no prospects for recovery from an offshore account.

Between December 1994 and October 1995, respondent paid himself or used for his own benefit from the Chin Trust Account the total amount of \$54,540.11, as follows:

<i>Date</i>	<i>Amount</i>	<i>Check No.</i>
<b>1994</b>		
12/20	\$4,200	1337
<b>1995</b>		
1/14	4,000	Deposited in general account
1/31	5,000	Deposited in general account
2/10	5,000	1360
2/23	1,762	1365
2/23	5,000	1367
3/9	500	1373
3/9	1,100	1374
3/10	1,000	1378
3/17	6,936.28	1381
3/21	3,180	1379
5/10	2,978.76	1391
5/15	1,883.07	1393
8/31	10,000	1403
10/10	<u>2,000</u>	1406
<b>Total</b>	<b>\$54,540.11</b>	

During that same period of time, respondent advanced from his own funds \$42,014 in costs for the FSBL collection effort, as follows:

<i>Date</i>	<i>Amount</i>	<i>Gen Acct. Check No.</i>
<b>1994</b>		
12/2	\$2,500	1474
12/9	4,200	1483
12/20	2,200	1502
<b>1995</b>		
1/16	4,000	1538
1/18	5,000	1543
1/27	14	1560
8/22	10,000	1841
9/22	10,000	1882
10/24	4,100	1911
<b>Total</b>	<b>\$42,014</b>	

### **E. Chins' Complaint Against Respondent and Respondent's Complaint Against Graham**

On April 22, 1997, the Chins filed a complaint with the State Bar regarding respondent's handling of the funds they gave him to pursue collection on Schmidt's assets.

On October 31, 1997, a few months after the Chins had complained to the State Bar and more than a year after Graham had disappeared, respondent and his wife filed a verified complaint for fraud against Graham and his wife, CCC, and Rainforest in Alameda County Superior Court. The complaint alleged, among other things, that Graham never worked in any capacity with the Department of Justice, that Graham was unable to perform even simple asset recovery, that respondent and his family were never in any danger, and that Graham expended no monies for protection and surveillance services.<sup>10</sup>

On June 26, 2000, respondent filed a declaration in support of a default judgment in connection with the October 1997 complaint, stating: "It is therefore without question that they [Graham and others] had orchestrated a fraud against myself and my clients and personally misappropriated the moneys paid to them for security and protective services."

On March 14, 2000, respondent responded to State Bar investigator John W. Matney's inquiries based on Dr. Chin's complaint. In that letter, respondent never so much as hinted that he thought Graham had perpetrated a fraud. Respondent testified that, as of the time of trial, he was not sure whether or not Graham had defrauded him and the FSBL plaintiffs.

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<sup>10</sup>Respondent alleged in the complaint that the money he gave Graham for investigation costs went for Graham's personal expenses including "business and office overhead, office employees' salaries, vacations, meals, transportation, and hotel expenses for their personal benefit, expenditures for trade shows and 'Easy Rider' conventions totally unrelated to the services represented as being performed."

### III. CULPABILITY

#### A. Rules of Professional Conduct, rule 1-400(C) - Solicitation<sup>11</sup>

Count one of the NDC charges respondent with a willful violation of rule 1-400(C), which provides that an attorney shall not solicit a prospective client with whom he has no family or prior professional relationship. The State Bar alleges that respondent violated this rule when, in late 1990, he and the Bieseckers strategized to arrange a meeting with the FSBL plaintiffs, and, thereafter, offered to represent these same persons.

Respondent argues that he did not improperly solicit clients because the Bieseckers had already contacted these clients before meeting him and that there was nothing wrong with receiving a referral of potential clients.

While client referral is proper, solicitation is not. The evidence establishes by clear and convincing evidence that, before respondent met with the potential clients, respondent and the Bieseckers strategized and targeted prospective clients in order to procure their business. In his September 19, 1990, memo to file, respondent noted, "The seven clients we are targeting have been interviewed extensively by Bob and are apparently squeaky clean. They were simply depositors who wanted to earn interest on their money. The ones that were more into speculative ventures . . . have been rejected." It thus appears that respondent and the Bieseckers chose these prospective clients and agreed that the Bieseckers would solicit them on respondent's behalf. In exchange, respondent would draft an agreement hiring the Bieseckers, even though they may not have been the most qualified. Thus, respondent's method of targeting these clients was not by simple referral without conditions, but by proscribed solicitation in which the solicitors were given a strong financial incentive to procure targeted clients for respondent. Ethically, respondent's agents were little different from runners and cappers hired by plaintiff personal injury lawyers to improperly solicit professional employment which the lawyers themselves

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<sup>11</sup>All further references to rules are to the current Rules of Professional Conduct.

could not ethically procure. (See, e.g., *Kitsis v. State Bar* (1979) 23 Cal.3d 857, 863-864; *Goldman v. State Bar* (1977) 20 Cal.3d 130, 134, fn.4, 141, fn.8; *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, 641, 651-652; cf. *Kelson v. State Bar* (1976) 17 Cal.3d 1 [attorney culpable of employing another to solicit professional employment for him where (1) his investigator asked him to handle a legal matter for a non-client and he agreed, though there was no prior relationship between the investigator and the non-client; (2) attorney never attempted to discover relationship between investigator and non-client; and (3) attorney was present when another employee later encouraged non-client to retain petitioner].)

“[T]he danger of solicitation is that lawyers, trained in persuasion, may attempt to use such skills on potential clients who are vulnerable and susceptible to manipulation. [Citation.]” (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 337; see also *In the Matter of Scapa and Brown, supra*, 2 Cal. State Bar Ct. Rptr. at p. 652.) We agree with the hearing judge that respondent is culpable of willfully violating rule 1-400(C).

**B. Business and Professions Code Section 6106 – Fraud<sup>12</sup>**

Respondent is charged in count three with violating section 6106, committing an act involving moral turpitude by obtaining money from the Chins by reassuring them that he was close to getting their judgment proceeds from Schmidt when in fact he was spending the Chins' money for his own personal purposes. The hearing judge considered this charge was proven by evidence in eight different areas and she devoted five pages of her decision to it. We uphold the hearing judge's conclusion that respondent engaged in fraud but, in our view, it is unnecessary to recount at length the considerable supporting evidence covering many subjects, as respondent's fraudulent conduct was not complex. Having ostensibly protected the Chins with an agreement that remitted Graham to a contingent fee for his investigative work and required respondent to

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<sup>12</sup>All further statutory references are to the Business and Professions Code unless otherwise indicated.

approve in writing Graham's expense reimbursement, respondent promptly ignored that agreement and speciously sought to blame his clients for respondent's failure to honor it. The evidence is clear that respondent repeatedly importuned the Chins for funds during 1995 on the repeated promise that recovery of judgment proceeds was imminent. Yet respondent had no basis for that claim of promised success. He had done no independent review of Graham's qualifications to perform the tasks given him, and he failed to monitor Graham's activities, which would have honestly permitted respondent to make the claims of imminent success he made to the Chins. Moreover, respondent had no ability to discern what specific expenses Graham was spending for FSBL asset recovery, despite his attempts to suggest otherwise. Any of respondent's testimony that the Chins "surprised" respondent by volunteering their large sums was equally unbelievable, especially since respondent's testimony varied and was rebutted by proof that after soliciting a large payment from the Chins, respondent aided Dr. Chin by furnishing the necessary forms to borrow the funds to pay respondent.

Whatever else moral turpitude may mean, it includes an attorney's acts of fraud, and those acts violate section 6106. (*In re Hallinan* (1954) 43 Cal.3d 243, 247.) Our conclusion is aided by the strikingly varying nature of respondent's testimony, abundantly observed and catalogued by the hearing judge over this 11-day trial. It is evident to us as well on a review of the printed record. Much of respondent's testimony conflicts with his explanations elsewhere and some of it is internally inconsistent or varied over a short time. Other of his testimony is "artful and hard to believe" (*Brockway v. State Bar* (1991) 53 Cal.3d 51, 66) and still other of his testimony is inherently improbable.<sup>13</sup>

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<sup>13</sup>Just a few of these examples of incredible testimony by respondent included: his testimony that he was attempting to pay Graham from the Chins' funds in "dibs and dabs" when the documentary evidence showed that the monies were disbursed promptly and sizably to Graham; his testimony as to why he listed some expenses paid to Graham in the civil action he filed against him which were different from some of the expenses he cited when asked by the State Bar; his internally inconsistent testimony as to whether respondent had available to him a

### C. Section 6106 – Misappropriation

We now address count seven of the NDC which alleges that between February 10 and August 31, 1995, respondent misappropriated \$44,249.38 of the Chins' money for his own use and benefit in violation of section 6106. The hearing judge based her determination of culpability on a finding that from December 20, 1994, through October 10, 1995, respondent issued checks from the Chin Trust Account to himself for his own use and benefit in the total amount of \$54,540.11.

We reject the amount that the hearing judge found to be misappropriated for respondent's own use and benefit in this charge. As we previously noted, although we agree with the hearing judge's calculation that respondent paid himself or took for his own benefit a total of \$54,540.11 from December 20, 1994, through October 10, 1995, we also recognize that respondent advanced costs from his own funds for the FSBL collection efforts during this time period in the total amount of \$42,014.<sup>14</sup> The difference between these two figures, which is the amount we determine that respondent took for his own use and benefit during this time, is \$12,526.11.

As to this amount, it appears that respondent claimed to have used it to hide his family from the danger which Schmidt and his cohorts allegedly threatened. Respondent relies on the Chins' authorization for him to use \$20,000 to protect his family. However, the hearing judge found respondent's testimony that he used this money for his family's safety to be incredible, determining instead that respondent used the funds for purposes unrelated in any way to the

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record which showed a running total of expenses incurred by Graham for FSBL asset recovery; and his explanation that he was attempting to hold Graham to the contingent agreement he had executed with him when the Chins "blew it by [paying] these monstrous amounts of money."

<sup>14</sup>While we recognize that the NDC alleged payments from the Chin Trust Account to respondent starting in February 1995, the record establishes that respondent made fairly substantial advances to the FSBL collection effort in December 1994 and January 1995. Therefore, we include in our calculation the amounts respondent advanced and the amounts respondent was reimbursed from the Chin Trust Account during that time frame.

FSBL collection effort.<sup>15</sup> We give great weight to the hearing judge's credibility determination in this regard, as we must. (Rules Proc. of State Bar, rule 305(a).) Under these circumstances, there is no alternative but to conclude that respondent did not use these funds for any purpose related to locating and seizing Schmidt's assets, or even protecting respondent from Schmidt, but instead intentionally misappropriated \$12,526.11 of the Chins' funds to his own use and benefit.

#### **D. Section 6106 – Misappropriation**

Count eight also charges respondent with misappropriation. In this count, the NDC alleges that respondent misappropriated funds by issuing checks between January and September 1995 in the total amount of \$356,400 from the Chin Trust Account to CCC. The hearing judge found that respondent misappropriated \$365,200 by paying that amount to Graham (through CCC) from December 1994 through September 1995. As previously noted, our own calculation establishes that, between January and September 1995 (the dates alleged in the NDC), respondent paid to CCC from the Chin Trust Account a total of \$385,400.

Respondent's position is that he paid these funds to CCC for the purpose of collecting on the FSBL judgment. However, there is no evidence that respondent was paying Graham for investigation or location of Schmidt's assets. Respondent offered no documents that explain the precise purpose for which he made those payments. The enormous volume of receipts in the record does not establish that the expenses were incurred for investigation related to the FSBL collection effort.

Although respondent defends his lack of documentation by asserting that the FSBL plaintiffs all knew that Graham would not be keeping records, it was respondent's duty, as the

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<sup>15</sup>The hearing judge found: "Unbeknownst to the Chins, respondent spent the funds on his family vacation to Greece, New York and Disneyworld and on his wife's lost earnings for February 1995. The Chins had authorized respondent to spend \$20,000 for security because respondent represented that his family's lives were in danger. But they never authorized respondent to spend the money for pleasure."

Chins' attorney, to ensure that the funds that the Chins provided were spent for the purpose that the Chins specified. "It is settled that an attorney-client relationship is of the very highest fiduciary character and always requires utmost fidelity and fair dealing on the part of the attorney. [Citations.]" (*In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 829 (*Priamos*)). Once respondent, acting as the attorney for the FSBL plaintiffs, undertook the task of hiring and overseeing an investigator to attempt to collect on the FSBL judgment, "he was held to the standards of conduct as an attorney. [Citations.] Moreover, no law or published opinion can excuse respondent from complying with basic fiduciary duties of complete and adequate recordkeeping . . . and accountings of [client funds] which are basic to the satisfactory discharge of his fiduciary duties." (*Ibid.*) "An attorney has a 'personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds.' [Citation.]" (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 411.) "The Rules of Professional Conduct requiring attorneys' correct handling of trust funds and trust accounts have long been directed at prohibiting the more serious risk of loss or misappropriation of those funds, whether through carelessness or design. [Citations.]" (*In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, 420.) Here, respondent did not maintain adequate bookkeeping records supported by documents. Thus, respondent failed to comply with his duty to maintain the complete, careful records required. Under these circumstances, "the suspiciously inadequate and disorganized bookkeeping practices of [respondent smack] of misappropriation and conversion." (*Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 576-577.) Although respondent asserts that he never personally used any of the funds paid to CCC, it is clear that respondent diverted large sums of client funds to Graham and his business, rather than using the funds for the benefit of his clients. Indeed, the amount of funds respondent diverted to Graham represented more than one-third of the sum of the Chins' verdict. Misappropriation may be found even when an attorney did not personally benefit from

the improper use of client funds. (*In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, 712 [misappropriation found where attorney used other clients' funds to advance settlement funds to indigent clients].)

In view of the foregoing, we conclude that respondent violated section 6106 by misappropriating \$385,400 from the Chin Trust Account by paying that amount to CCC.

**E. Rule 3-110(A) – Failure to Perform Competently**

Count two charges respondent with a willful violation of rule 3-110(A), which provides that an attorney shall not intentionally, recklessly or repeatedly fail to perform legal services competently.

The State Bar alleges that respondent failed to competently perform legal services by failing to properly supervise Graham's activities and by paying Graham large sums of money without verifying his billing statements. Respondent argues that this was not about competence, but about allegations of misrepresentations and misappropriation.

As we have previously discussed, we conclude that the misconduct upon which this charge was based was grounded in fraud and wilful misappropriation as charged in other counts. Under these circumstances, we do not find culpability for a violation of rule 3-110(A), as to do so would be duplicative (see, e.g., *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 536), and we dismiss this charge with prejudice.

**F. Section 6106 - Gross Negligence**

Count nine of the NDC alleges that respondent was grossly negligent in his management of the Chin Trust Account by (1) spending Chin's money for his own use and benefit, (2) failing to require documentation of the expenses Graham claimed he incurred to locate assets, (3) failing to require that Graham receive written permission from respondent before incurring expenses, (4) failing to require Graham to provide written proof of his claim that he located offshore assets, and (5) continuing to pay Graham large sums of money without written proof of Graham's

statement regarding location of Schmidt's assets. The hearing judge concluded that respondent did not commit this charged misconduct, not because of a failure of evidentiary proof, but because the facts supporting it were based on respondent's intentional conduct, rooted in fraudulent intent. The State Bar asserts that respondent's gross negligence amounts to moral turpitude in violation of section 6106.

As stated in our discussion of respondent's misappropriation, *ante*, because respondent was the FSBL plaintiffs' attorney, acting on their behalf when he hired Graham and undertook to oversee Graham's investigation, he remained in a fiduciary relationship of the highest character with the FSBL plaintiffs. As we also stated in our discussions of misappropriation and fraud, respondent repeatedly and seriously breached his fiduciary duties to his clients. Respondent failed to verify Graham's prior experience and ability in investigation and recovery of assets. After he hired Graham, he utterly failed to enforce the requirement in the investigative retainer agreement (which agreement respondent himself signed but the Chins had never seen) that Graham give written authorization *before* he incurred any expenses. Even after failing to require such authorization, respondent failed to obtain complete documentation of expenses Graham did incur. Then, notwithstanding these violations of respondent's duties, respondent continued to pay Graham (through CCC) large amounts of money for seriously underdocumented expenses, even though respondent also failed to require or obtain any independent verification of Graham's statements regarding the location and likely recovery of assets. In view of these numerous, intentional breaches of respondent's fiduciary duty to his clients, and his acts of fraud, we agree with the hearing judge that respondent's misconduct was not attributable to gross neglect but rather to intentional misconduct. To avoid duplicative findings (see *ante*), we decline to find respondent culpable of gross neglect.

### **G. Rule 4-100(B)(3) – Failure to Render Accounts**

In count six, respondent is charged with violating rule 4-100(B)(3), which provides in relevant part that an attorney must maintain complete records of all client funds in his possession and render appropriate accounts to the client.

After executing an agreement with Graham that required respondent's written approval of Graham's expenses, thus clearly contemplating adequate written records of those expenses, respondent argues that the Chins knew that Graham would not maintain records and that they had an understanding that no documentation would be kept. However, despite respondent's "understanding", rule 4-100(B)(3) *required* respondent, while acting as the Chins' attorney, (1) to maintain *complete* records of all funds the Chins gave to respondent and (2) to render an appropriate accounting to the Chins regarding these funds. Here, although the Chins and attorney Nevins made several requests for a detailed accounting of the funds the Chins had given to respondent, respondent failed to comply with their requests, going so far as to chastise Dr. Chin for making such a request. We adopt the hearing judge's conclusion that respondent, as the Chins' attorney, had a duty to provide an appropriate accounting to the Chins under rule 4-100(B)(3), and his failure to do so constituted a willful violation of that rule.

### **H. Section 6068, subdivision (m) – Failure to Respond to Status Inquiries**

In count four, respondent is charged with violating section 6068, subdivision (m) from October 1995 through April 19, 1996. That section provides in relevant part that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients in matters with regard to which the attorney has agreed to provide legal services.

Respondent argues that he was busy with other client matters and that he did communicate with the Chins and the other FSBL plaintiffs by writing letters to them. We agree with the hearing judge's determination that, while respondent provided a few communications to his clients, he failed to provide them with status updates regarding Graham's collection efforts,

which was the subject upon which Dr. Chin specifically requested communication. We therefore adopt the hearing judge's conclusion that, by failing to respond to Dr. Chin's numerous telephone calls from October 1995 through January 1996 and letters from October 1995 to April 1996, requesting a status update on the collection efforts, respondent failed to respond promptly to Dr. Chin's reasonable status inquiries in willful violation of section 6068, subdivision (m).

**I. Section 6068, subdivision (m) – Failure to Inform of Significant Developments**

Count five of the NDC charged respondent with violating section 6068, subdivision (m), by failing to keep the Chins reasonably informed of significant developments in their case.

While respondent contends that he informed the Chins of everything that he knew, the record establishes that he did not inform the Chins, or any of the FSBL plaintiffs, about Graham's disappearance in June 1996 until several months later. He did not inform the Chins of this fact until he sent a letter dated October 15, 1996, to Howard Nevins, the Chins' bankruptcy attorney. This letter was also the first time respondent informed the Chins of his suspicion that Graham had defrauded the FSBL plaintiffs and his conclusion that there was little or no chance of recovery of offshore assets. Under these facts, we adopt the hearing judge's conclusion that respondent failed to keep the Chins reasonably informed of significant developments in their case.

**J. Rule 3-310(B)(1) – Representation of Adverse Interests**

Respondent is charged in count twelve with a willful violation of rule 3-310(B)(1), which provides that an attorney shall not accept or continue representation of a client without written disclosure to the client that he has a business or financial relationship with a party or witness in the same matter.

In February 1995, respondent hired Graham to assist in protecting him and his family, and in exchange, respondent promised to pay Graham \$16,000 a month for these services when respondent received his attorney fees for the FSBL litigation. At that time, respondent had

already employed Graham as an investigator to locate Schmidt's assets for the Chins and the other FSBL plaintiffs. But respondent did not inform his clients that he had entered into a separate business relationship with Graham, a potential witness in any litigation necessary to collect on the FSBL judgment. By failing to give the FSBL clients written disclosure of his business relationship with Graham, respondent willfully violated rule 3-310(B)(1).

**K. Rule 3-300 – Avoiding Interests Adverse to Clients**

On the last day of trial, the State Bar moved to dismiss count ten, the charge of violating rule 3-300. Since there was no evidence presented of a business relationship between the Chins and respondent, we concur with the hearing judge's dismissal of this count with prejudice.

**L. Rule 4-200(A) – Unconscionable Fee**

Count eleven charges respondent with violating rule 4-200(A). That rule prohibits an attorney from entering into an agreement for, charging or collecting an illegal or unconscionable fee. The State Bar alleged that respondent charged an unconscionable fee by taking \$20,000 from the Chins in June 1995 to protect and hide his family in Europe.

As the hearing judge noted in her decision, "in general, the negotiation of a fee agreement is an arm's-length transaction. [Citations.]" (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913.) To determine whether a fee for legal services is unconscionable, "The test is whether the fee is 'so exorbitant and wholly disproportionate to the services performed as to shock the conscience.'" (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563.) Rule 4-200(B) sets forth 11 nonexclusive factors to be considered, where appropriate, in determining whether a fee is unconscionable, e.g., the amount of the fee in proportion to the value of the services performed and the skill required to perform the legal service properly. Thus, the terms of rule 4-200 establish that the rule applies only to unconscionable fees for legal services, not to other unconscionable agreements between an attorney and a client.

It is undisputed that the Chins agreed to allow respondent to spend \$20,000 for protection in Europe. There was no evidence that the \$20,000 was part of an agreement for a fee paid in exchange for legal services, or that any of the funds respondent took under that agreement were legal fees. Therefore, although we determine elsewhere that this use of client funds for respondent's benefit rather than for the clients' benefit constitutes a ground for discipline, respondent's taking this money from the Chins did not violate the prohibitions found in rule 4-200(A).

#### IV. LEVEL OF DISCIPLINE

##### A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) We give more weight overall to respondent's showing in mitigation than did the hearing judge.

The hearing judge concluded that, although respondent had no record of prior discipline in his 15 years of practice when the misconduct began in 1990, his lack of prior discipline is not considered as mitigation because his present misconduct is deemed very serious. (Std. 1.2(e)(i).) We note, however, that even in cases in which the misconduct at issue was serious, the Supreme Court has given some mitigating weight to an attorney's lack of a prior record. (See, e.g., *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 112 [attorney found culpable of three acts involving moral turpitude given mitigating credit for no prior misconduct in eight years of practice].) Accordingly, we give respondent some mitigating credit for lack of prior discipline.

Respondent cooperated with the State Bar by entering into a partial stipulation of facts. (Std. 1.2(e)(v).)

Respondent offered 12 character witnesses who testified to his honesty and integrity, including two retired superior court judges and six attorneys. (Std. 1.2(e)(vi).) While his wife, Suzanne Malone, testified to his good character, she had not read the NDC. Former Judge

Richard Patsey and attorney Patrick McMahon testified to respondent's truthfulness and integrity but also testified that they would change their opinion if respondent were found culpable of the misconduct. Former Judge Norman Spellberg testified that, although a finding of culpability would raise a question in his mind, he would nevertheless stand behind his testimony regarding respondent's good character and truthfulness unless he knew more, and in any event, he would see any such misconduct as aberrational. Bob Blamey, Bill Thomason, Hal Cunningham, and attorneys Gerald Welch, David Bowie, Michael Ney, Thomas Beatty, and Ray Rockwell were aware of the charges against respondent but testified that a culpability finding by a judge, without more, would not change their minds regarding respondent's honesty and competency. We conclude that respondent presented an impressive demonstration of good character and we therefore give the evidence more mitigating weight than did the hearing judge.

#### **B. Aggravation**

We agree with most, but not all, of the hearing judge's conclusions regarding aggravating factors in this case.

Respondent committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) He improperly solicited the Chins; misappropriated almost \$400,000 from the Chins by fraud; failed to provide the clients with status reports or keep them informed of significant developments; failed to provide them with an appropriate accounting; and failed to avoid adverse interests.

We reject the hearing judge's conclusion that respondent's misconduct was surrounded by bad faith, dishonesty and overreaching (std. 1.2(b)(iii)), since all of the facts upon which the hearing judge relied in finding this aggravating factor are part of the basis for finding culpability or other aggravation.

Respondent's misappropriation of at least \$387,000 caused the Chins substantial harm. (Std. 1.2(b)(iv).) The clients had to file for bankruptcy and move to another state to start their lives over. The poignant aspects of the Chins' situation are evident. After they were solicited to

retain respondent to seek redress for having been defrauded by Schmidt, respondent's own acts of fraud on the Chins were literally aggravating.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He refuses to admit to any wrongdoing and has never reimbursed any of the funds misappropriated from the clients.

We reject the hearing judge's conclusion that respondent displayed a lack of cooperation to the Chins, as respondent's failure to provide the Chins with accountings and failure to respond to their reasonable status inquiries formed the basis of culpability determinations. However, we adopt the hearing judge's determination of lack of candor to the State Bar, including during the proceedings in the hearing department. (Std. 1.2(b)(vi).) "Under certain circumstances, false testimony before the State Bar may constitute an even greater offense than misappropriation of clients' funds. [Citation.]" (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 23.) Here, respondent's testimony that he never asked the Chins for funds was contradicted by the Chins' testimony as well as Dr. Chin's notes and a letter from Hal Cunningham stating that respondent solicited funds from the Chins in an April 1995 meeting.

### **C. Discussion.**

The purposes of the disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (Std. 1.3; *In re Morse, supra*, 11 Cal.4th at p. 205.) We determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

In determining the appropriate level of discipline, we first consider the standards applicable to this case. Although we are "not compelled to strictly follow [the standards] in every case," we look to them for guidance (*In re Young*, (1989) 49 Cal.3d 257, 267, fn. 11), and they should generally be given great weight in order to assure consistency in attorney disciplinary

cases (*In re Brown* (1995) 12 Cal.4th 205, 220). While numerous standards are applicable to the misconduct found in this case, standard 1.6(a) provides in part that “[i]f two or more acts of professional misconduct are found . . . and different sanctions are prescribed . . . the sanction imposed shall be the more or most severe of the different applicable sanctions.”

This case involves most grievous misconduct. The standards for respondent’s misconduct calling for the most severe sanctions are standards 2.2(a),<sup>16</sup> 2.3,<sup>17</sup> and 2.6,<sup>18</sup> as these standards call for suspension or disbarment, depending upon the circumstances. In view of the amount of respondent’s misappropriation, we are especially cognizant of standard 2.2(a), providing that culpability of misappropriation warrants disbarment absent an “insignificantly small” amount involved or unless “the most compelling mitigating circumstances clearly predominate.”

In *Priamos*, the court recommended disbarment where, in investing funds for a vulnerable client, Priamos used over \$500,000 of her assets for speculative ventures in which Priamos had a financial or ownership interest and unilaterally took about \$450,000 in legal and management fees. Priamos also failed to disclose to the client either the fact of the investments or Priamos’s interest in the ventures and failed to account to the client. Priamos had one prior record of discipline for commingling and misappropriation, although the misconduct forming the basis for that discipline occurred after the misconduct in the case at issue. In aggravation, the misconduct caused significant harm, Priamos was indifferent to rectification of the harm, and Priamos failed

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<sup>16</sup>Standard 2.2(a) provides that culpability of willful misappropriation of entrusted funds shall result in disbarment unless the amount is insignificantly small or the most compelling mitigating circumstances clearly predominate.

<sup>17</sup>Standard 2.3 provides that culpability of moral turpitude, fraud, or intentional dishonesty shall result in actual suspension or disbarment.

<sup>18</sup>Standard 2.6 provides in relevant part that culpability of a violation of section 6068 shall result in disbarment or suspension.

to demonstrate any insight into wrongdoing. We assigned "limited" mitigating weight because of family pressures.

In *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, the attorney was disbarred for misappropriating about \$40,000 from a vulnerable client's personal injury settlement funds, misleading the client for over a year as to the status of the money, failing to respond to her reasonable status inquiries and to keep her informed of significant developments in her case, failing to keep client funds in trust, and failing to pay out client funds upon request. In mitigation, Spaith confessed to the client, although not until a year after the misappropriation, and promised to reimburse her, all before the client complained to the State Bar, and Spaith actually reimbursed all the stolen funds with interest as well as his fees taken from the funds involved. Spaith had no prior record of discipline in 15 and one-half years of practice, fully cooperated with the State Bar, made an extraordinary showing of good character, and presented evidence of community and pro bono service. In aggravation, Spaith committed multiple acts of misconduct, was culpable of uncharged misconduct in violating a court order relating to the settlement funds, and harmed his client.

We are also guided by *Chang v. State Bar* (1989) 49 Cal.3d 114. In that case, Chang was found culpable of misappropriating \$7,898.44 in client funds, failing to render an accounting to his client, and making misrepresentations to his client and to the State Bar. Although Chang had no prior disciplinary record, he never acknowledged the impropriety of his conduct, made no restitution, and demonstrated a lack of candor before the State Bar. The court concluded that "[t]he risk that [Chang] may engage in other professional misconduct if allowed to continue practicing law is sufficiently high to warrant his disbarment. [Citations.]" (*Id.* at p. 129.)

In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, the Supreme Court disbarred an attorney who intentionally misappropriated approximately \$29,000 from his law firm in a number of instances over an eight-month period, then engaged in several instances of deceit to the victims

and the State Bar. In mitigation, Kaplan had no prior record of discipline in 12 years of practice and suffered from emotional problems. However, the court found the mitigation was not sufficiently compelling.

Respondent's misconduct reflects a blatant disregard of professional responsibilities and embodies a virtual cornucopia of ethical violations. He flagrantly breached his fiduciary duties to the Chins and abused their trust as their attorney, defrauding them of almost \$400,000. This, coupled with the enormous harm to the Chins, weighs heavily in assessing the appropriate level of discipline. "It is clear that disbarment is not reserved just for attorneys with prior disciplinary records. [Citations.] A most significant factor . . . is respondent's complete lack of insight, recognition, or remorse for any of his wrongdoing. To the present time, he accepts no responsibility for what happened and only seeks to blame others." (*In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 83.)

In this matter, the significant mitigation does not outweigh the seriousness of the misconduct and the aggravating factors. Importantly, respondent's refusal to recognize any wrongdoing and continuous failure to comprehend basic adherence to fiduciary duties owed to clients warrant the highest level of public protection.

"In all but the most exceptional of cases, we must impose the harshest discipline for [misappropriation of client funds] in order to safeguard the citizenry from unethical practitioners. [Citations.]" (*Chang v. State Bar, supra*, 49 Cal.3d 114, 128.) "An attorney who is shown to have embarked on a course of conduct during which such breaches [of fiduciary duty] become common-place is not entitled to be recommended to the public as a person worthy of trust, and accordingly not entitled to continue to practice law." (*Resner v. State Bar* (1960) 53 Cal.2d 605, 615.) Based on the severity of the offense, the serious aggravating circumstances and the lack of clearly predominating compelling mitigating factors, we adopt the hearing judge's recommendation of disbarment.

## V. RECOMMENDED DISCIPLINE

We recommend that respondent Clifford Bernard Malone, Jr., be disbarred and his name be stricken from the roll of attorneys in this State.

We also recommend that the Supreme Court order respondent to comply with California Rules of Court, rule 955 and to perform the acts specified in paragraphs (a) and (c) within 30 and 40 days, respectively, after the effective date of its order imposing discipline in this matter.

We further recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and payable in accordance with Business and Professions Code section 6140.7.

Pursuant to the provisions of Business and Professions Code section 6007, subdivision (c)(4) and Rules of Procedure of the State Bar, rule 220(c), respondent is ordered enrolled inactive upon personal service of this opinion or three days after service by mail, whichever is earlier.

STOVITZ, P. J.

We concur:

WATAL, J.

EPSTEIN, J.

**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 March 9, 2006, I deposited a true copy of the following document(s):

**OPINION ON REVIEW, FILED MARCH 9, 2006.**

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

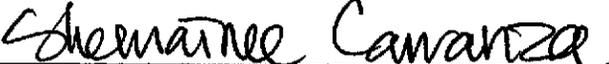
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**Clifford B. Malone, Jr.**  
**P.O. Box 754**  
**Diablo, CA 94528**

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

**Allen Blumenthal, Enforcement, San Francisco**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **March 9, 2006.**

  
**Shemainee Carranza**  
Case Administrator  
State Bar Court