

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of ) Case Nos.: **05-O-01947-PEM**  
 ) (06-O-11380; 07-O-10438)  
**ALAN IRVING MOSS** )  
 )  
**Member No. 68369** ) **DECISION AND ORDER OF**  
 ) **INVOLUNTARY INACTIVE**  
 ) **ENROLLMENT**  
A Member of the State Bar. )  

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**I. Introduction and Pertinent Procedural History**

This default matter was submitted for decision on November 4, 2009. Respondent **Alan Irving Moss** is charged with 12 counts of misconduct including allegations that he misappropriated trust funds in two separate matters. At the time of submission, the State Bar of California (“State Bar”) was represented in this matter by Deputy Trial Counsel Manuel Jimenez. Respondent represented himself, but tendered his resignation<sup>1</sup> and failed to appear at trial.

The State Bar filed a Notice of Disciplinary Charges (“NDC”) against respondent on July 11, 2008. On that same day, a copy of the NDC was properly served on respondent in the manner set forth in rule 60 of the Rules of Procedure of the State Bar of California (“Rules of Procedure”).<sup>2</sup>

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<sup>1</sup> As noted below, respondent’s resignation was subsequently rejected by the California Supreme Court.

<sup>2</sup> Unless otherwise indicated, all documents were properly served pursuant to the Rules of Procedure.

On or about August 5, 2008, respondent filed an answer to the NDC. Trial was ultimately scheduled for January 28, 2009.<sup>3</sup>

On January 28, 2009, respondent failed to appear for trial. That same day, he submitted his resignation with charges pending to the State Bar Court.

Due to respondent's failure to appear for trial, the court issued an order of entry of default and involuntary inactive enrollment on January 28, 2009.<sup>4</sup> A copy of said order was properly served on respondent at his membership records address, and was subsequently returned to the State Bar Court by the U.S. Postal Service marked "UNCLAIMED."

On April 2-3, 2009, the State Bar submitted declarations from Lisa Edwards, Manuel Jimenez, Melinda R. Maggiani, and Elisa Fisher. These declarations were admitted into evidence pursuant to rule 202 of the Rules of Procedure.

On April 27, 2009, this matter was abated based on respondent's pending resignation. On September 30, 2009, however, the California Supreme Court declined to accept respondent's voluntary resignation with charges pending. Accordingly, the present matter was removed from abated status and submitted for decision on November 4, 2009.

The court concludes that respondent was given sufficient notice of the pendency of this proceeding to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220 [126 S.Ct. 1708, 164 L.Ed.2d 415].)

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<sup>3</sup> On October 28, 2008 and January 6, 2009, notice of trial was mailed by first class mail, postage paid, to respondent at his official membership records address.

<sup>4</sup> Respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e) was effective three days after the service of this order by mail.

## **II. Findings of Fact and Conclusions of Law**

### **A. Jurisdiction**

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on April 21, 1976, and has been a member of the State Bar of California at all times since that date.

### **B. General Background Facts**

At all relevant times, respondent maintained a client trust account, Wells Fargo Bank account number XXXXXX5746 ("the trust account"). At all relevant times, the trust account was the sole client trust account maintained by respondent.

At all relevant times, respondent maintained additional bank accounts, none of which were client trust accounts. These accounts include the following: (1) Wells Fargo Bank account number XXXXXX4497 ("account 97"); and (2) Wells Fargo Bank account number XXXXXX5811 ("account 11").

### **C. The Fisher Matter - Case No. 05-O-01947**

#### **1. Findings of Fact**

In or about March 19, 2002, respondent was hired by Elise Fisher ("Fisher") on a contingent fee basis to represent her in a wrongful death action, *Elise Fisher v. John Muir Medical Center, et al.*, Superior Court of California, County of Alameda, case number 841341-7 ("*Fisher v. John Muir*").

Between on or about June 13, 2002 and May 2, 2003, Fisher paid respondent \$73,500 as an advance to pay the costs and expenses of litigation in *Fisher v. John Muir*. Each of these payments was deposited into the trust account, as follows:

<u>Date</u>	<u>Amount</u>
6/13/02	\$10,000.00
6/28/02	\$5,000.00
8/20/02	\$5,000.00
10/1/02	\$8,000.00
11/25/02	\$5,000.00
11/25/02	\$1,500.00
2/27/03	\$15,000.00
3/28/03	\$15,000.00
5/2/03	\$9,000.00

As an advance to pay the costs and expenses of litigation, the entire sum of \$73,500 should have remained in the trust account until used to pay litigation costs and expenses in *Fisher v. John Muir*, or otherwise disbursed for the benefit of Fisher.

Through on or about May 10, 2004, respondent issued the following checks from the trust account in payment of litigation costs and expenses in *Fisher v. John Muir* as follows:

<u>Date</u>	<u>Check No.</u>	<u>Payee</u>	<u>Amount</u>
8/28/02	3889	Jane Morton, MD	\$14,437.50
9/11/02	4001	Tooker and Antz	\$785.18
11/20/02	4033	Kendra Tanacea, Esq.	\$1,000.00
11/22/02	4025	Jane Morton, MD	\$12,666.50
11/27/02	4032	Christopher Barton, MD	\$687.50
6/17/03	4046	University of CA Regents	\$10,500.00
5/5/04	4057	Donald Schreiber, MD	\$1,000.00
5/5/04	4050	Karen Gunson, MD	\$1,000.00
5/7/04	4041	Patricia Callahan & Assoc.	\$8,870.40
5/10/04	4040	Christopher Barton, MD	\$1,500.00

The aggregate amount of the payments of litigation costs and expenses from the trust account through May 10, 2004, was \$52,446.68. Through May 10, 2004, respondent made no other payments from the trust account to pay litigation costs and expenses in *Fisher v. John Muir*, or otherwise for the benefit of Fisher. However, during this period respondent made many other withdrawals from the trust account not for the benefit of Fisher.

On May 10, 2004, after payment of trust account check number 4040 payable to Christopher Barton, MD, the balance of the trust account was \$2,722.27. Accordingly,

respondent misappropriated for his own personal purposes unrelated to the benefit of Fisher at least \$18,331.05 of the \$73,500 paid to him by Fisher for litigation costs and expenses in *Fisher v. John Muir*.<sup>5</sup>

In addition, while the trust account contained client funds, respondent commingled funds belonging to himself personally, and not necessary to pay bank charges, into the trust account, including the following:

<u>Date</u>	<u>Amount</u>	<u>Method of deposit</u>
6/19/02	\$6,000.00	Online transfer from account 97
8/7/03	\$5,000.00	Online transfer from account 97
4/29/04	\$15,000.00	Online transfer from account 11
7/18/05	\$2,750.00	Online transfer from account 97
7/25/05	\$4,000.00	Online transfer from account 11
8/25/05	\$1,250.00	Online transfer from account 97

## **2. Conclusions of Law**

### **a. Count One - Rules of Professional Conduct, Rule 4-100(A)<sup>6</sup> - [Failure to Maintain Client Funds in Trust]**

Rule 4-100(A) provides, in part, that all funds received or held for the benefit of clients must be deposited in an identifiable bank account which is properly labeled as a client trust account. By not maintaining in the trust account at least \$18,331.05 of the \$73,500 paid to him by Fisher for use in paying litigation costs and expenses in *Fisher v. John Muir*, respondent failed to maintain the balance of funds received for the benefit of a client in his client trust account, in willful violation of rule 4-100(A).

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<sup>5</sup> There is no indication in the record that the \$18,331.05 was subsequently refunded to Fisher.

<sup>6</sup> All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

**b. Count Two - Business and Professions Code, Section 6106 [Moral Turpitude - Misappropriation]<sup>7</sup>**

Section 6106 provides that the commission of any act involving moral turpitude, dishonesty or corruption constitutes a cause for suspension or disbarment. “There is no doubt that the wilful misappropriation of a client’s funds involves moral turpitude. [Citations.]’ [Citations omitted.]” (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) By misappropriating \$18,331.05 paid to him by Fisher for litigation costs and expenses, respondent willfully committed an act involving moral turpitude, dishonesty or corruption in violation of section 6106.

**c. Counts Three - Rule 4-100(A) [Commingling Personal Funds in Client Trust Account]**

Rule 4-100(A) further provides that no funds belonging to the attorney shall be deposited in an identifiable bank account which is properly labeled as a client trust account or otherwise commingled therewith. By depositing personal funds into the trust account when the trust account contained client funds, respondent misused his client trust account, in willful violation of rule 4-100(A).

**d. Count Four - Rule 4-100(A) [Failure to Deposit Client Funds in Client Trust Account]**

In Count Four, the State Bar alleges, in the alternative, that respondent violated rule 4-100(A) by depositing client funds into account 97 and account 11. There is, however, no evidence before the court supporting this assertion. Consequently, Count Four is dismissed with prejudice.

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<sup>7</sup> All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

## **D. The Roosta Matter - Case No. 06-O-11380**

### **1. Findings of Fact**

On or about October 7, 2003, Gohar Roosta (“Roosta”) hired respondent to represent her in an action for injuries suffered in a traffic accident, *Gohar Roosta v. Maria Rodriguez-Ramos*, Superior Court of California, County of Contra Costa, case number CO5- 02134 (“*Roosta v. Rodriguez-Ramos*”).

On or about March 1, 2005, Roosta provided respondent with her check number 283 in the amount of \$1,000 (“check number 283”) as an advance to pay for the cost of an accident reconstruction report for use in *Roosta v. Rodriguez-Ramos*.

As an advance for costs and expenses, respondent was obligated to deposit check number 283 into a client trust account. Check number 283, however, was never deposited into the trust account.

On or about May 16, 2005, Roosta provided respondent with her check number 5002 in the amount of \$1,000 (“check number 5002”) as an additional advance to pay for the cost of an accident reconstruction report for use in *Roosta v. Rodriguez-Ramos*.

As an advance for costs and expenses, respondent was obligated to deposit check number 5002 into a client trust account. Check number 5002, however, was never deposited into the trust account.

### **2. Conclusions of Law**

#### **a. Count 5 - Rule 4-100(A) [Failure to Deposit Client Funds in Trust]**

By not depositing check number 283 and check number 5002 into the trust account, respondent failed to deposit funds received for the benefit of a client in a bank account labeled “Trust Account,” “Client’s Funds Account” or words of similar import, in willful violation of rule 4-100(A).

## **E. The Maggiani Matter - Case No. 07-O-10438**

### **1. Findings of Fact**

On or about October 8, 2004, Melinda R. Maggiani (“Maggiani”) hired respondent to represent her in a medical malpractice matter, *Maggiani v. University of Southern California, et al.*, Superior Court of California, County of Los Angeles, case no. BC327154 (“*Maggiani v. USC*”).

To finance the costs and expenses of litigation in *Maggiani v. USC*, at respondent’s suggestion, Maggiani entered into an agreement with Plaintiff Support Services (“PSS”), a company which advances money to individuals to fund lawsuits in exchange for a portion of future settlements.

Under the terms of the agreement between Maggiani and PSS, in consideration for any advances, PSS was entitled: (1) to claim a 54% “rate of return;” and (2) to receive repayment of the amount advanced, adjusted to reflect the rate of return upon settlement of *Maggiani v. USC*. Maggiani was obligated to pay back the advances, as inflated by the “rate of return,” out of any settlement obtained in *Maggiani v. USC*.

On or about July 18, 2005, PSS issued its check number 8440 in the amount of \$5,000, payable to Maggiani (“PSS check number 8440”). PSS check number 8440 was sent directly to and received by respondent shortly after it issued. On or about July 22, 2005, respondent deposited PSS check number 8440 into account 11.

On or about November 16, 2005, PSS issued its check number 9157 in the amount of \$10,000, payable to Maggiani (“PSS check number 9157”). PSS check number 9157 was sent directly to and received by respondent shortly after it issued. On or about November 19, 2005, respondent deposited PSS check number 9157 into account 11.



On or about December 21, 2005, PSS issued its check number 9350 in the amount of \$10,000, payable to Maggiani (“PSS check number 9350”). PSS check number 9350 was sent directly to and received by respondent shortly after it issued. On or about December 28, 2005, respondent deposited PSS check number 9350 into account 11.

On or about January 20, 2006, PSS issued its check number 9509 in the amount of \$7,500, payable to Maggiani (“PSS check number 9509”). PSS check number 9509 was sent directly to and received by respondent shortly after it issued. On or about January 23, 2006, respondent deposited PSS check number 9509 into account 11.

On or about February 13, 2006, PSS issued its check number 1022 in the amount of \$5,000, payable to Maggiani (“PSS check number 1022”). PSS check number 1022 was sent directly to and received by respondent shortly after it issued. On or about February 15, 2006, respondent deposited PSS check number 1022 into account 11.

At all relevant times, respondent knew that the proceeds of any funds obtained from PSS were intended for use in paying the costs and expenses of litigation in *Maggiani v. USC*. As advances for costs and expenses, all checks obtained from PSS should have been deposited into a trust account and their proceeds maintained in trust until used to pay costs and expenses of litigation in *Maggiani v. USC*.

Maggiani knew that respondent had arranged to have PSS check number 8440 issued. At no time, however, did respondent inform Maggiani that he had requested additional advances from PSS beyond the initial \$5,000 advance contained in PSS check number 8440.

Subsequent to on or about July 22, 2005, respondent requested and obtained four additional advances from PSS (PSS check numbers 9157, 9350, 9509 and 1022), totaling \$32,500, under the terms and conditions of Maggiani’s original agreement with PSS. At no time

did respondent inform Maggiani that he received and negotiated PSS check numbers 9157, 9350, 9509 and 1022.

Among the defendants in *Maggiani v. USC* was Zbigniew Petrovich, M.D. (“Petrovich”). In or about January 2006, Maggiani, through respondent, agreed to settle with Petrovich for the sum of \$850,000.00. The settlement was structured, with Maggiani to receive an immediate lump sum payment of \$250,000.00.

On or about February 16, 2006, Petrovich’s insurance company, TIG Insurance - Napa Healthcare, issued check number 11476 in the amount of \$250,000.00 (“TIG check number 11476”), payable to Maggiani and respondent as her attorney, issued in satisfaction of the lump sum payment provision of the settlement with Petrovich.

TIG check number 11476 was deposited into the trust account on February 22, 2006. After the deposit of TIG check number 11476, the balance of the trust account was \$250,095.22.

Pursuant to Business and Professions Code section 6146, assuming respondent applied the proceeds of the PSS checks to appropriate costs and expenses of litigation in *Maggiani v. USC*, at most respondent was entitled to fees from the settlement with Petrovich in the amount of \$185,991.65. Respondent was entitled to deduct no more than \$49,922.31 from the proceeds of TIG check number 11476 to pay costs and expenses of litigation in *Maggiani v. USC*.

Respondent made no disbursements from the trust account to PSS to repay the PSS litigation costs advances. Nor did respondent distribute any portion of the \$250,000 to Maggiani. However, between February 22, 2006, and August 17, 2006, respondent made other unauthorized withdrawals from the trust account for his own personal use and benefit, and which did not benefit Maggiani.

On August 17, 2006, the balance of the trust account was \$1,672.91. Respondent misappropriated at least \$12,413.13<sup>8</sup> of funds belonging to Maggiani for his own purposes unrelated to the benefit of Maggiani.

By Supreme Court order S133038, filed July 1, 2005, respondent was actually suspended for a minimum of 60 days, effective on or about July 31, 2005.

Upon motion of respondent the effective date of respondent's suspension was continued multiple times. The final continuance of the effective date of the respondent's period of actual suspension was granted by Order of the Presiding Judge of the State Bar Court, which issued October 17, 2005 ("the October 17, 2005, Order of the Presiding Judge").

The October 17, 2005 Order of the Presiding Judge provided that the effective date of respondent's suspension was stayed until the conclusion of *Ortiz v. John Muir Medical Center* and *Maggiani v. USC*, or March 15, 2006, whichever was earlier. The October 17, 2005 Order of the Presiding Judge further provided as follows: "The Review Department contemplates no further extensions beyond March 15, 2006, in the event that either matter has not been concluded by that time."

Respondent received a copy of the October 17, 2005 Order of the Presiding Judge shortly after on or about October 17, 2005.

Upon respondent's settlement with Petrovich, USC and Kenneth Norris Jr. Cancer Hospital ("Cancer Hospital") were the only remaining defendants in *USC v. Maggiani*; however, as of January 2006, respondent had not effected service of process on defendant USC.

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<sup>8</sup> This number represents the \$250,000 payment, less \$185,991.65 (in potential fees), \$49,922.31 (in potential costs and expenses of litigation), and \$1,672.91 (representing the remaining balance in the trust account on August 17, 2006). This number differs from that alleged in the NDC because the NDC appears to assume that the extra \$95.22 remained in the trust account and was not otherwise withdrawn. The evidence, however, is unclear on this fact.

On or about January 13, 2006, counsel for defendants USC and Cancer Hospital filed a motion to continue the trial date in *Maggiani v. USC* from January 30, 2006 to March 30, 2006. Respondent received a copy of this motion shortly after on or about January 13, 2006.

With respondent's agreement, hearing on the motion to continue was set for January 17, 2006.

Respondent did not lodge an objection to the motion to continue, nor did he appear at the hearing on the motion on January 17, 2006.

By order of the superior court, issued January 17, 2006, the trial in *Maggiani v. USC* was continued to March 13, 2006. Respondent received notice of this order shortly after on or about January 17, 2006.

Respondent appeared at a "Final Status Conference" in *Maggiani v. USC* on March 8, 2006. At that time he was ordered to appear on March 10, 2006, and show cause why he should not be sanctioned for failure to timely serve defendant USC. Hearing on the OSC was set for March 10, 2006.

On March 10, 2006, a hearing on the OSC was held. Respondent appeared. Respondent was ordered to pay sanctions in the amount of \$1,000 for failure to timely serve defendant USC. Jury trial was confirmed for March 13, 2006.

At no time prior to on or about March 20, 2006, did respondent or his agent inform the superior court that he would not appear at trial due to his suspension from practice.

At no time did respondent move for, or otherwise seek, a continuance of the trial in *Maggiani v. USC* to a time when he would be eligible to represent Maggiani.

At no time prior to on or about March 20, 2006, did respondent arrange for associate counsel to represent Maggiani's interests in relation to *Maggiani v. USC* during the period of respondent's suspension.

The first day of trial in *Maggiani v. USC* trailed to March 20, 2006, when the matter was called for trial. Respondent did not appear, nor did Maggiani or anyone representing Maggiani's interests. The superior court ordered *Maggiani v. USC* dismissed as to defendant Cancer Hospital, and set a status conference for April 10, 2006, on the issue of the lack of service of defendant USC.

Between on or about October 17, 2005, and on or about March 15, 2006, respondent took no action to ensure that Maggiani's interests were represented during the period of his suspension. For example, respondent did not do any of the following prior to the commencement of trial in *Maggiani v. USC*:

- (A) Object to the continuance of the trial into the period of his suspension;
- (B) Give the superior court notice of his impending suspension from practice prior to March 20, 2006, despite having several opportunities to do so;
- (C) Seek a continuance of the trial to a date when he would be eligible to practice law;
- (D) Arrange to have associate counsel appear on Maggiani's behalf at the trial, and otherwise handle Maggiani's matter during his suspension; or
- (E) Appear on Maggiani's behalf at trial and provide an explanation to the superior court regarding his ineligibility to practice.

The sanctions imposed upon respondent by the Superior Court on March 10, 2006, were not sanctions for failure to make discovery. As of July 11, 2008, respondent had not reported to the State Bar of California, in writing or otherwise, the imposition of the sanctions imposed upon him by the superior court on March 10, 2006.<sup>9</sup>

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<sup>9</sup> There is no indication in the record that respondent has since reported the imposition of these sanctions to the State Bar.

## **2. Conclusions of Law**

### **a. Count 6 - Rule 4-100(A) [Failure to Deposit Client Funds in Client Trust Account]**

By depositing PSS check numbers 8440, 9157, 9350, 9509 and 1022 into account 11, respondent failed to deposit funds received for the benefit of a client in a bank account labeled “Trust Account,” “Client’s Funds Account” or words of similar import, in willful violation of rule 4-100(A).

### **b. Count 7 - Rule 4-100(B)(1) [Failure to Notify of Receipt of Client Funds]**

Rule 4-100(B)(1) requires that an attorney promptly notify a client of the receipt of the client’s funds, securities, or other properties. By not informing Maggiani of the solicitation, receipt, and negotiation of PSS check numbers 9157, 9350, 9509 and 1022, totaling \$32,500 in client funds, respondent failed to notify a client promptly of the receipt of the client’s funds, in willful violation of rule 4-100(B)(1).

### **c. Count 8 - Rule 4-100(A) [Failure to Maintain Client Funds in Trust]**

By not maintaining at least \$12,413.13 of the proceeds of TIG check number 11476—funds belonging to Maggiani—in the trust account, respondent failed to maintain the balance of funds received for the benefit of a client in a bank account labeled “Trust Account,” “Client’s Funds Account” or words of similar import, in willful violation of rule 4-100(A).

### **d. Count 9 - Section 6106 [Moral Turpitude — Misappropriation]**

By misappropriating at least \$12,413.13 belonging to Maggiani, respondent committed an act of moral turpitude, dishonesty and corruption, in willful violation of section 6106.

### **e. Count 10 - Rule 3-110(A) [Failure to Perform with Competence]**

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence. By failing to act to ensure Maggiani’s interests were represented while he was suspended from practice, respondent intentionally, recklessly, and

repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A).

**f. Count 11 - Section 6068, Subdivision (o)(3) [Failure to Report Judicial Sanctions]**

Section 6068, subdivision (o)(3), provides that it is the duty of an attorney to report the imposition of judicial sanctions against the attorney to the State Bar, in writing, within 30 days of the time the attorney has knowledge of the imposition of the sanctions.<sup>10</sup> By failing to report to the State Bar the imposition of sanctions imposed upon him on March 10, 2006, for failure to serve USC, respondent failed to report to the agency charged with attorney discipline, in writing within 30 days, the imposition of judicial sanctions, in willful violation of section 6068, subdivision (o)(3).

**F. Failure to Cooperate - Case Nos. 06-O-11380 and 07-O-10438**

**1. Findings of Fact**

**a. The Roosta Complaint**

On or about March 3, 2006, the State Bar opened an investigation, case no. 06-O-11380, based on a complaint received from Roosta.

On or about June 20, 2006, State Bar Investigator Lisa Edwards (“Edwards”) wrote to respondent’s former counsel (“the June 20, 2006 letter”) and requested a written response to the allegations under investigation in relation to Roosta’s complaint. Respondent’s former counsel received the June 20, 2006 letter shortly after on or about June 20, 2006.

Subsequent to on or about June 20, 2006, respondent discharged his former counsel. No one contacted Edwards or any other State Bar employee in substantive response to the June 20, 2006 letter.

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<sup>10</sup> This section does not apply to sanctions for failure to make discovery or monetary sanctions of less than \$1,000. Here, neither of these exceptions is applicable.

On or about October 12, 2006, Edwards wrote a letter to respondent (“the October 12, 2006 letter”), accompanied by a copy of the June 20, 2006 letter, and again requested a written response to the allegations under investigation in relation to Roosta’s complaint.

Respondent received a copy of the October 12, 2006 letter (with enclosed copy of the June 20, 2006 letter) shortly after on or about October 12, 2006. No one contacted Edwards in response to the October 12, 2006 letter.

As of July 11, 2008, respondent had not provided Edwards or any other State Bar employee with a response to the June 20, 2006 letter or the October 12, 2006 letter.<sup>11</sup> As of July 11, 2008, respondent had not provided Edwards or any other State Bar employee with any information regarding Roosta’s complaint.

**b. The Maggiani Complaint**

On or about January 24, 2007, the State Bar opened an investigation, case number 07-O-10438, based on a complaint received from Maggiani.

On or about March 8, 2007, Edwards wrote respondent (“the March 8, 2007 letter”) and requested a written response to the allegations under investigation in relation to Maggiani’s complaint. Among the information requested in the March 8, 2007 letter were copies of respondent’s trust account records required to be maintained pursuant to rule 4-100(C).

Respondent received the March 8, 2007 letter shortly after on or about March 8, 2007.

No one contacted Edwards or any other State Bar employee in response to the March 8, 2007 letter.

On or about March 29, 2007, Edwards wrote a second letter to respondent (“the March 29, 2007 letter”), accompanied by a copy of the March 8, 2007 letter, and again requested a written response to the allegations under investigation in relation to Maggiani’s complaint.

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<sup>11</sup> There is no indication in the record that respondent has since provided the State Bar with a response or any other requested information regarding the Roosta complaint.



Respondent received a copy of the March 29, 2007 letter (with enclosed copy of the March 8, 2007 letter) shortly after on or about March 29, 2007.

No one contacted Edwards or any other State Bar employee in response to the March 29, 2007 letter.

As of July 11, 2008, respondent had not provided Edwards or any other State Bar employee with a response to the March 8, 2007 letter or the March 29, 2007 letter.<sup>12</sup> As of July 11, 2008, respondent had not provided Edwards or any other State Bar employee with copies of his trust account records as required to be maintained pursuant to rule 4-100(C). As of July 11, 2008, respondent had not provided Edwards or any other State Bar employee with any information regarding Maggiani's complaint.

## **2. Conclusions of Law**

### **a. Count 12 - Section 6068, subdivision (i) [Failure to Cooperate in State Bar Investigation]**

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. By failing to provide a response to any of the State Bar investigator's letters or to the allegations of the Roosta and Maggiani complaints, respondent failed to cooperate and participate in disciplinary investigations pending against him, in willful violation of section 6068, subdivision (i).

## **IV. Mitigating and Aggravating Circumstances**

### **A. Mitigation**

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)<sup>13</sup>

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<sup>12</sup> There is no indication in the record that respondent has since provided the State Bar with a response to these letters or any other requested information in the Maggiani complaint.

<sup>13</sup> All further references to standard(s) are to this source.

Since respondent did not participate, the court has been provided no basis for finding mitigating factors.

## **B. Aggravation**

The court finds four factors in aggravation. (Std. 1.2(b).)

### **1. Prior Record of Discipline**

Respondent has a prior record of discipline.<sup>14</sup> (Std. 1.2(b)(i).)

On July 1, 2005, the California Supreme Court issued an order (S133038) suspending respondent from the practice of law for two years, stayed, with a two-year probationary period including a 60-day actual suspension and until restitution. This discipline stemmed from respondent's misconduct in two client matters. Said misconduct included failing to perform legal services competently and failing to refund unearned fees. In mitigation, respondent had no prior record of discipline and displayed spontaneous candor and cooperation with the State Bar. No aggravating circumstances were found.

### **2. Multiple Acts of Wrongdoing**

Respondent committed multiple acts of wrongdoing ranging from failing to perform to the misappropriation of client funds. (1.2(b)(ii).)

### **3. Significant Harm**

Respondent's misconduct resulted in extensive financial harm to his clients. (Std. 1.2(b)(iv).) Said harm included his misappropriation of \$30,744.18 in funds belonging to Fisher and Maggiani.

### **4. Failure to Participate**

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).)

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<sup>14</sup> Pursuant to Evidence Code section 452(h), the court takes judicial notice of respondent's prior record of attorney discipline in the State of California.

## V. 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. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.2(a), 2.2(b), and 2.3, among others, apply in this matter. The most severe sanction is found at standard 2.2(a) which recommends disbarment for willful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one year actual suspension.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar urges that respondent be disbarred. The court agrees. The Supreme Court has repeatedly held that disbarment is the usual discipline for the willful misappropriation of

client funds. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; and *Howard v. State Bar* (1990) 51 Cal.3d 215, 221.)

“In a society where the use of a lawyer is often essential to vindicate rights and redress injury, clients are compelled to entrust their claims, money, and property to the custody and control of lawyers. In exchange for their privileged positions, lawyers are rightly expected to exercise extraordinary care and fidelity in dealing with money and property belonging to their clients. [Citation.] Thus, taking a client’s money is not only a violation of the moral and legal standards applicable to all individuals in society, it is one of the most serious breaches of professional trust that a lawyer can commit.” (*Howard v. State Bar, supra*, 51 Cal.3d 215, 221.)

Here, respondent intentionally misappropriated \$30,744.18 and failed to participate in the present proceedings. The court finds no reason to deviate from the standards, and therefore recommends that respondent be disbarred.

## **VI. Recommended Discipline**

The court recommends that respondent **Alan Irving Moss** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

It is recommended that respondent make restitution to Elise Fisher in the amount of \$18,331.05 plus 10% interest per annum from May 10, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Elise Fisher, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof thereof to the State Bar’s Office of Probation.

It is also recommended that respondent make restitution to Melinda R. Maggiani in the amount of \$12,413.13 plus 10% interest per annum from August 17, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Melinda R. Maggiani, plus interest

and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof thereof to the State Bar's Office of Probation.

Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

The court further recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.<sup>15</sup>

### **VII. Order of Inactive Enrollment**

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 220(c).)

### **VIII. Costs**

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: January \_\_\_\_\_, 2010

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PAT McELROY  
Judge of the State Bar Court

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<sup>15</sup> Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)