

Filed April 24, 2017

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 14-O-05418
)	
ALBERT MIKLOS KUN,)	OPINION
)	
A Member of the State Bar, No. 55820.)	
_____)	

A hearing judge found Albert Miklos Kun culpable of three counts of misconduct: failure to maintain client funds in his trust account, misappropriation by gross negligence of a \$460 filing fee, and commingling. Kun has two prior discipline cases from 2002 (*Kun I*) and 2004 (*Kun II*). After weighing factors in aggravation and mitigation, the judge considered standard 1.8(b),¹ which provides for disbarment, under certain circumstances, when an attorney has two or more prior disciplines. However, the hearing judge declined to recommend disbarment, deeming it excessive because, among other things, more than 10 years had passed since Kun’s last discipline case, his misconduct occurred during three distinct periods and each was not prolonged, and he received only a public reproof in *Kun I* and a 30-day suspension in *Kun II*. Therefore, the judge recommended discipline that included a one-year actual suspension to continue until Kun pays restitution to his client.

Both Kun and the Office of Chief Trial Counsel of the State Bar (OCTC) appeal. Kun seeks a dismissal of all charges, contending that OCTC did not prove his culpability and the amount misappropriated was insignificantly small. He also argues for more mitigation. OCTC

¹ 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.

asks that we affirm the hearing judge's culpability findings, and seeks additional aggravation. Although OCTC sought a minimum of two years' actual suspension in both pretrial and posttrial briefs, it requests on review, as it did in closing argument at trial, that Kun be disbarred pursuant to standard 1.8(b).

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm all but one of the hearing judge's findings of fact and her culpability determinations. We uphold the judge's aggravation and mitigation findings, with some modifications, and find additional aggravation.² In determining the appropriate discipline, we agree with the hearing judge that disbarment under standard 1.8(b) is not warranted or necessary in this case. Instead, we look to standard 2.1(b), which applies directly to Kun's grossly negligent misappropriation of his client's filing fee. Given the small sum misappropriated, Kun's prior misconduct, and the comparable case law, we conclude that the proper discipline is a two-year actual suspension, continuing until Kun pays restitution and proves his rehabilitation and fitness to practice law, along with his successful completion of Ethics School and Client Trust Accounting School within his first year of probation, and other conditions.

I. PROCEDURAL BACKGROUND

On October 2, 2015, OCTC filed a four-count Notice of Disciplinary Charges (NDC) against Kun. Specifically, OCTC alleged that Kun (1) failed to maintain \$460 on behalf of his client in his trust account, in violation of rule 4-100(A) of the Rules of Professional Conduct;³ (2) misappropriated client funds of \$450.99, an act involving moral turpitude, dishonesty, or

² Having independently reviewed all arguments set forth by Kun, those not specifically addressed have been considered and are rejected as having no merit.

³ All further references to rules are to this source, unless otherwise noted. Under rule 4-100(A), "[a]ll funds received or held for the benefit of clients by a member . . . shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import"

corruption, in violation of section 6106 of the Business and Professions Code;⁴ (3) deposited or commingled personal funds in his client trust account (CTA), in violation of rule 4-100(A);⁵ and (4) paid personal expenses with funds from his CTA, in violation of rule 4-100(A).

On January 22, 2016, the first day of trial, the parties filed a Stipulation as to Facts and Admission of Documents. On February 16, 2016, the parties filed a Supplemental Stipulation as to Facts. Trial was held on January 22, 2016, and February 16, 2016. The hearing judge issued her decision on June 2, 2016.

II. CHALLENGE TO DENIAL OF MOTION TO SUPPRESS EVIDENCE

Prior to his disciplinary trial, Kun filed a motion to suppress evidence, which sought to quash OCTC's subpoena to Bank of the West for production of Kun's CTA records.⁶ Kun claimed that the subpoena lacked probable cause and was facially defective. The hearing judge denied that motion on November 23, 2015, and a subsequent motion for reconsideration on January 8, 2016. Now, on review, Kun asks that we review the hearing judge's orders. As analyzed below, we find that Kun's challenge to the judge's orders is untimely, procedurally improper, and otherwise unmeritorious.

Grants or denials of pretrial motions may be reviewed by the Review Department pursuant to the procedures for interlocutory review if the aggrieved party seeks review within 15 days of the judge's order(s). (Rules Proc. of State Bar, rule 5.150.) Kun, however, did not file a

⁴ All further references to sections are to this source. Under section 6106, "[t]he 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."

⁵ Under rule 4-100(A), "[n]o funds belonging to the member or the law firm shall be deposited [in the client trust account] or otherwise commingled therewith. . . ."

⁶ For many years, Kun has maintained two CTAs: one at Wells Fargo Bank (Wells Fargo CTA) and another at Bank of the West (Bank of the West CTA). Only Kun's CTA records from Bank of the West are relevant to the issues in this case.

request for interlocutory review. Instead, after trial, he now seeks review of the hearing judge's orders pursuant to rule 5.151, which provides for review of Hearing Department decisions and orders "that fully dispose of an entire proceeding." (Rules Proc. of State Bar, rule 5.151(A).) Further, Kun did not supplement his briefs with the materials required for review of his motion to suppress. (Rules Proc. of State Bar, rule 5.150(C) [interlocutory petition must be supported by appendix containing copy of written order or audiotape of hearing and copies of all related pleadings].) Thus, we are unable to evaluate his claim on review in a meaningful manner.

Even if we were to consider Kun's challenge on the merits, his arguments that the subpoena lacked probable cause and is facially defective would fail. As noted on the face of the subpoena, Kun has irrevocably authorized disclosure of his trust fund records to the State Bar by operation of law. "Every member of the State Bar shall be deemed by operation of . . . law to have irrevocably authorized the disclosure to the State Bar and the Supreme Court . . . of any and all financial records held by financial institutions . . ." (§ 6069, subd. (a).) Further, the Supreme Court has held that section 6069, subdivision (a), complies with constitutional requirements and that State Bar proceedings are not criminal in nature. Therefore, while Kun is entitled to a fair hearing (*Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1094-1095), "particular procedural safeguards applicable in criminal and civil litigation are not required in disciplinary proceedings to insure a right to due process." (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472; see also *Doyle v. State Bar* (1982) 32 Cal.3d 12.)

III. FACTUAL BACKGROUND⁷

A. Kun's Work for Dana LeGrande

After initially consulting with Kun during April of 2014 regarding a separate legal matter, Dana LeGrande subsequently hired him on June 9, 2014, to represent her in obtaining a restraining order against her brother to stop him from making false allegations against her and otherwise harassing her. Kun agreed to represent her for \$2,000 in attorney fees and \$460 for the filing fee. LeGrande sent Kun a check for \$2,460. The memo line of the check contained the notation "retainer and filing fee." Kun did not discuss with her whether he was charging her a flat fee or an hourly fee. He also did not enter into a written fee agreement, as required under section 6148,⁸ telling LeGrande it was not necessary when she asked him if one was required.

Kun failed to communicate with LeGrande for a month after she retained him. In late June, she called and left him a message that she no longer wanted him to represent her since she had not heard from him, and asked him to refund her money. During a call with LeGrande on July 7, 2014, Kun persuaded her not to terminate him because he had already prepared a document for her review. LeGrande received the draft with a letter from Kun dated July 10, 2014. She was not satisfied with the document he sent, which was a petition regarding her

⁷ We base the factual background on the Stipulation as to Facts and Admission of Documents, the Supplemental Stipulation as to Facts, 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).) We give great weight to the judge's credibility findings. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions "because [the judge] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].)

⁸ Under section 6148, "[i]n any case [other than contingency fee contracts] in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars. . . , the contract for services in the case shall be in writing."

mother's trust, not the restraining order against her brother that she expected. LeGrande left Kun a voicemail terminating his services the same day she received his letter.⁹

Thereafter, LeGrande left multiple messages for Kun between July 10 and July 29. After receiving no reply, she confirmed his termination in a letter dated July 29, 2014, which stated that she was unhappy with the quality and content of the petition Kun prepared and requested a refund of any remaining attorney fees and the filing fee. In response, Kun wrote to LeGrande on July 31, 2014, apologizing for the delay in returning her calls and informing her that he would "prepare a bill, and send the unused money back" the next week.

Kun sent LeGrande an invoice dated August 7, 2014, which identified "total fees" billed as \$2,475 at \$250 an hour for 9.9 hours of work. Despite his representation to her during their July 7 call that he had already prepared the petition, most of the work reflected on the invoice was done on July 9 and 10 (2.9 hours for research, 3.8 hours for drafting the petition, and 0.4 of an hour for writing a letter). The invoice did not account for the \$460 filing fee, and Kun did not return either the filing fee or any unexpended attorney fees to LeGrande. He testified that the draft petition he provided to LeGrande would have required a filing fee if he had filed it, but the restraining order he discussed with her would not require a filing fee. Since Kun determined that the filing fee was not needed, he testified that he used it to pay his attorney fees over the \$2,000 he initially quoted LeGrande. He did not explain to her that he had converted the filing fee to attorney fees.

⁹ The hearing judge found that LeGrande terminated Kun during the phone call on July 7, 2014. Both parties contend that this factual finding is in error. The record shows that LeGrande did not terminate Kun during that call, but did so after she received the unsatisfactory draft petition regarding her mother's trust on July 10, 2014.

B. Kun's CTA Activity

Between June 16, 2014 and April 30, 2015, Kun wrote at least 34 checks from his Bank of the West CTA to pay personal and business expenses.¹⁰ During the same period, he deposited fees he had earned from other clients, and made 78 cash withdrawals.

On June 12, 2014, Kun deposited LeGrande's \$2,460 check into his Bank of the West CTA. By June 30, 2014, the balance in that CTA had dipped below the \$460 he was required to maintain for the filing fee for LeGrande's matter. By the end of the day on July 7, 2014, the Bank of the West CTA balance had dropped to \$9.01. According to his own invoice, at this point, Kun had not earned more than \$700 in attorney fees in LeGrande's matter.

IV. CULPABILITY

**A. Count One - Failure to Maintain Client Funds (Rule 4-100(A))
Count Two - Misappropriation/Moral Turpitude (§ 6106)**

In Count One, Kun was charged with failing to maintain \$460 on LeGrande's behalf in his Bank of the West CTA. However, the hearing judge found Kun culpable of failing to maintain client funds because he did not maintain at least \$1,775 in the account after July 7, 2014. Kun and OCTC both argue that this finding is erroneous because it is based on the factual finding that LeGrande terminated Kun on July 7. We agree with both parties that the \$1,775 amount is incorrect because LeGrande did not terminate Kun on that date.

Nevertheless, we find that Kun violated rule 4-100(A), as charged, because he failed to maintain the \$460 filing fee in the Bank of the West CTA. Specifically, on July 7, 2014, Kun's account balance fell to \$9.01, which was \$450.99 less than the required \$460 in unexpended advance costs. Like the hearing judge, we assign no additional weight to the charge in Count

¹⁰ These personal and business expenses included car insurance, a car loan, office expenses, and personal healthcare expenses.

One because the same facts support the section 6106 violation discussed below. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

As for Count Two, we affirm the hearing judge's finding that Kun misappropriated \$450.99 of LeGrande's funds by gross negligence, in willful violation of section 6106, as supported by clear and convincing evidence.¹¹ Kun was required to maintain \$460 on LeGrande's behalf, but the CTA balance at one point dropped to \$9.01. The mere fact that his CTA balance fell below \$460 raises an inference of misappropriation. (*Giovanazzi v. State Bar*, *supra*, 28 Cal.3d at p. 474 [inference of misappropriation if attorney's CTA balance drops below amount attorney should maintain for client].) Further, Kun failed to rebut this inference. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618 [once inference of misappropriation arises, burden shifts to attorney to prove no misappropriation occurred].)

Additionally, Kun stipulated to all of the withdrawals from his Bank of the West CTA that caused his account to fall below the amount he was required to maintain on LeGrande's behalf. He argues that it was improper for the hearing judge to find culpability for a series of \$40 cash withdrawals because Kun was never told that such withdrawals were improper. That argument fails. The State Bar's Handbook on Client Trust Accounting for California Attorneys (Handbook) makes clear that Kun may not take unauthorized money from his CTA to spend on personal expenses.¹² Further, Kun presents no authority, and we can find none, to distinguish between a cash withdrawal and a check withdrawal for purposes of determining whether a

¹¹ 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.)

¹² As explained by the Handbook: "You *can't* make payments out of your client trust bank account to cover your own expenses, personal or business, or for any other purpose that isn't directly related to carrying out your duties to an individual client." (Handbook (2013) § VI, p. 19, italics in original.)

misappropriation occurred. Regardless of the means, the relevant issue is whether money that was required to be maintained in the trust account was improperly withdrawn.

Kun further argues that \$460 is an insignificantly small amount of misappropriation, as referenced in standard 2.1(a),¹³ and that Civil Code section 2319 gave him authority to convert advance costs into fees. Both arguments are unpersuasive. First, standard 2.1(a) is inapplicable here as it recommends a sanction for *intentional* misappropriation; Kun committed a *grossly negligent* misappropriation to which standard 2.1(b) applies and directs that an actual suspension is the presumed sanction. Second, Civil Code section 2319 generally provides that an agent has authority to do everything necessary or proper to effectuate the purpose of his or her agency. This general authority does not authorize Kun to convert advance costs into attorney fees without his client's agreement. (*Schwarting v. Artel* (1940) 40 Cal.App.2d 433, 436, 441 [agent is bound to exercise utmost good faith and honesty in any transaction; when acts are questioned, agent has burden to demonstrate that he acted with utmost good faith and fully disclosed all details to principal].)

**B. Count Three – Commingling: Deposit of Personal Funds in CTA (Rule 4-100(A))
Count Four – Commingling: Payment of Personal Expenses from CTA
(Rule 4-100(A))**

On Count Three, the hearing judge found that Kun violated rule 4-100(A) by depositing personal funds into his Bank of the West CTA. We affirm the judge's finding because the record is undisputed that Kun deposited personal funds into the CTA.

The hearing judge dismissed Count Four with prejudice as duplicative of Count Three. We disagree. Both counts alleged different violations of rule 4-100(A), with Count Three charging the deposit of personal funds into Kun's CTA and Count Four charging payment of

¹³ Standard 2.1(a) provides, inter alia, that disbarment is the presumed sanction for an intentional or dishonest misappropriation unless the amount misappropriated is "insignificantly small" or sufficient compelling mitigating circumstances clearly predominate.

personal expenses from that same account. As to the facts established regarding Count Four, Kun stipulated that he made multiple withdrawals from the CTA, and testified that many were for personal or business purposes, including medical bills, car insurance, and office expenses. Case law is well settled that using a CTA for payment of personal expenses constitutes commingling, even when client funds are not in the trust account. (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 876.) Because the misconduct charged in Count Four is different from that charged in Count Three, and Kun committed both, we find him culpable of both Counts Three and Four.

V. AGGRAVATION OUTWEIGHS MITIGATION¹⁴

The hearing judge found significant aggravation for Kun's two prior disciplines, his indifference towards rectification or atonement, and uncharged misconduct for failure to refund unearned fees. The judge also found minimal mitigation for candor and cooperation, emotional difficulties or physical disabilities, and good character. OCTC supports the findings in aggravation and seeks additional aggravation for multiple acts, dishonesty and bad faith, refusal or inability to account for entrusted funds, and failure to make restitution. Kun does not address the judge's findings in aggravation, but argues for additional mitigation for good faith and lack of harm to his client. He also argues that the hearing judge erred by not giving sufficient mitigation for his physical disabilities and good character testimony.

A. Aggravation

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

We agree with the hearing judge that significant aggravating weight should be assigned to Kun's prior discipline records. Although much of the misconduct in *Kun I* and *Kun II* overlap in time, he is culpable of failing to refund fees in this case, and he stipulated to the same

¹⁴ Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Kun to meet the same burden to prove mitigation.

misconduct in 2004 in *Kun II*. Such similarities between prior and current misconduct render previous discipline more serious as they indicate the prior discipline did not rehabilitate the attorney. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444.)

***Kun I* (Case Nos. 01-O-04505 and 01-O-04626)**

On September 9, 2002, Kun stipulated to a public reproof in connection with an NDC filed August 29, 2002, charging 10 counts of misconduct in two client matters. In case number 01-O-04505, Kun stipulated to culpability under section 6068, subdivision (m), for not responding to his client's requests for information, and under rule 3-700(D)(1) for failing to return his client's file and medical photographs after the client terminated his services. The misconduct underlying this case occurred between July 1998 and October 2001.

In case number 01-O-04626, Kun stipulated to culpability for three counts. The first was for a violation of section 6068, subdivision (e), by willfully failing to maintain his client's secrets when he disclosed personal information about his client to a member of the client's family. The second was for a violation of section 6090.5, subdivision (a)(2), by conditioning settlement of a fee arbitration on the client's dismissal of his State Bar complaint. The third was for a violation of rule 3-700(A)(2) by failing to avoid prejudice to his client when he promised to file an appeal, and then abandoning his client and attempting to mislead him. The misconduct underlying this case occurred between April 1997 and February 2002.

***Kun II* (Case No. 02-O-14481)**

On June 10, 2004, the Supreme Court entered an order (S123260) suspending Kun for one year, stayed, and placing him on probation for one year, subject to conditions, including a 30-day actual suspension. This disciplinary matter was based on an NDC filed September 5, 2003, which alleged six counts of misconduct in a single client matter; Kun stipulated to culpability on four counts. First, Kun stipulated to a violation of rule 3-110(A) for failing to

perform legal services with competence by not filing pleadings in his client's case. Second, he stipulated to a violation of section 6068, subdivision (m), for failing to keep his client informed of significant developments. Third, he stipulated to a violation of section 6106 for acts involving moral turpitude, dishonesty, or corruption for misleading his client into believing that her appeal was pending when it had been dismissed. Finally, Kun stipulated to a violation of rule 3-700(D)(2) for failing to provide any services of value and failing to refund unearned fees after he was terminated by the client. Most of the misconduct underlying this case (failing to file pleadings and to keep his client informed and misleading his client about the status of the case) occurred between April 2001 and July 2002. Kun's client requested, and Kun paid, a refund of unearned fees in January 2003.

2. Indifference (Std. 1.5(k))

The hearing judge found significant aggravation based on Kun's indifference toward rectification or atonement for his misconduct, as well as a lack of insight. However, we find that Kun's indifference warrants only moderate aggravation, as analyzed below.

The hearing judge found that Kun showed indifference because he argued that he provided services worth the full value of the amount paid by LeGrande and also that the amount of misappropriated funds was nominal. On review, we understand Kun's argument as his attempt to establish that the \$460 he misappropriated was "insignificantly small," according to the language from standard 2.1(a). But, as previously noted, this standard addresses intentional misappropriation, which is not at issue here. Since Kun has the right to vigorously defend himself (*In re Morse* (1995) 11 Cal.4th 184, 209), we do not consider this argument to demonstrate his indifference or unwillingness to conform to his ethical responsibilities.

Nonetheless, the record reveals other evidence that establishes moderate indifference by Kun. First, he attempted to shift blame to his client. (*In the Matter of Wolff* (Review Dept.

2006) 5 Cal. State Bar Ct. Rptr. 1, 14 [attorney who fails to accept responsibility for actions and instead seeks to shift responsibility to others demonstrates indifference and lack of remorse].)

He minimized his wrongdoing and the resulting harm to LeGrande, testifying that she only filed a complaint with the State Bar because she knew that he had previously been disciplined and she thought she could use the Bar “as a collection agency.” While the law does not require false penitence, it does require that Kun accept responsibility for his misconduct and come to grips with his culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) He has not done this.

3. No Aggravation for Uncharged Misconduct (Std. 1.5(h))

The hearing judge assigned aggravation for uncharged misconduct, finding that Kun failed to refund unearned fees of \$1,775. However, as previously stated, this finding is based on the judge’s erroneous factual finding that LeGrande terminated Kun on July 7, 2014. Kun and OCTC both argue that this aggravation should not be considered because Kun was actually terminated on July 10. We agree, and thus decline to assign aggravation for uncharged misconduct.

4. OCTC’s Requests for Additional Aggravation

OCTC asks us to assign additional aggravation for multiple acts. (Std. 1.5(b).) Kun misappropriated his client’s money in dozens of separate withdrawals in less than a month. We find this conduct constitutes multiple acts of wrongdoing, warranting significant aggravation. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279 [65 improper CTA withdrawals are multiple acts of misconduct constituting significant aggravation].)

OCTC also requests that we assign additional aggravation for failure to make restitution. (Std. 1.5(m).) Kun has not refunded the \$460 filing fee to LeGrande, despite her multiple requests and the clear understanding of the parties at the time he was retained that this amount

was given to Kun as advance costs. During the investigation, Kun told a State Bar investigator that the \$460 remained in his trust account and he could send it the following day, conditioned on having the “issue . . . cleared once and for all.” He has not yet refunded the \$460. By the time of trial, he testified that he had converted the \$460 to attorney fees, and he did not believe LeGrande was entitled to a refund. Even so, he also testified that “if the Court tells me that I’m legally obligated, then I’ll pay it back. Okay?” We therefore assign moderate aggravating weight for Kun’s failure to refund the unspent filing fee. (See *Chang v. State Bar* (1989) 49 Cal.3d 114, 124 [failure to reimburse client for misappropriated funds considered as aggravating factor].)

We decline OCTC’s request for aggravation for intentional misconduct, dishonesty, and bad faith (std. 1.5(d)) and refusal or inability to account for entrusted funds. (Std. 1.5(m).) Our culpability and other aggravation findings encompass the misconduct upon which OCTC bases its claims for additional aggravation. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [where factual findings used to find culpability, it is improper to again consider in aggravation].)

B. Mitigation

1. Spontaneous Candor and Cooperation (Std. 1.6(e))

We affirm the hearing judge’s assignment of minimal mitigation for candor and cooperation. Kun cooperated by entering into two pretrial factual stipulations, one with admission of exhibits. However, the stipulated facts related to matters easily proved, warranting less mitigation. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567 [limited mitigating weight for belated stipulation concerning easily provable facts where respondent failed to show significant shortening of trial time].)

2. Extreme Physical/Mental Disabilities (Std. 1.6(d))

We also affirm the hearing judge's finding of no mitigation for Kun's physical disability and his wife's mental disability. Mitigation is available for physical or mental disabilities if: (1) an attorney suffered from them at the time of his misconduct; (2) they are established by expert testimony as being directly responsible for the misconduct; and (3) the difficulties no longer pose a risk of future misconduct. Kun testified that he has a hearing disability and his wife suffers from dementia, but he made no showing that these disabilities were directly responsible for his wrongdoing. In fact, he appears to confuse his need for accommodations under the Americans with Disabilities Act (ADA) (assistive technology during his trial to address his hearing disability) with the nexus that must be established between his disability and his misconduct to warrant mitigation. However, he has not cited to any authority requiring the State Bar to determine whether he had a disability under the ADA during the time that his misconduct occurred. Moreover, since he did not establish the nexus required by the standard nor show that these disabilities no longer pose a risk of future misconduct, Kun has failed to prove that he is entitled to mitigation.

3. Extraordinary Character Evidence (Std. 1.6(f))

We disagree with the hearing judge that Kun is entitled to even minimal mitigating weight for his character witness testimony. Mitigation credit is afforded for extraordinary good character attested to by a wide range of references in the legal and general communities who are aware of the full extent of the misconduct. One attorney witness testified, and, although the judge declined to admit a declaration from a second witness, it appears she considered it in her decision.¹⁵ The attorney who testified described Kun as an ethical and competent attorney. In general, we give serious consideration to attorneys' testimony due to their "strong interest in

¹⁵ Accordingly, we reject Kun's challenges of the hearing judge's refusal to admit the declaration.

maintaining the honest administration of justice.” (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) However, this witness knew nothing about the present charges pending against Kun and did not know how Kun managed his CTA. Moreover, the witness was aware of only one of Kun’s prior discipline cases and was unfamiliar with the nature of Kun’s misconduct in that matter. This witness felt that Kun was honest and worked hard, but also concluded that Kun’s two prior disciplines were of concern. We find that the overall character testimony is insufficient to warrant credit because two witnesses do not represent a broad spectrum of the community, nor was either witness aware of the full extent of Kun’s misconduct, as the standard requires. (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476 [character testimony from three attorneys not sufficiently wide range of references]; *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 508-509 [no good character mitigation for testimony of two attorneys who did not know scope of charges].)

4. Kun’s Request for Additional Mitigation

Finally, we reject Kun’s request for additional mitigation for a good faith belief that is honestly held and objectively reasonable (std. 1.6(b)) and lack of harm to the client. (Std. 1.6(c).) Kun may not claim a good faith belief that that \$460 was an “insignificantly small” amount to misappropriate because any misappropriation establishes culpability. (*Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122-123 [finding misappropriation with gross negligence for failure to maintain \$270]; see also *Heavey v. State Bar* (1976) 17 Cal.3d 553 [finding misappropriation and commingling for failure to maintain \$353.65].) LeGrande suffered harm because Kun has not refunded the filing fee, and she did not receive the legal services she retained Kun to provide.

VI. DISCIPLINE¹⁶

Kun maintains that his minimal misconduct in the present case warrants no discipline. OCTC has equivocated about the appropriate level of discipline, despite Kun's two prior discipline records. In its pretrial statement, OCTC requested, at a minimum and among other things, a two-year actual suspension.¹⁷ Yet, during closing argument, it urged disbarment under standard 1.8(b). Then, in its posttrial brief, it reverted to its initial pretrial request for a minimum two-year actual suspension. Finally, on review, OCTC again urges disbarment.

Our analysis begins with the standards, which, although not binding, are entitled to great weight (std. 1.1; *In re Silvertown* (2005) 36 Cal.4th 81, 91-92), and should be followed "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. Here, standards 2.2(a) and 2.1(b) apply, but standard 2.1(b) is the most severe, providing that actual suspension is the presumed sanction for misappropriation involving gross negligence.¹⁸ Next, standard 1.8(b) establishes disbarment as appropriate discipline since Kun has two prior records of discipline, one of which resulted in an actual suspension.¹⁹ Even so, disbarment is not mandatory in every standard 1.8(b) case. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [disbarment not imposed with two prior disciplines and no compelling mitigating circumstances (analysis under former std. 1.7(b))].) The Supreme Court did not apply

¹⁶ The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.)

¹⁷ OCTC reserved the right to modify this request at trial.

¹⁸ Standard 2.2(a) provides that a three-month actual suspension is the presumed sanction for commingling.

¹⁹ The two stated exceptions to disbarment under standard 1.8(b) do not apply here because (1) Kun did not prove compelling mitigation that clearly predominates, and (2) his present misconduct did not overlap in time with his prior misconduct.

former standard 1.7(b) in a rote fashion, nor do we apply standard 1.8(b) in such a manner. Rather, we examine the nature and chronology of prior discipline records, recognizing that “[m]erely declaring that an attorney has [two prior] impositions of discipline, without more analysis, may not adequately justify disbarment in every case.” (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

Here, we find clear reasons to recommend a discipline less than disbarment under standard 1.8(b). (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) The most serious misconduct in this case was a grossly negligent misappropriation of \$450.99, a relatively small amount²⁰ that was a part of a \$460 filing fee his client paid him, which he subsequently converted into part of his attorney fees. Further, in Kun’s two prior cases, he stipulated to misconduct, which, while serious, largely overlapped in time, dated back 14 years over his 44-year career, and resulted in light discipline – a public reproof in *Kun I* and a 30-day suspension in *Kun II*, the shortest period generally imposed.²¹ (See *McCray v. State Bar* (1985) 38 Cal.3d 257, 274 [less aggravating weight where prior misconduct overlapped and light discipline of 30-day actual suspension imposed].)

Notably, the hearing judge found similar reasons to recommend discipline short of disbarment, including that more than 10 years passed since Kun’s prior discipline cases, his misconduct occurred during three distinct periods that were not prolonged, the present misappropriation was not surrounded by misrepresentations to his client, and Kun has no history of failing to participate in State Bar Court proceedings or performing poorly on probation. Along with these factors, the judge considered Kun’s present misconduct and concluded that “the

²⁰ See *In the Matter of Bleecker*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 122, 127 (amount of misappropriated funds considered in determining discipline; \$270 non-intentional misappropriation deemed “relatively small amount”).

²¹ Standard 1.2(c)(1) (actual suspension generally for period of 30 days, 60 days, 90 days, six months, one year, 18 months, two years, three years, or until conditions met).

nature and extent of Respondent’s prior disciplines do not justify disbarment.” We agree.²² (*Howard v. State Bar* (1990) 51 Cal.3d 215, 222 [Supreme Court has expressly reserved for itself authority to “temper the letter of the law with considerations peculiar to the offense and the offender”].)

Returning to the application of standard 2.1(b) to Kun’s misconduct, this standard provides that an actual suspension is the presumed sanction for misappropriation involving gross negligence. We agree with the hearing judge that Kun’s misconduct “calls for a lengthy period of suspension,” but disagree that a one-year suspension will adequately protect the public, the courts, and the legal profession.²³ (Stds. Part B [presumed sanction is starting point for imposition of discipline; may be adjusted up or down depending on mitigating and aggravating circumstances].) Though Kun’s misappropriation was of a small amount, he ignored appropriate trust accounting principles, citing a lack of knowledge about them; has significant aggravation including two prior records of discipline; proved minimal mitigation; and has not paid restitution.

In view of these factors, we find that a two-year actual suspension with a three-year probation period is the most appropriate discipline, and note that this recommended discipline is significantly progressive from the 30-day suspension Kun received in *Kun II*. (See *Palomo v. State Bar* (1984) 36 Cal.3d 785 [one-year actual suspension for grossly negligent misappropriation of over \$3,000 with one prior record of discipline but where mitigating factors were present including payment of restitution]; *Hipolito v. State Bar* (1989) 48 Cal.3d 621 [one-year actual suspension for willful \$2,000 misappropriation with no prior record of discipline but

²² The hearing judge appears to make a contradictory finding, at page 11 of her decision, that Kun’s prior record of discipline and current disciplinary proceedings demonstrate an unwillingness to conform to his ethical responsibilities. We do not find an unwillingness to conform given that Kun’s last misconduct occurred over a decade before his current misconduct and the better part of his lengthy career has been discipline free.

²³ The cases cited by the hearing judge in support of a one-year actual suspension are distinguishable from the present case as the disciplined attorneys did not have any prior disciplinary record and presented greater mitigation than Kun did.

where several mitigating factors were present, including remorse, cooperation, candor, repayment of restitution, and engagement of management firm to avoid future difficulties].) We further recommend that Kun's suspension continue until he proves his rehabilitation and fitness to practice law pursuant to standard 1.2(c)(1) and pays restitution to his client. Finally, we recommend that Kun successfully complete both Ethics School and Client Trust Accounting School during his first year of probation.

VII. RECOMMENDATION

For the foregoing reasons, we recommend that Albert Miklos Kun be suspended from the practice of law for three years, that execution of that suspension be stayed, and that he be placed on probation for three years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first two years of the period of his probation, and remain suspended until the following conditions are satisfied:
 - a. He makes restitution to Dana LeGrande in the amount of \$460 plus 10 percent interest per annum from June 9, 2014 (or reimburses the Client Security Fund to the extent of any payment from the Fund to Dana LeGrande, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof to the State Bar Office of Probation in Los Angeles; and
 - b. He provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of

probation, he must promptly meet with the probation deputy as directed and upon request.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.
6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VIII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Albert Miklos Kun be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

IX. RULE 9.20

We further recommend that Albert Miklos Kun be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to 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 proceeding. Failure to do so may result in disbarment or suspension.

X. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.