PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **Juvenal Federico Agravante,** **Member No. 169950,** A Member of the State Bar.	**Case No. 04-O-12504-RAP** **Decision**

I. Introduction

In this original disciplinary matter, which proceeded by default, Deputy Trial Counsel Eric H. Hsu appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Juvenal Federico Agravante[1] did not appear in person or by counsel.

In the notice of disciplinary charges (NDC), the State Bar charges respondent with combined total of eleven counts of professional misconduct, seven counts with respect to two separate client matters, two counts for failing to maintain a current address with State Bar, and two counts for failing to cooperate and participate in a State Bar disciplinary investigation.[2] The State Bar asserts that the appropriate level of discipline is disbarment.

For the reasons stated *post*, the court (1) finds that respondent is culpable on only seven counts of misconduct and (2) recommends that respondent be placed on five years' stayed

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[1]Respondent was admitted to the practice of law in California on March 10, 1994, and has been a member of the State Bar since that time. He does not have a prior record of discipline.

[2]In its April 7, 2005, brief on culpability and discipline, the State Bar requests that, in the interest of justice, the court dismiss the two counts charging respondent with failing to maintain a current address with the State Bar (i.e., counts 3 and 8). The court grants the State Bar's request. Counts 3 and 8 are dismissed with prejudice.

suspension and three years' actual suspension that will continue until respondent makes restitution to one client and until respondent files and the State Bar Court grants a motion, under rule 205 of the Rules of Procedure of the State Bar, to terminate his actual suspension.

II. Relevant Procedural History

On December 9, 2004, the State Bar filed the notice of disciplinary charges (NDC) in this proceeding and, in accordance with Business and Professions Code section 6002.1, subdivision (c),[3] properly served a copy of it on respondent by certified mail, return receipt requested, at his latest address shown on the official membership records of the State Bar (official address). That service was deemed complete when mailed. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108.)

The copy of the NDC that the State Bar served on respondent was returned to the State Bar undelivered by the United States Postal Service (hereafter Postal Service). Accordingly, the State Bar took other steps in an attempt to provide respondent with actual notice of this proceeding. Those steps are set forth in the declaration of a State Bar deputy trial counsel that is attached to the State Bar's March 2, 2005, motion for entry of default. The additional steps taken by the State Bar are as follows. On March 1, 2005, the deputy trial counsel assigned to this proceeding telephoned respondent at two telephone numbers in its investigation file. When he telephoned respondent at the first number, the number was busy. When he telephoned respondent at the second number, he left respondent a numeric page for respondent to return the call. Respondent never responded to the numeric page. Accordingly, that same day, the deputy trial counsel consulted two telephone directories on the Internet and was unable to find a telephone number for respondent in the area which includes respondent's official address. He also checked Martindale-Hubbell's Internet lawyer locator service, but respondent was not listed. The State Bar has not had any contact with respondent since July 21, 2004.

Respondent was required to file a response to the NDC no later than January 4, 2005, but he did not do so. Therefore, the State Bar filed a motion for the entry of respondent's default on

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[3]Unless otherwise indicated, all further statutory references are to this code.

March 2, 2005. On that same date, the State Bar properly served a copy of that motion on respondent by certified mail, return receipt requested, at his official address.[4]

Respondent did not respond to the motion for entry of default. Because all of the statutory and rule prerequisites were met, this court filed an order on March 18, 2005, entering respondent's default and, as mandated in section 6007, subdivision (e)(1), placing him on involuntary inactive enrollment. The clerk properly served a copy of that order on respondent by certified mail, return receipt requested, at his official address. However, the Postal Service returned that copy of the order undelivered to the clerk on April 18, 2005.[5]

On April 7, 2005, the State Bar filed a brief on culpability and discipline (hereafter State Bar's April 7, 2005, brief). In that brief, the State Bar waived its right to request a hearing in this proceeding. Accordingly, the court took the matter under submission for decision without hearing on April 7, 2005.

On April 8, 2005, the State Bar filed a pleading that it titled "withdrawal of exhibits and amendment to footnote 14." That pleading, however, is defective in that there are no exhibits that the State Bar can withdraw because as the State Bar asserts, in that pleading, it inadvertently omitted the exhibits from its April 7, 2005, brief. Moreover, the court rejects the State Bar's attempt to use that pleading to exclude from the court's consideration the client letter that was to have been attached to the State Bar's April 7, 2005, brief as exhibit 4, which the State Bar knows establishes that respondent is not culpable of misappropriating the full amount alleged in count 11, which deals with the Tria client matter. Moreover still, the court rejects the State Bar's attempt to amend footnote 14 in its April 7, 2005, brief to delete the description of the content of the client letter that was to have been attached to that brief as exhibit 4. To do so would mislead the court into believing that respondent is more morally culpable in the Tria client matter than he is.

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[4]The record does not indicate whether this mailing was returned undelivered to the State Bar.

[5]All the other notices that the clerk served on respondent were also returned undelivered to the clerk by the Postal Service.

Almost 15 years ago, the review department set forth the principle that, when the State Bar proffers evidence at a default hearing that negates the deemed allegations in the notice of disciplinary charges, it is the evidence and not the allegations that control the findings of fact. (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318, citing *Remainders, Inc. v. Bartlett* (1963) 215 Cal.App.2d 295.) That principle is founded not only on well-established California law, but also is also founded on fundamental fairness and due process. Without question, even though the allegations of notice are deemed admitted by the entry of an attorney's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)), this court will not find an attorney culpable of professional misconduct which the evidence establishes that the attorney did not commit (e.g., *In the Matter of Heiner, supra,* 1 Cal. State Bar Ct. Rptr. at p. 318).

Concomitantly, the State Bar should *never* seek to mislead this court into accepting deemed admissions as true when it either knows that they are not true or has reason to believe that they are not true. (See § 6068, subd. (d) (attorneys have statutory duties to employ those means only as are consistent with truth and to never seek to mislead a judicial officer); see also § 6068, subd. (c) (attorneys have statutory duty to counsel and maintain those actions, proceedings, and defenses only as appear legal or just); cf. rule 5-110 [attorney in government service must never institute or cause to be instituted criminal charges when the attorney knows *or should know* that the charges are not supported by probable cause].)

III. Findings of Facts and Conclusions of Law

The court's findings are based (1) on the allegations contained in the NDC, which are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)) and the facts in this court's official case file.

A. The Loraine Client Matter (Counts 1, 2 & 5)

1. Findings of Fact

In September 2003, Ann Loraine and Barry J. Olaguer, who are married, employed respondent to obtain a work permit for Loraine. It was agreed that the clients did not have to pay respondent's attorney's fees until after Loraine obtained her work permit.

On October 9, 2003, the clients provided respondent with $555 for filing fees. Soon thereafter, respondent telephoned Loraine and Olaguer and told them that he had submitted, to the Bureau of Citizenship & Immigration Services (hereafter BCIS), the necessary documents (hereafter Loraine's application).

In January 2004, Loraine telephoned respondent, and respondent told her that he had not heard anything from the BCIS. When she asked for evidence that he actually filed her application, respondent told her that BCIS did not provide any evidence of filing and to wait for a letter from BCIS. In early February 2004, Loraine called respondent and left a message for him to the effect that it had been two months since respondent told her that the documents had been filed and that she still had not heard from BCIS. Respondent returned Loraine's telephone call that same day and told her that she could expect to hear from the BCIS by the end of the month. When Loraine told respondent that she was going to call the BCIS and check on her application, respondent immediately told her not to call the BCIS and to leave it up to him to check on her application. But Loraine telephoned the BCIS anyway.

When Loraine telephoned the BCIS, its National Service Center (hereafter NSC) told her that, if respondent had filed her application when he said he did, she should have received her work permit. The NSC suggested that Loraine go to the local BCIS office and ask if respondent had filed her application. And Loraine went to the BCIS's office in San Francisco, but was told that it did not have a record of her case/application. Accordingly, Loraine telephoned respondent and left him a message about what she was told the BCIS's San Francisco office and asked respondent to return her call. Shortly thereafter and before respondent returned her telephone call, Loraine telephoned respondent again. When she asked respondent to explain what had happened with her case, he offered no explanation. And, when she asked for proof that he had filed her application, respondent requested that she give him until March 15, 2004 to settle everything and then abruptly hung up before Loraine could answer. Loraine immediately called respondent back, but no one answered the phone. Thus, she left respondent a voice mail message stating that she could not wait until March 15, 2004, and asking respondent to return her call. Because respondent did not provide Loraine with proof that he had filed her application,

she telephoned the United States Department of Homeland Security (hereafter DHS) on February 13, 2004, and asked that it look for her application.

Even though the NDC initially pleads that Respondent neither returned Loraine's telephone call or otherwise communicate with her, it later pleads that he returned her call on February 20, 2004. Even though Loraine asked respondent for a status report on her application in a telephone call, respondent did not give her one. Instead, he told her that he had filed her application and then faxed her a copy of an October 13, 2003, cover letter reflecting that he sent her application to the BCIS on October 13, 2003.

Loraine then took that copy to the BCIS's San Francisco office, but the BCIS was still unable to find any record of Loraine's application. Later that same day, Loraine telephoned respondent and left a voice mail message informing him of her second visit to the BCIS's office and asking that he return her call.

On February 25, 2004, the DHS sent a letter to Ann Loraine in response to her telephone inquiry of February 13, 2004, in which it stated that, after conducting a through search of its records under both Loraine's maiden and married name, it was unable to locate any records of application in its database. Thereafter, in March 2004, Loraine again telephoned respondent and left him a voice mail message requesting a status report on her application and asking that he return her call. Respondent, however, did not do so. Nor did he otherwise communicate with Loraine by letter, etc.

On March 22, 2004, Loraine filed a complaint against respondent with the State Bar. Then, in April 2004, Loraine and Olaguer went to respondent's home and met with respondent. At that meeting, respondent gave his clients a copy of an Express Mail receipt that indicated that he mailed Loraine's application to the BCIS on March 19, 2004. He also gave them a copy of a DHS receipt of filing dated March 22, 2004. And, on April 4, 2004, Loraine checked the validity of the Express Mail receipt respondent and verified that the BCIS's San Francisco office received respondent's filing on March 22, 2004.

On July 19, 2004, respondent telephoned Loraine and told her that she had an interview with the BCIS on July 21, 2004, which Loraine attended.

2. Conclusions of Law

The record clearly establishes that, as charged in count 1, respondent repeatedly and intentionally failed to competently perform the legal services for which Loraine and Olaguer retained him in willful violation of rule 3-110(A) of the Rules of Professional Conduct of the State Bar.[6] From October 9, 2003, to March 19, 2004, respondent failed to promptly file Loraine's application when he knew that time was of the essence. It is clear from his repeated telephone conversations with Loraine that his persistent failure to file it was not only repeated, but also deliberate (i.e., intentional). (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 83.)

The record also clearly establishes that, as charged in count 2 respondent willfully violated his duty, under section 6068, subdivision (m), to respond to the reasonable inquiries of his clients. Respondent failed to provide Loraine with the requested status reports on her application. What is more, the court concludes that respondent's willful violation of section 6068, subdivision (m), involves moral turpitude and dishonesty in willful violation of section 6106 as charged in count 5.[7] Certainly, respondent deliberately failed to provide Loraine with the requested status reports on her application to deceive her and to conceal from her the fact that he had not filed her application as he told he had. "Concealment can be dishonest and involve moral turpitude within the meaning of section 6106. [Citation.]" (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576.)

Further, the record clearly establishes that respondent engaged in additional acts of moral turpitude and dishonesty in willful violation of section 6106 as charged in count 5. Without question, respondent's repeated lying to Loraine that he had filed her application involved not

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

[7]It is not duplicative to rely on one act of misconduct to find that an attorney has willfully violated both a Rule of Professional Conduct and section 6106. (See, e.g., *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169 [attorney's misappropriation of $929 violated trust account rule and section 6106].) In other words, it is not duplicative to find that an attorney's violation of rule is egregious that it rises to the level of an act involving moral turpitude, dishonesty, or corruption in violation of section 6106.

only moral turpitude (*Cadwell v. State Bar* (1975) 15 Cal.3d 762, 772 [" 'An attorney's practice of deceit involves moral turpitude.' "], quoting *Cutler v. State Bar* (1969) 71 Cal.2d 241, 252-253), but also dishonesty. (See also *Codiga v. State Bar* (1978) 20 Cal.3d 788, 793 ["deceit by an attorney is reprehensible misconduct whether or not harm results and without regard to any motive or personal gain"].) Respondent's conduct is particularly egregious in that he lied to a client, who is an individual to whom he owed the highest of fiduciary duties.

B. The Tria Client Matter (Counts 6,7, 8, 10 & 11)

1. Findings of Fact

In May 2002, Jesus C. Tria Sr. (hereafter Tria) employed respondent to prepare and file with the National Visa Center (hereafter NVC) a visa application (i.e., Form I-864) for each of his five children. In June 2002, as part of the application process, respondent prepared an affidavit for Tria to execute, which he took to Tria's home and asked Tria to have it notarized, which Tria did. Not long thereafter, respondent picked up the notarized affidavit from Tria's apartment. At the same time, Tria gave respondent a total of $2,570 in cash for filing fees and an additional $600 in cash as advanced attorney's fees. Respondent promised Tria that he would buy money orders with the $2,570 and that he would use those money orders to pay filing fees.[8] Respondent told Tria that the visas for his children would be ready sometime in either August or September 2003 (more that a year later) and that his children were to wait for the United States Embassy in Manila to call them for visa interviews.

Respondent filed the visa applications with the NVC on June 20, 2003, but failed to send the filing fees. And, in October 2003, Tria received a letter from the NVC requesting a $335 filing fee for each application, which Tria was to pay to the United States Department of State. In November 2003, Tria telephoned respondent about the October 2003 letter and asked respondent for an explanation. Respondent, however, did not offer an explanation even though

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[8]Footnote 14 of the State Bar's April 7, 2005, brief establishes that, of the $2,570 Tria gave respondent, only $1,240 of the was to be used to pay the filing fees for four of Tria's five children and the remaining $1330 was to be used to pay the filing fees for the applications of (1) a Father Noel P. Tria and (2) a Filipinas T. Fullero and her husband and daughter.

Tria had given him $1,240 for filing fees of his children's visa applications more than a year earlier.

In December 2003, Tria sent respondent a letter in which he again notified respondent of the NVC's October 2003 letter, asked whether respondent had sent his children's visa applications and the filing fees to the NVC, and asked respondent to telephone him. Respondent received Tria's letter, but failed to respond to it. On numerous occasions between November 2003 and July 1, 2004, Tria left telephone messages for respondent asking respondent to call him. Even though respondent received those messages, he did not respond (i.e., respondent did not telephone Tria or otherwise communicate with Tria by letter, etc.).

2. Conclusions of Law

The record clearly establishes that, as charged in count 7, respondent willfully violated his duty, under section 6068, subdivision (m), to communicate with his client and to respond to the reasonable inquiries of his clients when respondent failed to respond to Tria's December 2003 letter and to return Tria's telephone calls.

The record fails to establish that respondent failed to perform competently in willful validation of rule 3-110(A) as charged in count 6; accordingly, that count is dismissed with prejudice. There are no allegations that respondent intentionally, repeatedly, or recklessly failed to perform any legal service competently. To the extent that respondent's failure to use $1,240 of the $2,570 Tria to pay the filing fees for Tria's children's visa applications might be considered a failure to perform, the court declines to rely on it as such. Instead, as discussed *post*, the court relies on that failure to establish respondent's misappropriation of client funds.

Furthermore, the court does not find that respondent willfully violated rule 4-100(A) as charged in count 10. The State Bar failed to establish that respondent willfully violated rule 4-100(A) by using the $2,570 to purchase money orders with which to pay the filing fees in the manner set forth in footnote 8 *ante* instead of depositing the money into his client trust account. Accordingly, count 10 is also dismissed with prejudice.

What is more the State Bar failed to establish that respondent violated section 6106 by misappropriating $2,570 from Tria as it alleges in count 11. It has, however, established such a

violation to the extent that, as discussed *post*, respondent misappropriated $1,240 of that $2,570. Because the term "misappropriation" has such a serious opprobrium attached to it, the term is most appropriately used only to describe a conversion of client or other trust funds that involves moral turpitude, dishonesty, or corruption. (Accord, *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.)

As noted *ante*, respondent was to have used $1,240 of the $2,570 to pay the filing fees for Tria's children's visa applications, but he did not do so. Moreover, respondent did not tell Tria what he did with that $1,240 even though Tria asked him for an explanation in their November 2003 telephone conversation and in the December 2003 letter that Tria sent him. Because the record establishes that respondent failed to use the $1,240 for the purpose for which it was given to him and that respondent refused to account for the $1,240 in response to Tria's repeated requests, the court finds that respondent deliberately and dishonestly misappropriated $1,240 from Tria for his own use and benefit. (*Brody v. State Bar* (1974) 11 Cal.3d 347, 350 [attorney's refusal to account to his client in the face of repeated demands that he do so, justifies finding a willful misappropriation].) Moreover, even if respondent's conduct was not deliberate or dishonest, he was, at a minimum, grossly careless and negligent in not applying the $1,240 to the filing fees for Tria's children's applications and in not providing Tria with an accounting as to the $1,240. Such gross carelessness and negligence constitute a violation of respondent's oath to faithfully discharge his duties and involve moral turpitude. (*Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.)

Accordingly, the court finds that respondent willfully violated section 6106 as charged in count 11 to the extent that he misappropriated $1,240 from Tria.

C. Failure to Cooperate With State Bar Disciplinary Investigations (Counts 4 & 9)

1. Findings of Fact

a. Loraine Client Matter Investigation

On June 15, 2004, the State Bar opened a disciplinary investigation with respect to complaints that Loraine filed against respondent. And, on July 21, 2004, a State Bar investigator mailed, to respondent at his official address, a letter asking respondent to respond, in writing, to

specific allegations of misconduct that Loraine made against him. That letter was not returned to the State Bar by the Postal Service. Respondent did not respond to that letter. Accordingly, on August 20, 2004, the investigator mailed, to respondent at his official address, a letter noting respondent's failure to respond to her July 21 letter and again asking respondent to respond, in writing, to specific allegations of misconduct that Loraine made against him.

The August 20 letter was not returned to the State Bar by the Postal Service. Respondent did not respond to the August 20 letter. Accordingly, on September 16, 2004, the investigator mailed, to respondent at his official address, a letter asking respondent to telephone her to discuss the Loraine client matter. Respondent did not call the investigator in response to her September 16 letter. Nor did he otherwise communicate with the State Bar about Loraine's complaints or participate in the bar's investigation of them.

b. Tria Client Matter Investigation

On September 9, 2004, the State Bar opened a disciplinary investigation with respect to complaints that Tria filed against respondent. On September 21, 2004, a State Bar investigator mailed respondent a letter at his official address asking respondent to respond, in writing, to specific allegations of misconduct that Tria made against him. That letter was not returned to the State Bar by the Postal Service. And respondent did not respond to that letter. Accordingly, on October 8, 2004, the investigator mailed respondent a letter noting respondent's failure to respond to her September 21 letter and again asking respondent to respond, in writing, to specific allegations of misconduct that Tria made against him. That October 8 letter was not returned to the State Bar by the Postal Service. Respondent neither responded to the October 8 letter nor otherwise communicated with the State Bar about Tria's complaints or participated in the bar's investigation of them.

2. Conclusions of Law

The record clearly establishes that, as charged in counts 4 and 9, respondent wilfully violated his duty under, section 6068, subdivision (i), to cooperate and participate in State Bar disciplinary investigations when he failed to respond to the State Bar investigator's letters with respect to the Loraine and Tria client matters and when he failed to otherwise participate in the

bar's investigations in those two client matters..

IV. Aggravation and Mitigation

A. Aggravation

The State Bar must prove all aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)[9] The record establishes three aggravating circumstances, one of which warrants only little weight.

1. Multiple Acts of Misconduct

Respondent has been found culpable of multiple acts of misconduct. That is an aggravating circumstance. (Std. 1.2(ii).)

2. Misconduct Involving Client Funds

The State Bar contends that the fact that respondent's misconduct included his mishandling of the Tria's money is an aggravating circumstance under standard 1.2(iii). The court disagrees. It would clearly be inappropriate to find that respondent's refusal to account to Tria for the $1,240 is an aggravating circumstance because the court relies on that fact as basis for its determination that respondent misappropriated $1,240 from Tria. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 132-133.)

3. Harm

Respondent's misconduct caused significant client harm. (Std. 1.2(b)(iv).) He delayed his clients' immigration proceedings in both the Loraine and the Tria client matters. In addition, Tria was harmed by respondent's misappropriation of more than a $1,000.

4. Failure to Participate in State Bar Court Proceeding

Respondent's failure to participate in this proceeding before the entry of his default is an aggravating circumstance (*Conroy v. State Bar* (1990) 51 Cal.3d 799, 805); however, it warrants little weight because the conduct relied on to establish it closely equals the misconduct establishing respondent's culpability under section 6068, subdivision (i) and the

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[9]All further references to standards are to this source.

entry of respondent's default (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 223, 225).

B. Mitigating Circumstances

1. No Prior Record of Discipline

As the State Bar aptly notes, respondent does not have a prior record of discipline. The record clearly establishes that respondent practiced law discipline-free for 8 years. While eight years' of discipline-free practice is not an extremely long period, it is a mitigating circumstance under standard 1.2(e)(i). This is true even though the misconduct found includes moral turpitude and dishonesty. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13, and cases there cited [absence of a prior record discipline over many years of practice is strong mitigation even when present misconduct is deemed serious notwithstanding the plain language to the contrary in standard 1.2(e)(i)].)

2. No Other Mitigating Circumstances

Because of respondent's failure to participate in this proceeding, there is no evidence of any mitigating circumstances other than the lack of prior record mitigation found *ante*.

V. Discipline Discussion

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

When determining the appropriate level of discipline, the court first looks to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) However, the standards are not to be applied in a talismanic fashion. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Looking to the standards first, standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed

for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent's misconduct is found in standard 2.2(a). Standard 2.2(a) provides that a willful misappropriation of entrusted funds shall result in disbarment unless the amount of funds misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case the attorney shall be actually suspended for at least one year. However, this one-year minimum is a guideline, "not an inflexible mandate." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.)

Not every misappropriation that is technically willful is equally culpable. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367.) The Supreme Court has differentiated between mere negligent misappropriations unaccompanied by acts of deceit or other aggravating factors and willful misappropriations where a client's money is taken by the attorney through acts of deception or with an intent to deprive. (*Edwards v. State Bar, supra,* 52 Cal.3d at p. 38.) In doing so the Supreme Court has held that even though disbarment is the usual form of discipline for willful misappropriation, it "would rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of negligent misappropriation, unaccompanied by acts of deceit or other aggravating factors." (*Ibid.*)

Even though there are cases in which the Supreme Court has disbarred an attorney for a single misappropriation (e.g., *Grim v. State Bar* (1991) 53 Cal.3d 21; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 657; *Chang v. State Bar* (1989) 49 Cal.3d 114), there are more recent review department cases in which disbarment was neither recommended by the State Bar Court nor imposed by the Supreme Court (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595-596 [attorney negligently misappropriated $50,000 and deliberately misappropriated $29,875.89, additional serious misconduct and aggravation, including failure to make restitution]; *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364 [attorney either negligently or deliberately misappropriated $20,000, additional serious misconduct and aggravation, including failure to make restitution]).

Even though respondent's misconduct was serious, it was directed towards only two clients and committed during the same general time frame, and respondent has no other record of

discipline. (Cf. *Boehme v. State Bar* (1988) 47 Cal.3d 448, 451-452; *Edwards v. State Bar*, *supra*, 52 Cal.3d at pp. 36-37, 39.) The court concludes that disbarment would be excessive in this case. In the court's view, *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357 supports a recommendation of five years' stayed suspension and three years' actual suspension. The discipline imposed in *Lawhorn* was five years' stayed suspension and five years' probation on conditions, which included a two-year actual suspension. Similar to the present proceeding, the misconduct in *Lawhorn* included a single misappropriation of $1,355.75. Even though there was additional misconduct in that case, it was all committed in a single client matter and there were other mitigating factors not present in this proceeding. Thus, the court concludes that respondent's discipline should be greater than that imposed in *Lawhorn*.

In sum, in light of standard 2.2(a), the foregoing case law, and all the other relevant factors, the Court concludes that the appropriate discipline to recommend is five years' stayed suspension and three years' actual suspension continuing until respondent makes restitution to Tria and until respondent files and the State Bar Court grants a motion, under rule 205 of the *Rules of Procedure, to terminate his actual suspension.*

VI. Discipline Recommendation

This Court recommends that respondent Juvenal Federico Agravante be suspended from the practice of law in the State of California for a period of five years, that execution of the five-year suspension be stayed, and that he be actually suspended from the practice of law for three years and until:

(1) he files and the State Bar Court grants a motion, under rule 205 of the Rules of Procedure of the State Bar, to terminate his actual suspension; and

(2) 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.

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Furthermore, in accordance with rule 205 of the Rules of Procedure of the State Bar, the court recommends that, if the State Bar Court grants a motion to terminate Agravante's actual suspension, it be authorized to place him on probation for a specified period of time and to impose on him such probation conditions as it deems necessary or appropriate in light of the misconduct found in this proceeding. The court further recommends that Agravante be ordered to comply with any such probation conditions imposed on him by the State Bar Court.

VII. Professional Responsibility Exam, Rule 955, and Costs

The court recommends that Agravante 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 such passage to the State Bar's Office of Probation in Los Angeles within that same time period.

The court further recommends that Agravante be ordered to comply with 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.*[10]

Finally, the court recommends 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.

Dated: July 6, 2005.

RICHARD A. PLATEL
Judge of the State Bar Court

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[10]Agravante is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 955 is also a ground for disbarment or suspension and for revocation of any pending probation. (Cal. Rules of Court, rule 955(d).) Even though sanctions less than disbarment are authorized, Agravante is advised that, in the absence of *compelling* mitigating circumstances, disbarment is almost always ordered for an attorney's failure to comply with rule 955. (See *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 296.)

CERTIFICATE OF SERVICE

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

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on July 6, 2005, I deposited a true copy of the following document(s):

DECISION, filed July 6, 2005

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:

JUVENAL F AGRAVANTE
520 E WILLOW #11
LONG BEACH CA 90806

COURTESY COPY
JUVENAL FEDERICO AGRAVANTE
(AKA LEON F AGRAVANTE)
4311 YORK BLVD
LOS ANGELES CA 90041 3219

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

ERIC HSU ESQ, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **July 6, 2005**.

Angela Owens-Carpenter

Angela Owens-Carpenter
Case Administrator
State Bar Court