PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

FILED AUGUST 9, 2012

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case Nos. 09-O-17404 (09-O-19075)
	)	
HOWARD ROY LEVINE,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 105973.	)	
	)	

This is Howard Roy Levine's second disciplinary matter involving mishandling entrusted funds. Levine misappropriated over $61,000 from two clients, did not tell a client he received her settlement, accepted fees from a non-client, collected an unconscionable fee, and committed an additional act of moral turpitude by signing the client's name without her consent. Levine failed to show compelling mitigation and the hearing judge recommended disbarment.

Levine seeks review and asserts that the hearing judge denied him due process, erred in all but two culpability findings, inappropriately rejected mitigating factors and improperly assessed aggravation. Levine claims that disbarment is too harsh and contends his misconduct warrants no more than a one-year suspension. The State Bar Office of the Chief Trial Counsel (State Bar) asks us to affirm the disbarment recommendation.

Based on our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge's culpability determinations. Although we modify the aggravation and mitigation findings, we find that the significant aggravation outweighs the mitigation. Levine's prior record of discipline is particularly disconcerting because he mishandled entrusted funds as

he did in the case before us. Therefore, we conclude disbarment is necessary to protect the public, the courts, and the legal profession.

I. THE HEARING JUDGE DID NOT DENY LEVINE DUE PROCESS

Levine argues the hearing judge was biased and denied him a fair trial based on statements she made explaining her view of the relevant issues. He specifically objects to the hearing judge's statement to a character witness about the result Levine obtained for a client: "It doesn't really matter. The issue is whether [Levine] failed to maintain the client's funds in a trust account . . . and whether he failed to pay client funds properly. That's what the issue is." We conclude that this statement and other similar statements Levine identified would not lead a reasonable person to question the hearing judge's impartiality. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 103-104 [standard for judicial disqualification due to bias is whether reasonable person would entertain doubts concerning judge's impartiality].)

II. FACTUAL FINDINGS AND LEGAL CONCLUSIONS

The parties stipulated to several facts that we adopt and set forth below, adding additional relevant facts from the record.

A. Case Number 09-O-19075 – The Ayon Matter

1. Factual Findings

In October 2007, Armando Ayon and his mother Virginia retained Levine to represent Armando in a felony criminal matter.[1] The case arose from an automobile fatality Armando caused while driving Virginia's vehicle, which was totaled in the accident. The parties executed a fee agreement that stated Levine would represent Armando up to and including the preliminary

[1] We use first names to avoid confusion, not out of disrespect.

hearing for a $25,000 fee with $3,000 down, $10,000 by October 24, and the remainder due after the first court appearance.

In May 2008, the parties executed a second fee agreement for Levine to complete Armando's criminal matter.[2] This second agreement merely provided that Levine would receive "$15,000 down and [the] balance in semi monthly payments." It did not specify a total fee nor set forth an hourly rate or other method to determine future fees. Armando signed both agreements as the defendant, while Virginia signed both as the "responsible party." However, the agreements do not define "responsible party," specify that Virginia would pay the fees or state that Armando consented to her paying. Ultimately, Virginia paid Levine a total of $42,000 ($25,000 under first fee agreement plus $15,000 under second fee agreement plus $2,000 for investigative costs). Levine admitted he never obtained Armando's written consent for Virginia to make these payments.

Shortly thereafter, Levine agreed to represent Virginia in a property damage claim against her insurance company. He also hoped to negotiate a payoff for her totaled vehicle. Virginia never signed a written agreement for these services and believed the May 2008 fee agreement "was for everything." She understood that the additional $15,000 payment not only covered any remaining services in Armando's criminal matter, but also included Levine's assistance with her insurance claim and her vehicle payoff.

In September 2008, Levine received a $39,443.18 settlement check for Virginia's totaled vehicle. He never notified her that he received the funds. On September 26, 2008, Levine signed Virginia's name to the settlement check without her authorization and deposited it in his

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[2] Both agreements are on the same form "Retainer Agreement-Criminal." However, neither is a "true retainer" because the fees were for specific services, not solely to secure Levine's availability. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4 [retainer is money paid in advance to secure attorney's availability for period of time and not for specific legal services].)

client trust account (CTA). Virginia did not learn that the check was issued until she contacted her insurance company in April 2009. After the insurance company provided a copy of the front and back of the settlement check, Virginia notified her insurer that it had been deposited into an unknown account and the signature on the check was not hers. She also reported the incident to the police. Not until she met with Levine on May 15, 2009, did Virginia learn that he had received and deposited the settlement check into his CTA.

From September 26, 2008 to July 1, 2009, Levine did not disburse any funds to Virginia, or on her behalf, but his CTA balance dropped below the $39,443.18 he was required to maintain on her behalf as follows:

Date	CTA balance
October 9, 2008	$31,668.14
November 28, 2008	$10,748.43
May 6, 2009	$ 2,804.62

On June 29, 2009, Virginia authorized Levine to pay $19,247 to Nissan for the outstanding loan on her totaled vehicle, and he issued the check from his CTA. She then met with Levine on July 1, 2009, to discuss how to distribute the remaining funds from her settlement. According to Virginia, this was the first time Levine informed her that he wanted an additional $16,000, which included $6,000 for 15 hours at $400 an hour for settling her property damage claim and negotiating the payoff for her vehicle, plus $10,000 more to conclude Armando's criminal matter. Virginia refused because she had already paid Levine $42,000 in Armando's criminal case. Instead, she offered $5,000 for settling her property damage claim and negotiating the vehicle payoff. Levine countered with an offer to split the remaining settlement funds equally, but Virginia again refused. In November 2009, Virginia withdrew her offer to pay the additional $5,000 and demanded the entire $20,196.18 that remained from her property claim settlement.

After Levine paid Virginia's debt to Nissan, he made no other distributions to her or on her behalf. However, he repeatedly failed to maintain the $20,196.18 balance in his CTA as follows:

Date	CTA balance
July 20, 2009	$17,393.36
August 5, 2009	$ 3,718.40
August 11, 2009	$ 408.40

On July 15, 2011, one week after his discipline trial in this matter ended, Levine paid Virginia $20,196.18 plus $1,410.36 in interest.

2. Legal Conclusions

The State Bar charged Levine with six ethical violations in the Ayon matter.[3] Clear and convincing evidence supports the hearing judge's culpability findings on all counts.[4]

Count One – Failure to Notify Client of Receipt of Funds (Rules Prof. Conduct, rule 4-100(B)(1))[5]

Rule 4-100(B)(1) requires an attorney to "[p]romptly notify a client of the receipt of the client's funds . . . ." Levine testified that he "was under the impression that [Virginia] had been notified about this check . . . ." However, he admitted that he probably did not tell Virginia he received the check and does not know whether someone from his office did. The hearing judge found Virginia credibly testified that Levine never told her that he received the settlement check and that she only learned about it in April 2009 after contacting her insurance company. We find no reason to disturb the hearing judge's credibility determination on this count, and conclude that Levine willfully violated rule 4-100(B)(1). (Rules Proc. of State Bar, rule 5.155(A) [hearing

[3] Prior to trial, the State Bar dismissed with prejudice Counts Six and Seven.

[4] 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.)

[5] Unless otherwise noted, all further references to "rule(s)" are to the State Bar Rules of Professional Conduct.

judge's factual findings entitled to great weight]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280 [hearing judge's credibility findings entitled to great weight].)

Count Two – Moral Turpitude (Signing Client's Name Without Consent) (Bus. & Prof. Code, § 6106)[6]

Section 6106 prohibits an attorney from committing any act that involves moral turpitude, dishonesty, or corruption. The State Bar alleged that Levine committed an act involving moral turpitude because he signed Virginia's settlement check without her consent. We agree.

Levine admits he did not have authority to sign the settlement check and that it was a mistake to have endorsed it. However, he asserts he is not culpable of an act of moral turpitude because he had a good faith belief that he had a power of attorney to sign Virginia's name to any settlement check based on his standard practice of obtaining such powers of attorney from his clients. (E.g., *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240-241 [attorney not culpable of moral turpitude where he reasonably believed he had authority to endorse client's name to checks].)

The hearing judge did not discuss Levine's good faith defense, but nevertheless concluded he was culpable as charged. Such a conclusion indicates that the hearing judge did not find credible Levine's self-serving statement that he honestly believed he had a power of attorney from Virginia. Levine presented no testimonial or documentary evidence to corroborate his own testimony on this issue. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935, fn. 13 [where attorney failed to corroborate his testimony with evidence that one would have expectedly produced, such failure is strong indication his testimony is not

[6] Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

credible].) We find the record clearly supports the hearing judge's conclusion that Levine committed an act of moral turpitude by signing Virginia's name without her consent.

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

Rule 4-100(A) requires an attorney to maintain in a CTA all "funds received or held for the benefit of clients . . . ." The hearing judge found that Levine violated this rule when he failed to maintain the entire $39,443.18 settlement in his CTA on Virginia's behalf between September 2008 and June 2009, and at least $20,196.18 thereafter. Levine does not contest this culpability finding, which is supported by the record, and we adopt it.

Count Four – Failure to Promptly Pay Client Funds (rule 4-100(B)(4))

Upon a client's request, an attorney must promptly pay or deliver funds the client is entitled to receive. (Rule 4-100(B)(4).) Although Virginia demanded the remainder of her property damage settlement, Levine delayed payment for over a year and a half. He claims that Virginia was not entitled to the entire balance of the settlement money because there was a fee dispute. He is incorrect. Levine did not claim all of the remaining settlement money as his fee and he had no reason to delay paying Virginia any *undisputed* portion of the settlement.

We also reject Levine's contention that the fee dispute "eliminates any willfulness" on his part. To establish a willful breach of the rules "it must be demonstrated that the person charged acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it. [Citations.]" (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 792.) Levine's conduct was willful because he purposely delayed paying Virginia any undisputed portion of the settlement.

Count Six – Moral Turpitude (Misappropriation) (§ 6106)

The hearing judge concluded Levine committed an act involving moral turpitude because he misappropriated $36,638.56 ($39,443.18 settlement - $2,804.62 lowest CTA balance) of

Virginia's settlement. We agree. Levine contends his misappropriation did not involve moral turpitude because the State Bar failed to prove what happened to the funds he was required to maintain in his CTA.

However, Levine admitted the CTA withdrawals "always went into the [firm's] operating account." He acknowledged: "I was not paying attention to the balances. I wasn't paying attention to what was going in. I wasn't paying attention to what was going out. I needed money." Thus, Levine repeatedly transferred CTA funds into his operating account because he needed the money, which clearly and convincingly establishes moral turpitude. (*In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 286 [attorney's conduct in depositing trust funds in personal account and using such funds involves moral turpitude].)

<u>Count Eight – Accepting Fees from a Non-Client (rule 3-310(F))</u>

Rule 3-310(F) requires, among other things, that an attorney must not accept compensation to represent a client from someone other than the client unless the attorney obtains the client's informed written consent. We reject Levine's argument that the State Bar failed to prove culpability. Levine admitted during trial that he did not obtain Armando's informed written consent for Virginia to pay his attorney fees. Therefore, clear and convincing evidence establishes that Levine violated rule 3-310(F).

B. Case Number 09-O-17404 – The Gonzalez Matter

1. Factual Findings

On March 16, 2009, the Los Angeles City Attorney filed a misdemeanor complaint charging Jose Gonzalez with cockfighting. On March 25, 2009, Jose Gonzalez hired Levine to represent him in the criminal matter. Gonzalez only speaks Spanish, so he brought his daughter,

Carina, to Levine's office to translate. In accordance with the written fee agreement,[7] Gonzalez paid $5,000 in installments for Levine's legal representation.

Levine appeared with Gonzalez in Los Angeles County Superior Court on May 27, 2009, and Gonzalez pled nolo contendere to one misdemeanor violation. The court accepted the plea, dismissed the remaining charges, sentenced Gonzalez to three years' summary probation, and imposed a $20,215 fine. When the police first arrested Gonzalez, they seized $25,690 in cash from him. The court ordered this money released to Levine and ordered him to pay the $20,215 fine, and the $5,475 balance to Gonzalez by December 14, 2009.

On June 9, 2009, Levine went to the Los Angeles Police Department (LAPD) property room in downtown Los Angeles to obtain Gonzalez's funds. Levine learned then that the seized cash would only be available in check form and that the check could either be mailed or claimed in person two weeks after submitting the requisite form. Levine completed the form and indicated he would claim the check in person. He returned to the LAPD property room on June 22, 2009, and picked up the check, which he deposited into his CTA that same day. Between this date and August 11, 2009, Levine neither paid Gonzalez's fine nor made any distributions on Gonzalez's behalf. Although Levine should have maintained $25,690 in his CTA during this period, the CTA balance fell below this amount as follows:

Date	CTA balance
July 20, 2009	$17,393.36
August 5, 2009	$ 3,718.40
August 11, 2009	$ 408.40

In October 2009, more than three months later, Levine wrote to Gonzalez to inform him that he received the funds from the LAPD. Levine also included an invoice charging Gonzalez $1,728 (4.3 hours billed at $400/hr plus $8 parking) for two trips to the LAPD property room.

[7] Levine used the same "Retainer Agreement-Criminal" form as in the Ayon matter.

Levine deducted $1,728 from the $5,475 owed to Gonzalez and enclosed a check for $3,747 with the invoice.

Gonzalez and his daughter understood that the $5,000 was the entire fee to "take care of the case" unless it went to trial. Gonzalez disputed the unexpected additional fees because Levine never disclosed he would charge him to pick up the impounded funds. According to Carina, Levine explained only that it would be faster and easier if he, instead of Gonzalez, picked up the funds. Levine refused to refund the $1,728, contending it was for post-conviction work not covered under the fee agreement. Gonzalez filed a State Bar complaint.

On December 14, 2009, Levine paid Gonzalez's $20,215 fine. On July 20, 2011, after his discipline trial in this matter, Levine paid Gonzalez $1,728.09 and $120.67 in interest.

2. Legal Conclusions

The State Bar charged Levine with four ethical violations in the Gonzalez matter.[8] Although we dismiss one count as duplicative, clear and convincing evidence supports the hearing judge's culpability findings on all other counts.

Count Nine – Failure to Maintain Client Funds in Trust (rule 4-100(A))

Levine does not contest the hearing judge's finding that he violated rule 4-100(A) when he failed to maintain at least $25,690 in his CTA on Gonzalez's behalf between July and August 2009. We adopt this finding.

Count Twelve – Moral Turpitude (Misappropriation) (§ 6106)

The State Bar alleges that Levine's misappropriation of Gonzalez's funds between July and August 2009 constituted an act of moral turpitude. As with the Ayon matter, Levine contends that his withdrawal of the funds from his CTA did not involve moral turpitude because the State Bar failed to prove what happened to the funds. Since Levine admitted that he

[8] Prior to trial, the State Bar dismissed with prejudice Counts Ten and Eleven.

transferred the funds to his firm's operating account because he needed money, we reject his contention and find that his misappropriation of $25,281.60 ($25,690 seized funds - $408.40 lowest CTA balance) of Gonzalez's funds involved moral turpitude.

Count Thirteen – Unconscionable Fee (rule 4-200(A))

Rule 4-200(A) prohibits an attorney from entering "into an agreement for, charge, or collect an illegal or unconscionable fee."[9] The State Bar alleges that the additional $1,728 in legal fees that Levine charged Gonzalez without his consent in October 2009 constituted an unconscionable fee. Levine contends he was entitled to charge an additional fee because the fee agreement applied only to Gonzalez's defense, not to postconviction services such as obtaining Gonzalez's seized funds.

"An attorney may not unilaterally determine his own fee and withdraw funds held in trust for his client in order to satisfy it, without the knowledge or consent of the client." (*Most v. State Bar* (1967) 67 Cal.2d 589, 597 [attorney culpable of misappropriation after unilaterally withholding attorney fee greater than amount agreed to by client].) Here, Levine admitted he did not have Gonzalez's informed consent to the additional $1,728 fee. (Rule 4-200(B)(11).) Furthermore, Levine incurred unnecessary fees since the check could have been mailed. (Rule 4-200(B)(6).) Merely picking up the funds from the LAPD was neither novel nor difficult, and did not require legal skills or an inordinate amount of time or labor to complete. (Rule 4-200(B)(3) and (10).) Overall, the $400/hour fee was clearly disproportionate to the limited value of the services performed. (Rule 4-200(B)(1).) Under these circumstances, we find that Levine charged an unconscionable fee in violation of rule 4-200(A). (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851 [attorney violated rule 4-200(A) where he

[9] Some of the factors to consider if a fee is unconscionable include: (1) the informed consent of the client to the fee; (2) the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (3) the time and labor required; and (4) the amount of the fee in proportion to the value of the services performed. (Rule 4-200(B).)

reduced medical lien and unilaterally collected $217.18 fee for reduction without client's informed consent].)

Count Fourteen – Moral Turpitude (Misappropriation) (§ 6106)

The State Bar alleges that Levine also committed an act of moral turpitude by misappropriating Gonzalez's funds under the guise of charging a fee and doing so without his consent. We agree. (*Grossman v. State Bar* (1983) 34 Cal.3d 73, 79 [attorney culpable of misappropriation for collecting 40% fee when client consented only to 33% fee]; see also *Herrscher v. State Bar* (1935) 4 Cal.2d 399, 403 [where attorney fails to disclose true facts, the fee charged "constitute[s] a practical appropriation of the client's funds under the guise of retaining them as fees and is excessive"].) However, since we relied on the same facts to support culpability under Count 13 (unconscionable fee), we find this count duplicative and dismiss it with prejudice. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little if any purpose served by duplicate misconduct allegations].)

III. AGGRAVATION AND MITIGATION

The offering party bears the burden to prove aggravating and mitigating circumstances. The State Bar must establish aggravating circumstances by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)),[10] while Levine has the same burden to prove mitigating circumstances. (Std. 1.2(e).)

A. Aggravation

The hearing judge found three factors in aggravation: (1) prior discipline; (2) multiple acts of misconduct; and (3) significant client harm. We adopt the first two factors, but do not find significant client harm. However, we find additional aggravation in Levine's indifference.

[10] Unless otherwise noted, all further references to "standard(s)" are to this source.

1. Prior Discipline (std. 1.2(b)(i))

In 1995, the Supreme Court imposed a two-month stayed suspension on Levine for misconduct in four client matters that occurred between 1990 through 1993. Levine failed to supervise his office manager (rule 3-110(A)), failed to promptly notify a client of receipt of funds (rule 4-100(B)(1)), did not maintain proper trust account records (rule 4-100(B)(3)) and failed to promptly pay client funds (rule 4-100(B)(4)). Levine had no prior record of discipline, cooperated in the matter, and did not cause client harm. He also suffered extreme emotional distress caused by financial difficulties and a marital dissolution. Levine attributed his CTA violations to his lapse in supervision of his office manager, who may have engaged in unauthorized activities. In the stipulated discipline, Levine explicitly stated he was remorseful about the lack of office supervision and was "committed to ensure that similar problems will not reoccur." As in his prior discipline, Levine attributes his present misconduct to family-related stress and improperly supervised office staff. Levine's prior discipline strongly aggravates his wrongdoing in this matter because the present misconduct is similar but more extensive than the prior misconduct.

2. Multiple Acts (std. 1.2(b)(ii))

For approximately four years Levine committed multiple acts of misconduct by failing to notify a client of receipt of funds, failing to promptly pay those funds, improperly accepting fees from a non-client, collecting an unconscionable fee, and repeatedly misappropriating client funds. This lengthy and serious misconduct significantly aggravates the case.

3. Indifference (std. 1.2(b)(v))

Levine did not reimburse Virginia and Gonzalez until after the hearing department proceedings were completed. Such delay demonstrates indifference toward rectifying the

consequences of his misconduct and is properly considered aggravating. (*Read v. State Bar* (1991) 53 Cal.3d 394, 423.)

4. Record Does Not Establish Significant Client Harm (std. 1.2(b)(iv))

We do not adopt the hearing judge's finding that Levine's failure to promptly disburse funds "significantly" harmed Virginia and Gonzalez. (Std. 1.2(b)(iv) [requiring that misconduct significantly harm client, the public, or administration of justice].) The State Bar did not offer any evidence of significant harm that was specific to Virginia or Gonzalez. A mere failure to promptly disburse client funds does not necessarily establish significant client harm. (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 519-520 [absent additional facts such as wrongful intent, loss of use caused by attorney's failure to promptly pay client funds constitutes genuine monetary injury, albeit not particularly severe or grievous].) Thus, since this misconduct forms the basis for the rule 4-100(B)(4) violations, and there is no evidence of significant harm beyond the failure to promptly pay, we do not consider it in aggravation. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [where factual finding used for culpability, improper to again consider in aggravation.].)

B. Mitigation

The hearing judge found three mitigating factors: extreme emotional difficulties; spontaneous candor and cooperation; and good character. We agree with all but the first factor. We also find mitigating Levine's pro bono and community work.

1. Candor and Cooperation (std. 1.2(e)(v))

Levine established cooperation because he stipulated to certain facts with the State Bar. However, the facts were easily provable and Levine did not stipulate to culpability. Thus, we do not accord extensive weight to this mitigating factor. (Compare *In the Matter of Johnson*

(Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability as well as facts].)

2. Good Character (std. 1.2(e)(vi))

The State Bar does not contest the hearing judge's finding that Levine's six character witnesses demonstrated extraordinary evidence of his good character. Four attorneys, a superior court commissioner, and a physician who was a past client testified that Levine is a responsible attorney who is honest and has excellent moral character. Two of the attorneys have referred clients to Levine with good results. Based on this testimony, we adopt the hearing judge's finding of good character in mitigation.

3. Additional Mitigation for Pro Bono and Community Work

Levine argues that the hearing judge should have afforded him mitigation for his pro bono and community work, his remorse, his good faith in dealing with Virginia and Gonzalez, and the fact that he harmed no clients. We conclude the hearing judge properly declined to accord Levine additional mitigation, except as to his pro bono and community work.

Levine testified that between 1996 through 1999, he volunteered approximately seven hours per week as a soccer coach; between 1995 through 2000, he volunteered two hours per week with the Boy Scouts; and in 2007, he volunteered approximately 30 hours on four different occasions to raise funds for a women's shelter. Additionally, he negotiated a stipulated judgment without charge on behalf of his child's teacher when she faced eviction, completed a nine-day jury trial pro bono on behalf of a teenage defendant, and provided an unspecified amount of free legal work for the Japanese community until 2001. We believe Levine's testimony about his pro bono work and his community service warrant modest weight in mitigation. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [limited weight given to community service established only by attorney's own testimony].)

4. Levine Did Not Prove in Mitigation: Rehabilitation from Extreme Emotional Difficulties; Remorse; Lack of Harm; or Good Faith

The State Bar disputes the mitigation credit the hearing judge gave to Levine for his emotional difficulties. To receive mitigation for extreme emotional difficulties, an attorney must: (1) prove that he or she suffered from extreme emotional difficulties at the time of the professional misconduct; (2) provide expert testimony that establishes the emotional difficulties were directly responsible for the misconduct; and (3) establish that he or she no longer suffers from such emotional difficulties. (Std. 1.2(e)(iv).)

Levine established that he suffered emotional difficulties that "caused or contributed to [his] misconduct . . . ." (*In re Naney* (1990) 51 Cal.3d 186, 197.) He presented testimony from his treating therapist, Harlan Dwarski, who began seeing Levine in 1998 due to family issues with his daughter. In 2008, Dwarski diagnosed Levine with major depressive disorder caused by financial setbacks and tremendous marital difficulties. As a result, from 2008 through 2010, Levine suffered multiple depressive episodes that impaired his ability to focus and concentrate on the day-to-day oversight of his law office. Dwarski acknowledged that Levine still suffers from dysthymic disorder (low-grade depression), although he no longer diagnoses Levine as suffering from major depressive disorder. While this evidence is not significantly compelling, it is sufficient to satisfy the first two prongs of the standard.

But Levine failed to establish the third prong – that his emotional difficulties are under control. "A psychological disorder that has caused or contributed to misconduct is mitigating only if the attorney establishes . . . that he has so overcome or controlled the disorder that it is unlikely to cause further misconduct. [Citations.]" (*In re Naney, supra,* 51 Cal.3d at p. 197.) Dwarski admitted that his psychotherapy alone was not enough to help Levine through his episodes of major depression. As a result, as recently as December 2010, Levine also began treatment with a psychiatrist who prescribed medication to help the psychotherapy be more

effective. However, Levine provided no evidence from his treating psychiatrist or any other expert about his recovery prognosis or how long he would need to undergo treatment.

Absent evidence of "successful therapeutic rehabilitation or a strong prognosis for future rehabilitation," (*Ballard v. State Bar* (1983) 35 Cal.3d 274, 289), Levine cannot provide adequate assurance that he will avoid future misconduct. (*In re Lamb* (1989) 49 Cal.3d 239, 246 [due to serious nature of attorney's felony conviction for posing as husband to take bar exam, proof of sustained recovery and rehabilitation had to be exceptionally strong before emotional difficulties could serve as mitigating circumstance].) Thus, since Levine has failed to show meaningful rehabilitation, we afford him no mitigation under standard 1.2(e)(iv).

Also, the circumstances under which Levine paid restitution to Virginia and Gonzalez do not establish his remorse under standard 1.2(e)(vii). Restitution made after initiation of State Bar proceedings does not constitute proper mitigation. (*In re Naney, supra,* 51 Cal.3d at p. 196.) We further reject Levine's argument that his misconduct did not harm Virginia or Gonzalez. (Std. 1.2(e)(iii).) Unquestionably, both clients were, at a minimum, inconvenienced by Levine's delay in paying them their funds. Although this delay might not rise to the level of significant harm for purposes of aggravation without additional facts (as discussed above), it precludes a finding of no harm.

Finally, Levine contends he acted in good faith because he completed a large amount of work for Virginia without knowing if he would be paid and because he offered to reduce his fees in the Gonzalez matter. Mitigation for good faith requires that an attorney have an honest and reasonable belief that explains his misconduct. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [good faith mitigation requires attorney's belief be both honestly held and reasonable].) Levine's argument for good faith mitigation does not explain his willful

misappropriation and other misconduct. Therefore, we do not find good faith mitigation under this standard.

IV. LEVEL OF DISCIPLINE

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. 1.3.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

We begin our analysis with the standards which the Supreme Court instructs us to follow "whenever possible." (*In re Young, supra,* 49 Cal.3d at p. 267, fn. 11.) We give them great weight to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91, citation and internal quotations omitted.) The standards call for a broad range of discipline in this case.[11] However, we focus on standard 2.2(a), which applies to misappropriations and imposes the most severe discipline. Under standard 2.2(a), "misappropriation of entrusted funds or property shall result in disbarment" unless "the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate . . . ." We find no reason to deviate from the disbarment recommendation in standard 2.2(a).

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[11] Multiple standards apply: 1.6(a) provides the most severe sanction is used when different sanctions apply; 1.7(a) provides that if there is a prior record of discipline, the discipline imposed in the current proceeding must be greater; 2.2(b) imposes a three-month suspension for rule 4-100 violations not involving misappropriation; 2.3 imposes actual suspension or disbarment for acts of moral turpitude; 2.7 imposes a six-month actual suspension for charging or collecting an unconscionable fee; and 2.10 calls for reproval or suspension for rule violations not specified in the standards.

Foremost, Levine misappropriated a substantial sum: $36,638.56 from Virginia and $25,281.60 from Gonzalez, totaling $61,920.16. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367-1368 [misappropriation of $1,355.75 considered "not insignificant" under std. 2.2(a)].) Although Levine eventually repaid his clients, a significant portion of the restitution was made almost two years later and only *after* his discipline trial was completed.

In addition, the mitigation is neither sufficiently compelling nor predominant to warrant discipline less than disbarment. (Std. 2.2(a).) In fact, the aggravating factors clearly outweigh Levine's mitigation. Even though his prior discipline required him to complete State Bar Ethics School and Client Trust Accounting School, Levine continued to mishandle his CTA funds, again attributing it to improper office supervision and severe emotional difficulties. Although Levine now takes prescribed medication under psychiatric care, he has not sufficiently proved his mental health issues are under control. Perhaps most disturbing is Levine's rationale for misappropriating his clients' funds – he repeatedly transferred client funds into his operating account because he needed money. "It is precisely when the attorney's need or desire for funds is greatest that the need for the public protection afforded by the rule prohibiting misappropriation is greatest. [Citations.]" (*Grim v. State Bar* (1991) 53 Cal.3d 21, 31.)

Clearly, the public and the legal profession will be best protected if Levine is required to demonstrate sustained rehabilitation in a reinstatement proceeding following disbarment. Case law supports our conclusion that disbarment is appropriate under the circumstances. (*Grim v. State Bar, supra,* 53 Cal.3d at pp. 35-36 [good character and cooperation not considered compelling mitigation in view of prior disciplinary record and failure to pay restitution timely, attorney disbarred for misappropriating $5,546]; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067 [11 years of practice without priors, payment of restitution, severe emotional problems, and good character insufficient to avoid disbarment for misappropriating $29,000]; *Gordon v. State Bar*

(1982) 31 Cal.3d 748 [despite 13 years of discipline-free practice, financial difficulties, emotional difficulties due to divorce, remorse, and lack of harm, attorney disbarred for misappropriating over $27,000].)

V. RECOMMENDATION AND ORDER

We recommend that Howard Roy Levine, member number 105973, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys of all persons admitted to practice in this state.

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

We recommend that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable under section 6140.7 and as a money judgment.

The hearing department ordered Levine involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4). The involuntary inactive enrollment became effective on October 19, 2011, and Levine has remained on involuntary inactive enrollment since that time. It is hereby ordered that he remain on involuntary inactive enrollment pending the final disposition of this matter.

REMKE, P. J.

WE CONCUR:

EPSTEIN, J.

PURCELL, J.