PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Nos. 16-O-17184 (16-O-17404)
	)	
MOGEEB WEISS,	)	OPINION AND ORDER
	)	
State Bar No. 236087.	)	
	)	

In this, his second disciplinary proceeding, Mogeeb Weiss was charged with nine counts of misconduct in two client matters. In the first matter, he was charged with five counts related to his duty to hold net proceeds in his client trust account (CTA) from the sale of a property that was the subject of litigation between his client and an opposing party. In the second, he was charged with four counts stemming from his representation of two clients in litigation against a former client. The most serious charge in the Notice of Disciplinary Charges (NDC) is the allegation that Weiss intentionally misappropriated funds from his CTA that he had agreed to hold in trust by agreement with the opposing counsel in the first matter.

The hearing judge found Weiss culpable on seven of the nine charges, including the intentional misappropriation. Based on these findings, the judge recommended that Weiss be disbarred. Weiss appeals the judge's recommendation, maintaining that the evidence is not sufficient to find him culpable of any of the charges. OCTC does not appeal and requests that we uphold the judge's recommendation.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we agree with all but one of the hearing judge's culpability findings. Because Weiss intentionally misappropriated $30,000, the applicable disciplinary standards call for disbarment absent

compelling mitigation that clearly predominates, which he did not prove. Like the judge, we recommend that Weiss be disbarred.

I. PROCEDURAL BACKGROUND

On September 29, 2017, OCTC filed an NDC charging Weiss with nine acts of misconduct: (1) moral turpitude under section 6106 of the Business and Profession Code[1]—breach of a fiduciary duty; (2) moral turpitude under section 6106—misappropriation; (3) failure to maintain client funds in trust account under rule 4-100(A) of the Rules of Professional Conduct;[2] (4) failure to perform with competence under rule 3-110(A); (5) moral turpitude under section 6106—misrepresentation to the State Bar; (6) moral turpitude under section 6106; (7) conflict under rule 3-310(E)—representation adverse to former client; (8) failure to maintain client confidence under section 6068, subdivision (e)(1); and (9) moral turpitude under section 6106—misrepresentation to counsel. Trial was held from April 24 through April 27, 2018, and posttrial briefing followed. On the second day of trial, the parties filed their Stipulation as to Facts and Admission of Documents (Stipulation). On July 30, 2018, the hearing judge issued her decision.

II. THE OAKLAND PROPERTY MATTER

A. RELEVANT FACTUAL BACKGROUND[3]

1. Introduction

Weiss was admitted to the practice of law on May 23, 2005. On June 15, 2015, his clients, Ocean Investments & Decor, LLC, and its owner, Manjit Jodha, were sued in a real estate

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[1] All further references to sections are to the Business and Professions Code unless otherwise noted.

[2] All further references to rules are to the former Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

[3] The facts discussed throughout this opinion are based on the Stipulation, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

dispute.[4] The lawsuit involved three properties located in Alameda County, including one at 3325 Greenwood Drive in Fremont (Fremont Property) and one at 5744 Gaskill Street in Oakland (Oakland Property). Roger Wintle and Ginny Bedi represented the plaintiffs in the lawsuit.

During the litigation, the Fremont Property was sold. In order to close escrow, Weiss drafted a Trust Fund Agreement that he, Wintle, and Bedi signed on June 10, 2015. In the agreement, all three attorneys "agreed to retain the proceeds of the funds from the sale of the Fremont Property in [Wintle's CTA] until such a time when joint instruction is received by [Wintle] instructing disbursement. The joint instruction shall be from the [parties'] counsel."

A short time later, the Oakland Property was sold. For this sale, Weiss drafted a second Trust Fund Agreement, similar to the Fremont Property agreement, in which the three attorneys agreed to close escrow and resolve outstanding issues later. Specifically, the Oakland Property Trust Fund Agreement (Oakland Property TFA) provided, in part:

> From the proceeds of the sale of the Oakland Property the escrow shall be instructed to pay off any outstanding liens on the Oakland Property as well as any Broker fees. While the Parties work to resolve their issues, Weiss has agreed to retain the proceeds of the funds from the sale of the Oakland Property in its attorney client trust account until such a time when joint instruction is received from the Parties' respective legal counsel instructing Weiss to disburse the funds.
>
> In the event Weiss disburses any funds without the receipt of joint instruction from the [parties'] counsel, Weiss shall be in breach of the Agreement . . ."

Weiss, Wintle, and Bedi signed the Oakland Property TFA on August 28, 2015.

The escrow for the Oakland Property closed on March 8, 2016, at which time the title company delivered the net proceeds of the sale, $67,653.08, to Jodha. Weiss did not provide closing instructions to the title company, and did not inform it of the Oakland Property TFA. He testified that he believed Jodha did so because the Oakland Property was under her name and

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[4] *A.K. Gill Properties, LLC, Kuldip Kaur, and Amrik Singh v. Ocean Investments & Décor, LLC, Manjit Jodha, and Pacific Realty Partners, Inc.*, Alameda County Superior Court, No. HG15774117 (*A.K. Gill* lawsuit).

because the Oakland Property TFA did not require him to contact the title company or provide it with any information.

Weiss also did not inform Wintle and Bedi that the Oakland Property had been sold; however, they learned of it from their clients approximately two months after the sale. On May 5, 2016, Wintle wrote a letter to Weiss, reminding him of his obligation to hold the Oakland Property net sale proceeds in his CTA and requesting that he provide proof that he was doing so. Weiss received the letter.

On May 17, 2016, Weiss sent an email to Wintle, stating that he received from Jodha an "HUD-1 form" for the Oakland Property and a check for $30,000.[5] The next day, Wintle replied, requesting an explanation of the $30,000 check since the form Weiss emailed indicated that the net proceeds from the sale of the Oakland Property was "$67K." Wintle did not receive a response.

On or about May 24, 2016, Jodha gave Weiss a cashier's check for $30,000. Weiss deposited the check into his CTA on June 2.

On June 6, 2016, Wintle wrote to Weiss, again asking about the sale proceeds, which Weiss was to hold "in trust" pending the resolution of the lawsuit. Wintle also reminded Weiss that he was holding the net proceeds of the Fremont Property sale in his CTA as agreed and that failure to keep the Oakland Property sale proceeds in Weiss's CTA would be a "serious breach" of the agreement. Weiss received the letter. There is a dispute in the record between Wintle and Weiss at this point. Wintle testified that he did not receive a response to his June 6 letter and that he never learned what happened to the approximately $37,000 missing from the sale proceeds. Weiss testified that he called Wintle before June 6 to explain that he did not receive the full amount of the Oakland Property sale proceeds because his client had paid contractors who had worked on the property.

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[5] Weiss deposited this check into his CTA shortly after receiving it, but it was returned for insufficient funds.

In October 2016, Wintle and Bedi filed a complaint with the State Bar on behalf of their clients, and alleged that Weiss failed to hold $67,653.08 in his CTA.

2. Weiss Removes Entrusted Funds from his CTA

Weiss had a conversation with Wintle in early December 2016, in which he informed Wintle that he was going to take the $30,000 from the CTA for litigation expenses because his client did not have the funds to pay him to prepare for the upcoming trial.[6] Weiss recalled that "Wintle's attitude was that, regardless, I am going to collect it from you based on the trust fund agreement." Later in the same conversation, Wintle said, "I am going to collect $67,000. I don't care about the 30." Weiss testified that he then asked Wintle, "[C]an I take it?" to which Wintle replied, "Well, you can take whatever you want. I want $67,000 when I secure a judgment."

In response to a State Bar investigation request, Weiss sent the investigator a copy of the following email he claimed that he sent Wintle on December 8, 2016,

> "Mr. Wintle, [t]o reiterate, Weiss Law . . . will withdraw the amount of $30,000 currently held in its trust fund pursuant to the Trust Fund Agreement signed on August 28, 2015. All other terms of the Trust Fund Agreement remains in effect. If your understanding is different, please let me know."

Wintle testified at trial that he never received the email,[7] and that he never authorized Weiss to withdraw the $30,000 from his CTA. Once Weiss was aware of the State Bar investigation, he called Wintle to ask if he would draft a declaration confirming that he gave permission for Weiss to withdraw the funds from his CTA. Wintle replied that he did not "want [Weiss] to be in trouble," but he could not sign a document under penalty of perjury that he agreed for Weiss to remove the $30,000. Bedi also did not authorize Weiss to distribute or withdraw the money in

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[6] Phone records show that Weiss and Wintle spoke on the phone for about four minutes on December 5, 2016.

[7] Weiss also testified that he did not receive any notification that the email to Wintle was returned as not deliverable.

his CTA. On December 9, 2016, Weiss transferred the $30,000 from his CTA to his firm's business account.

On December 29, 2016, Weiss responded to a State Bar investigation letter sent on December 15. Weiss informed the State Bar investigator that he and opposing counsel "entered into a written agreement that the proceeds of the sale of the [Oakland Property] would be placed into my trust fund account." However, he did not disclose that he had transferred the $30,000 from his CTA to his firm's business account.

On January 24, 2017, the parties in the *A.K. Gill* lawsuit attended a judicially supervised Mandatory Settlement Conference. Pursuant to an agreement drafted by the superior court judge who handled the settlement conference, the parties agreed that the plaintiffs were to receive the Fremont Property proceeds held in Wintle's CTA and that the defendants were "to direct their counsel to pay the $30,000 held in his [CTA regarding the Oakland Property] to [p]laintiffs forthwith[,] but in any event before February 14, 2017 . . . ." Weiss then transferred $30,000 back into his CTA and timely paid the plaintiffs pursuant to the settlement agreement.

On February 7, 2017, Weiss again responded to an inquiry from the State Bar investigator. In this email, Weiss told the investigator that Wintle had authorized him to withdraw $30,000 from his CTA, and that he never heard any objection from Wintle regarding the withdrawal. On February 27, 2017, Weiss informed the investigator that he asked Wintle for authorization to withdraw the funds to cover his attorney fees and related litigation expenses in the *A. K. Gill* lawsuit because his client could not pay his fees for trial preparation.

B. CULPABILITY FINDINGS

1. Count Two—Misappropriation (§ 6106)

We first consider count two as it is the most serious misconduct alleged. The hearing judge found that Weiss intentionally misappropriated $28,350.01.[8] However, Weiss does not deny that he removed the $30,000 from his CTA. Because his CTA balance fell below $30,000, the amount entrusted to him by Wintle and Bedi, an inference of willful misappropriation is raised, which Weiss then has the burden to rebut. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) Weiss undertakes to rebut this inference by asserting that he did not misappropriate the funds because he obtained Wintle's authorization to transfer the $30,000 from his CTA to his business account to cover Jodha's legal fees. We disagree.

Like the hearing judge, we find clear and convincing evidence of Weiss's culpability for intentional misappropriation. First, we rely on the judge's finding that Wintle did not give Weiss the authority to transfer the funds.[9] We also find that Weiss could not reasonably believe that Wintle authorized the transfer. Weiss himself testified that Wintle told him that Wintle's clients were entitled to the entire $67,653.08 from the Oakland Property escrow, and he would seek a judgment for that amount.

Other facts also support our conclusion of intentional misappropriation. Weiss failed to tell the superior court settlement judge that the funds for the agreed upon settlement were not in his CTA. He also failed to initially disclose to the State Bar investigator that he transferred the funds to his business account. We view his failure to disclose as indicia of concealment. (See *In*

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[8] The judge determined that $28,350.01 was intentionally misappropriated by checking the balance in the CTA ($1,649.99) after Weiss removed the $30,000 on December 9, 2016.

[9] The judge's credibility findings are entitled to great weight. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions "because [judge] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].)

the Matter of Davis (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 589 [attorney's concealment of existence and location of insurance proceeds is persuasive evidence of lack of honest belief in right to proceeds and supports moral turpitude finding].)

Weiss had a duty to maintain the $30,000 in trust and failed to do so. His unreasonable belief in the statements by Wintle does not excuse his misconduct, and, by concealing that he had removed the money, he demonstrated that he knew his actions were wrong. Thus, we conclude that Weiss intentionally misappropriated the funds, an act of moral turpitude. (See *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170 [intentional misappropriation of $55,000 where attorney removed funds from trust account and assertion that his client authorized loan of those funds neither reasonable nor honest].)

2. Count One—Moral Turpitude/Breach of Fiduciary Duties (§ 6106)

The hearing judge found that by failing to follow the terms of the Oakland Property TFA, Weiss breached his fiduciary duties to his client and the opposing parties in the lawsuit, an act of moral turpitude, in violation of section 6106 of the Business and Professions Code.[10] Specifically, the judge found that Weiss breached his duties by failing to provide closing instructions to the title company to transfer the sales proceeds from the Oakland Property to him, to inform it of the Oakland Property TFA, and to inform opposing counsel of the sale. Weiss asserts that he did not owe a fiduciary duty to the opposing parties because he had no attorney-client relationship with them; his duty to hold the funds in trust did not arise until he received the sale proceeds; and no breach occurred as Wintle told him that he could remove the funds from his CTA. OCTC asserts that the hearing judge's culpability finding should be upheld.

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[10] All further references to sections are to this source. Under section 6106, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension."

We find that Weiss did have a fiduciary duty to hold the sale proceeds from the Oakland Property until the parties resolved their disputes and he received joint instructions from the parties' legal counsel to distribute the money. This duty is clearly stated in the Oakland Property TFA. Contrary to Weiss's assertion, an attorney can create a fiduciary relationship with a non-client. A fiduciary duty to a competing party is created by the actual agreement of the attorney. (*Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155–156; *Crooks v. State Bar* (1970) 3 Cal.3d 346, 355.) The duty applies regardless of whether an attorney-client relationship exists. (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979 [duty applies to funds held for both client and client's former spouse]; *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632.)

However, contrary to the hearing judge's finding, the Oakland Property TFA did not state that Weiss had to instruct the escrow company to transfer the sales proceeds to his CTA. Given that this duty is not clearly stated in the agreement, we therefore find that Weiss did not have a fiduciary duty to ensure that he obtained the sales proceeds. (See *Summit Financial Holdings Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 [obligation of escrow holder is limited to carrying out instructions of parties to escrow].) Rather, the duty to hold the funds only arose when he received the $30,000 from his client. Upon receiving the $30,000, Weiss then breached his fiduciary duty by transferring those funds to his business account contrary to the escrow terms. (See *Bate v. State Bar* (1983) 34 Cal.3d 920, 923 [willful misappropriation of entrusted funds involves moral turpitude].)

We reject Weiss's assertion that he did not breach a fiduciary duty because Wintle gave him permission to transfer the $30,000. We agree with the hearing judge's finding that Wintle did not provide this authorization. (*McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1032.) However, while we find culpability for a breach of fiduciary duty, we do not afford this

misconduct any additional weight. Failing to keep the $30,000 in his CTA is the same misconduct alleged in count two, which charges misappropriation based on Weiss's transfer of the money to his business account. (See *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 ["little, if any, purpose is served by duplicative allegations of misconduct" in State Bar proceedings].)

3. Count Three—Failure to Maintain Client Funds in Trust (rule 4-100(A))

The hearing judge found that by transferring the $30,000 to his business account, Weiss failed to maintain funds in trust in violation of rule 4-100(A) of the Rules of Professional Conduct.[11] We agree. The judge also properly found that no additional weight should be assigned to this rule violation because the misconduct underlying the section 6106 violation supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

4. Count Four—Failure to Perform Legal Services with Competence (Rule 3-110(A))

The hearing judge found that Weiss did not perform legal services with competence, in violation of rule 3-110(A), because he failed to hold the sale proceeds for the Oakland Property in his CTA until the parties reached a joint agreement regarding the disbursement of the funds, in violation of the Oakland Property TFA. We agree that his failure to comply with the terms of the agreement is a failure to perform legal services with competence. (See *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 111–112 [attorney who holds funds subject to legally enforceable lien has duty as fiduciary to perform competently in handling funds].)

While we find a failure to perform legal services with competence, we do not afford this misconduct any additional weight. Failing to keep the $30,000 in his CTA is the same

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[11] All further references to rules are to this source, unless otherwise noted. Under rule 4-100(A), all funds received or held for the benefit of clients by an attorney or law firm must be deposited in a client trust account.

misconduct as in count two, which charges misappropriation based on Weiss's transfer of the money to his business account. (See *Bates v. State Bar*, *supra*, 51 Cal.3d at p. 1060.)

5. Count Five—Misrepresentation (§ 6106)

The hearing judge found that Weiss committed an act of moral turpitude involving dishonesty by telling a State Bar investigator that Wintle authorized him to withdraw the $30,000 to pay for his legal fees when he knew the statement was false and misleading. Weiss asserts that it was not a misrepresentation because he demonstrated that he had a phone conversation with Wintle on December 5, 2015, where Wintle agreed to the withdrawal. However, we agree with the judge's finding that Wintle did not authorize the transfer. Moreover, we find that Weiss could not have reasonably believed that Wintle authorized the transfer given that Wintle insisted that his clients were entitled to the entire $67,653.08. Therefore, Weiss's statement to the State Bar investigator was a misrepresentation that he knew, or should have known, was false and misleading and constitutes moral turpitude. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [moral turpitude includes concealment as well as affirmative misrepresentations with no distinction to be drawn between "concealment, half-truth, and false statement of fact"]; *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15 [actual intent to deceive is not necessary for finding moral turpitude; finding of gross negligence in creating false impression is sufficient for violation of § 6106].)

III. THE MIRZA MATTER

A. RELEVANT FACTUAL BACKGROUND

This matter involves Weiss's representation of two clients, Mohammad Kakar and David Tahiry, including in a lawsuit against a former client, Shariq Mirza, and other parties filed on

November 23, 2015 (*Kakar* lawsuit).[12] The *Kakar* lawsuit alleged a dispute over a short-term loan provided by the plaintiffs to the defendants for the development of a residential parcel of land at 1900 Buttner Road, Pleasant Hill, California (Buttner Property).

Mirza testified that he considered Weiss to be his attorney from 2005 through the filing of the *Kakar* lawsuit, and that Weiss provided legal services in about a dozen matters during this time. These legal services included providing defense representation in two unlawful detainer (UD) actions in 2010 and 2014, and legal advice in other matters related to business formation, business disputes, and contracts. During this period, Mirza testified he disclosed confidential information about his family's business and his own businesses to Weiss without hesitation because he fully trusted him.

Weiss testified that he began providing unpaid legal services to Mirza as early as 2006 and until 2010, and then provided paid legal services in 2014 in a UD action. The unpaid legal services occurred on two or three occasions and dealt with business transaction questions.[13] As to the 2014 UD action, Weiss testified that his representation of Mirza was brief because he quickly secured a dismissal of the action and did not consider Mirza to be his client after it was dismissed.

On October 9, 2015, Weiss had a four-minute phone call with Mirza. Weiss drove past a vacant lot at 29212 Mission Boulevard, Hayward, California (Mission Property) that had a for sale sign listing a phone number for someone he did not know. Weiss called the phone number because the client in his car at the time, Mohammad Mehdavi, was interested in purchasing the lot. When Mirza answered, Weiss identified himself, and, after recognizing each other, stated that he had a client who was interested in purchasing the property. They discussed the size of the lot and

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[12] Weiss also had a third client, Khalil Tahiry, who was involved in this matter but not a plaintiff in the lawsuit, entitled *Mohammad Tahir Kakar and David Tahiry v. Tariq Mirza et al.*, Alameda County Superior Court, No. RG15794393 (*Kakar* lawsuit).

[13] In addition, Weiss once owned a brokerage firm in which Mirza worked, and Mirza forwarded agents' questions to Weiss.

Weiss's client's interest in developing it for senior housing. During the call, Mirza said he was in Karachi, Pakistan, and not much else was discussed because of the time delay in relaying each man's statements over the phone. Shortly after Mirza agreed to provide information on the property when he returned, the call was disconnected.

Mehdavi also testified at trial that he was in the car with Weiss and could hear both men talking. His testimony was similar to Weiss's regarding the substance of the four-minute phone call between Weiss and Mirza. However, Mirza also testified that he provided Weiss with confidential information relating to the property, the limited liability company (LLC) that owned it, and his family members who owned the LLC.[14]

At the end of October 2015, Weiss met with Khalil[15] and Kakar to discuss their concerns that the loan they made to Mirza would not be repaid by the agreed-upon deadline of October 31. Weiss reviewed the agreement that Khalil and Kakar brought to him, and that existed between Mirza, Kakar, and David. Weiss then texted Mirza. When Mirza asked about the buyer's continued interest in the Mission Property, Weiss instead inquired on behalf of Khalil regarding the development status of the Buttner Property.

Upon his recommendation to Khalil, Weiss set up a meeting regarding the Buttner Property for November 15, 2015, by sending an email to Mirza, Khalil, David, and Kakar. The record is unclear if the meeting occurred. Around November 15, Weiss met with David, who discussed in detail the relationship and history between his and Mirza's families. David also discussed his knowledge about Mirza and his family's assets, which included the Mission Property. Also at this time, Khalil, David, and Kakar hired Weiss to take legal action against

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[14] Mirza also signed a declaration under penalty of perjury as part of a motion to disqualify Weiss from representing the plaintiffs in the *Kakar* lawsuit in which he made the same statements that he made at trial.

[15] Khalil Tahiry (father) and David Tahiry (son) are referred to by their first names to avoid confusion; no disrespect is intended.

Mirza. Weiss did not ask Mirza for written consent or other authorization to represent Khalil, David, or Kakar.

On August 30, 2016, Mirza filed a motion to disqualify Weiss as counsel for the plaintiffs in the *Kakar* lawsuit. On October 6, 2016, the superior court granted the motion.

B. CULPABILITY FINDINGS

1. Count Six—Section 6106 (Moral Turpitude)

The NDC charged Weiss with moral turpitude by alleging that he made false and misleading statements to his former client Mirza in their November 1, 2015 phone conversation when he failed to disclose that he was representing David and Kakar. At trial, OCTC requested that this count be dismissed with prejudice, which was granted. We affirm this dismissal as supported by the record.

2. Count Seven—Rule 3-310(E) (Avoiding Representation of Adverse Interest to Former Client, Written Consent)[16]

The NDC charged Weiss with his failure to obtain Mirza's informed written consent to Weiss's representation of David and Kakar in the planning of the *Kakar* lawsuit, where Weiss obtained from Mirza confidential information material to his employment by David and Kakar. The hearing judge found Weiss culpable as charged.

Weiss generally contends that OCTC did not sustain its burden in proving this count and, more specifically, that the hearing judge improperly relied on *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735 to find culpability under the rule. OCTC agrees with the judge's determination and supports her finding of culpability.

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[16] Rule 3-310(E) provides that, "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

We agree with the hearing judge that Weiss violated rule 3-310(E). First, the record and case law support the judge's finding that Weiss had an attorney-client relationship with Mirza from 2005 until the filing of the *Kakar* lawsuit. While Mirza had only specific recollections regarding two UD actions in 2010 and 2014, he also testified that Weiss advised him on several other business matters. Even Weiss agreed that he provided advice on two or three matters and represented Mirza in the 2014 UD action. Furthermore, Mirza had a reasonable belief during this time that Weiss was his attorney and the record shows that at no point did Weiss give Mirza notice that he would no longer be his attorney. (See *Bernstein v. State Bar* (1990) 50 Cal.3d 221, 230 [in establishing attorney-client relationship, "[n]o formal contract or arrangement or attorney fee is necessary . . . It is the fact of the relationship that is important. [Citations]]"; *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 82 [in determining if an attorney-client relationship has ended, "[t]he central question is whether the client would reasonably understand that the representation has terminated"].) Given this record, we conclude that Weiss and Mirza had an attorney-client relationship at the time that he began his attorney-client relationship with David and Kakar.

Weiss also argues that the record fails to establish the rule's requirement that he "obtained confidential information material to the employment." As noted by the hearing judge, actual possession of confidential information need not be demonstrated. It is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (*In the Matter of Lane*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 747; *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1452.) Given that Weiss had a long-term attorney-client relationship with Mirza that involved knowledge of Mirza's business and financial affairs, and the *Kakar* lawsuit also involved Mirza's business affairs, we agree with the judge that the conclusive presumption

discussed in *Lane* applies to his relationship with Mirza. Finally, because Weiss did not obtain informed written consent from Mirza that he could represent David and Kakar, we affirm the judge's finding that Weiss violated rule 3-310(E).

3. Count Eight—§ 6068, Subdivision (e)(1) (Attorney's Duty to Maintain Confidence and Secrets of Client)[17]

The NDC charged Weiss with failure to maintain Mirza's confidential information by using, in the *Kakar* lawsuit, information provided by Mirza in a phone conversation on or around November 1, 2015. Specifically, the NDC alleges that this information pertained to the ownership structure and financing of the LLC that owned the Mission Property, the subject of the phone conversation. The Mission Property's LLC was named as a defendant in the lawsuit, along with the allegation that the Mission Property as an LLC should be disregarded and it should be treated as the personal property of the other named defendants.

The hearing judge found Weiss culpable as charged. Weiss argues that the record does not contain clear and convincing evidence that he violated the statute. OCTC argues the record supports culpability because of the findings made by the superior court judge in the *Kakar* lawsuit pursuant to the defendant's successful motion to disqualify Weiss as the plaintiffs' counsel.

On the first day of trial, OCTC requested that the order disqualifying Weiss be admitted into the record. Weiss's counsel objected "that the contents are hearsay." The hearing judge overruled the objection, but then stated, "It's not for the truth of the matter asserted in the document, it's that this document was filed."

As OCTC argues in its brief, findings, conclusions, and judgments in underlying relevant civil actions can be admitted as evidence in State Bar Court proceedings and can be subject to judicial notice as well, where the factual issues in the underlying proceedings and the disciplinary

[17] Section 6068, subdivision (e)(1), provides that, "It is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

proceedings are similar or essentially identical. (*In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 325; *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634.) The problem with OCTC's position on this point is that the superior court's order clearly was not admitted for the truth of the matter asserted, i.e., the findings that the superior court judge made to disqualify Weiss; only that an order disqualifying Weiss was filed. Further, the record fails to show that the order was otherwise judicially noticed. Therefore, we decline to take into consideration the findings contained in that order because of the hearing judge's conditions imposed on its admission.

In reviewing the record to determine if clear and convincing evidence[18] exists that Weiss disclosed confidential information obtained from Mirza during their phone call, we find that this level of proof has not been met. Mirza testified that he discussed, in a four-minute conversation, that his family was selling the Mission Property, its feasibility for a senior housing project, and information relating to the property, including that his family members owned the LLC that owned it. Given that the phone call lasted four minutes, we do not find Mirza's testimony credible that he conveyed information about the ownership of the LLC, a point disputed by Weiss and Mehdavi, while also discussing other details related to the Mission Property that are undisputed.

Additionally, Weiss provided evidence that was admitted into the record in this disciplinary matter, but not considered in the plaintiffs' motion for disqualification: the testimony of Mehdavi and David. (See *In the Matter of Applicant A*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 324–325 [attorney has right to offer evidence in disciplinary hearing to controvert, temper, or explain civil findings made against attorney in civil proceeding].) Mehdavi testified that he heard Mirza's statements in the phone conversation with Weiss, and confirmed that no information was

[18] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

discussed except that the property was for sale and that the two men talked about it being used for senior housing. David also testified that he provided information to Weiss regarding the Mission Property and Mirza's family's finances and history that was used in the *Kakar* lawsuit. He possessed this information because of Mirza's family and his family's close ties for years before the lawsuit began. Since the hearing judge did not make any credibility determinations about these two witnesses, we conclude that OCTC did not meet its burden to prove this allegation by clear and convincing evidence. Accordingly, we dismiss this count with prejudice. (See *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 839 [dismissal of count for want of proof after trial on merits is with prejudice].)

4. Count Nine—§ 6106 (Moral Turpitude)

OCTC alleged that Weiss willfully violated section 6106 by making a misrepresentation in a court filing for the *Kakar* lawsuit. The hearing judge concluded that OCTC did not establish clear and convincing evidence of a misrepresentation, and that, at worst, the misstatement was a negligent act that did not rise to the level of moral turpitude. OCTC did not appeal this finding, and we affirm it as supported by the record.

IV. AGGRAVATION AND MITIGATION

Standard 1.5[19] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Weiss to meet the same burden to prove mitigation.

A. AGGRAVATION

1. Prior Record of Discipline (Std. 1.5(a))

On August 12, 2015, Weiss stipulated to a public reproval for failure to comply with a court order for monetary sanctions in 2013, in willful violation of section 6103 in State Bar

[19] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

Court No. 14-O-03152. One aggravating circumstance, indifference, and no mitigating circumstances were established.

Weiss's misconduct in the Mirza matter began only three months after signing the stipulation in his prior discipline when he filed the *Kakar* lawsuit in November 2015. Thus, Weiss should have had a heightened awareness of his professional and ethical duties. Also, his misconduct in this proceeding occurred during the one-year reproval period, which magnifies this aggravating circumstance. (*In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 438.) We agree with the hearing judge that substantial aggravating weight should be assigned to Weiss's prior discipline record.

2. Multiple Acts (Std. 1.5(b))

In the Oakland Property matter, Weiss failed to hold entrusted funds, which resulted in culpability for misappropriating those funds, breaching his fiduciary duty to third parties, failing to maintain those funds in his CTA, and failing to perform competently. Second, he also made a misrepresentation to the State Bar. Finally, in the Mirza matter, Weiss failed to avoid representation of interests adverse to a former client. Weiss's three acts of misconduct constitute an aggravating factor, to which we assign moderate aggravating weight. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three wrong acts considered multiple acts].)

3. Significant Harm (Std. 1.5(j))

The hearing judge assigned significant harm as aggravation for Weiss's intentional misappropriation. We do not agree because the harm to the plaintiffs in the Oakland Property matter was inherent in the misappropriation and thus is not a separate basis for aggravation. (*In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678, 684 [harm inherent in misconduct is not separate basis for aggravation].)

4. Indifference (Std. 1.5(k))

The hearing judge found that Weiss exhibited indifference because he expressed no remorse for or recognition of the serious consequences of his misbehavior. We disagree and find that this aggravating circumstance has not been established.

The hearing judge found that Weiss blamed his client for giving him $30,000 instead of the full sale proceeds for the Oakland Property, but we find nowhere in the record that Weiss so testified. Our review of the record reveals that he argued he had no duty regarding the sale proceeds until his client delivered them, based on the wording of the Oakland Property Trust Fund Agreement and case law. These facts do not prove indifference. Additionally, as discussed above, we do not find clear and convincing evidence that Weiss actually disclosed confidential information from his client Mirza.

B. MITIGATION

1. Good Character (Std. 1.6(f))

Weiss presented character testimony from five witnesses consisting of an attorney, current and former clients, and friends. We give serious consideration to the attorney's testimony because attorneys have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) However, two character witnesses were not aware of the full extent of Weiss's misconduct and thus their testimony is not entitled to full weight. (See *In re Aquino* (1989) 49 Cal.3d 1122, 1130–1131 [testimony of seven witnesses plus 20 letters affirming attorney's good character not entitled to significant weight in mitigation because most were unaware of details of attorney's misconduct].) While his character witnesses demonstrated only a minimal understanding of the alleged misconduct, they did attest to his honesty, good character, and integrity. We agree with the hearing judge that Weiss is entitled to moderate weight for this mitigating circumstance.

2. Pro Bono and Community Service

Pro bono work and community service are mitigating circumstances. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) One witness testified that Weiss did extensive volunteer work for her organization, the Afghan Coalition, including representing one family in a legal matter. A second witness testified that Weiss represented him in a business matter for four years at no charge. We find that he is entitled to moderate weight for this mitigating circumstance.

V. DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to maintain the highest professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1.) Our disciplinary analysis begins with the standards, which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow them whenever possible (see *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and to look to comparable case law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

We begin with standard 1.7(a), which instructs that when an attorney commits two or more acts of misconduct, the most severe sanction for all of the acts of misconduct must be imposed. Weiss's intentional misappropriation qualifies for application of standard 2.1(a), which states that disbarment is the presumed sanction and we find is the most severe. [20]

In considering the remaining aspects of standard 2.1(a), an attorney may avoid disbarment if the amount misappropriated is "insignificantly small" or "sufficiently compelling mitigating circumstances clearly predominate." Where either condition applies, actual suspension is

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[20] Various other standards also apply (i.e., stds. 2.2(b) [failure to maintain client funds in CTA], 2.5(a) [representation of adverse interests], 2.7(c) [failure to perform competently], and 2.11 [moral turpitude], with the presumed discipline ranging from reproval to disbarment. Standard 2.1(a) is the most severe of all five standards as it provides for only disbarment as the presumed sanction for intentional acts of misappropriation.

appropriate. Here, Weiss intentionally misappropriated $30,000, a significant amount of money. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [$1,355.75 held to be significant amount].) Furthermore, his two mitigating circumstances of good character and pro bono work are clearly not compelling, nor do they predominate over the serious misconduct and two aggravating circumstances of prior discipline and multiple acts.

Misappropriation of trust funds "breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.]" (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) It is grave misconduct for which disbarment is the usual discipline. (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 38.) "Even a single 'first-time' act of misappropriation has warranted such stern treatment." (*Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 657.)

Nonetheless, we finally consider whether any reason exists to depart from the discipline in standard 2.1(a), and we acknowledge that disbarment is not mandatory in every case where someone is being disciplined for intentional misappropriation.[21] However, if we deviate from recommending disbarment, we must articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) From our review of the record, we find no reason to deviate from the presumed sanction. Weiss chose to withdraw $30,000 of entrusted funds from his CTA at the expense of his ethical, professional, and fiduciary duties to Wintle and Bedi's clients, and committed other misconduct that would also

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[21] E.g., *Edwards v. State Bar*, *supra*, 52 Cal.3d 28 [12 years' discipline-free practice, no acts of deceit, full repayment made before aware of complaint to State Bar; one-year actual suspension]; *Howard v. State Bar* (1990) 51 Cal.3d 215 ["relatively small sum" of $1,300 misappropriated and rehabilitation from alcoholism and drug dependency; six-month actual suspension]; *Friedman v. State Bar* (1990) 50 Cal.3d 235 [over 20 years' discipline-free practice, stress arising from marital problems; three-year actual suspension]; *Chefsky v. State Bar* (1984) 36 Cal.3d 116 [nearly 20 years' discipline-free practice, illness, loss of full-time secretary, relocation of practice; 30-day actual suspension].

qualify for disbarment. We recommend that Weiss be disbarred to protect the public, the courts, and the legal profession.

VI. RECOMMENDATION

We recommend that Mogeeb Weiss be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Weiss must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against an attorney who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

VII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Mogeeb Weiss be involuntarily enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective August 2, 2018, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Court Specialist 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 June 7, 2019, I deposited a true copy of the following document(s):

OPINION AND ORDER FILED JUNE 7, 2019

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:

MOGEEB WEISS
WEISS LAW PC
1151 HARBOR BAY PKWAY STE 134
ALAMEDA, CA 94502

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

Manuel Jimenez, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on June 7, 2019.

Julieta E. Gonzales
Court Specialist
State Bar Court