PUBLIC MATTER – DESIGNATED FOR PUBLICATION

FILED OCTOBER 30, 2001

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **THOMAS P. FREYDL**, A Member of the State Bar.	))))))	**99-J-11781** **OPINION ON REVIEW**

In 1998, respondent Thomas P. Freydl, who is a member of both the Michigan and California Bars, was suspended from the practice of law in the State of Michigan for a period of three years. In December 1999, the State Bar[1] sought to discipline respondent in California, based on the misconduct found in the Michigan proceedings. The hearing judge held that under the provisions of Business and Professions Code section 6049.1,[2] the misconduct found in the Michigan proceedings required a finding of misconduct in California, and recommended to the Supreme Court that respondent be actually suspended from practice in California for a period of two years. With some limited exceptions, section 6049.1 provides that California "shall" rely on the formal record of discipline in another state as conclusive evidence of professional misconduct in this state.

Respondent seeks review, contending that prior California discipline precludes this state

[1]All references to the State Bar are to the California State Bar.

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

(See Concurring and Dissenting Opinion)

from relying on the Michigan proceedings in seeking further discipline in California. More specifically, respondent contends that (1) his prior California discipline involved the same misconduct as that found in the Michigan proceeding and (2) in agreeing to settle the disciplinary charges in a prior California disciplinary case he relied on the State Bar's representations that there were no other matters under investigation by the California authorities. We reject respondent's arguments and affirm the hearing judge's finding of culpability. We recognize that we "'must independently review the record and may adopt findings, conclusions, and a decision or recommendation at variance with the hearing decision.'" (*In re Morse* (1995) 11 Cal.4th 184, 207.) Following that independent review and consideration of the hearing judge's recommendation, we find that respondent has a disturbing history of (1) ignoring his obligations to clients, (2) failure to respond to the Michigan disciplinary investigations, (3) failure to advise the State Bar of his current address and thus not responding to a California disciplinary investigation, (4) failure to comply with the provisions of his prior California disciplinary probation, and (5) failure to appear in his prior probation violation case. When this history is combined with the serious misconduct found in the Michigan disciplinary matter we conclude that disbarment is the appropriate recommended discipline.

Nature of Present Proceeding

The present proceeding, under the provisions of section 6049.1, is based on a finding of respondent's misconduct by the State of Michigan. Under that section a final order of the United States, or of a sister state or territory of the United States, determining that a member of the California Bar has committed professional misconduct in that jurisdiction is conclusive evidence that the attorney is culpable of professional misconduct in California. A respondent may challenge the imposition of discipline in California under section 6049.1 only by affirmatively showing that as a matter of law the culpability found in the other jurisdiction would not warrant discipline in California or that the proceeding in the other jurisdiction lacked fundamental

constitutional protection. (§ 6049.1(b)(1), (2) & (3); *In the Matter of Jenkins* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 157, 162.) If a respondent fails to make this affirmative showing, the only remaining issue is the degree of discipline, to be determined by California.

Procedural History

Respondent was admitted to practice law in the State of Michigan in June 1968 and was similarly admitted in California in June 1992. For conduct occurring during the years 1995 and 1996 in Michigan, respondent was alleged to have committed misconduct in four matters: (1) Melissa Christie's employment of respondent to dissolve a business entity known as "Magnolias;" (2) Lawrence Shinoda's engagement of respondent for contract negotiation with Gibson Guitar Company; (3) a check that was dishonored by respondent's bank; and (4) a matter regarding respondent's client Buddy Killen Music Inc. (Killen).[3]

In June 1997, based on complaints filed with the State Bar on behalf of clients of respondent, the State Bar filed original disciplinary proceedings against respondent, charging misconduct in the Shinoda and Killen matters in *In the Matter of Freydl*, case number 96-O-01650 (*Freydl I*). The charges in that case were based on the State Bar's own investigation and not on the record of the Michigan Attorney Discipline Board or section 6049.1.

Respondent stipulated to misconduct in *Freydl I* in both the Shinoda and Killen matters. The charges in those matters arose out of the same conduct and client matters as did the charges involving Shinoda and Killen contained in the Michigan matter. No reference to the Christie matter is included in *Freydl I.* On May 18, 1998, the Supreme Court suspended respondent for a period of two years, stayed, on condition that he be actually suspended for 45 days, and until he made restitution to Killen in the sum of $2,500, plus interest, among other conditions of

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[3]The Killen matter is sometimes referred to in the record as the Weaver/Killen matter as respondent was hired by Killen's Nashville lawyer, C. Steven Weaver, to represent Killen in a copyright infringement action.

probation. That restitution has been made.[4]

The Michigan Proceedings

In August 1996, the State of Michigan brought disciplinary proceedings against respondent involving the Christie, the Shinoda and the check matters. The Michigan Attorney Discipline Board found respondent culpable of professional misconduct in the Christie and Shinoda matters. A count concerning the dishonored check was dismissed on appeal by the Attorney Discipline Board of Michigan, and we do not further consider that charge. However, the Michigan Attorney Discipline Board found respondent culpable of failure to respond to the investigation of the check matter, and we do consider that finding. Respondent was suspended from practice in Michigan for three years. On respondent's appeal in Michigan, the Michigan Attorney Discipline Board affirmed that order. Respondent did not seek review by the Michigan Supreme Court. During the two-year course of the Michigan proceedings on these three matters, the Killen matter was charged and resolved in Michigan by the imposition of a 60-day suspension, to run concurrently with the 3-year suspension already imposed.

The Michigan Attorney Discipline Board, following the recommendation of the local grievance panel, found respondent culpable in three separate charges involving his client Christie. In count 1, respondent was found culpable of misappropriation of $12,500 (although charged with misappropriating $25,000) of Christie's funds, failure to maintain her funds in trust, failure to promptly pay funds to Christie, failure to keep Christie informed concerning the status of the funds, failure to respond to inquiries concerning Christie's funds, failure to account, and moral turpitude.[5] In count 2, respondent was found culpable of failure to represent Christie

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[4]In a subsequent California proceeding, respondent's violation of some remaining conditions of that probation were considered, as we will discuss *post*.

[5]In the Michigan matter, count one, involving Christie, respondent was found culpable of a violation of the Michigan Court Rules (MCR) 9.104(2) (conduct that exposes the legal profession or courts to obloquy, contempt, censure, or reproach); MCR 9.104(3) (conduct

diligently and expeditiously and failure to keep Christie reasonably informed concerning the status of the matter. In count 5, respondent was found culpable of failure to respond to a request for investigation in the Christie matter.

In count 9, respondent was found culpable of failure to respond to a request for investigation in a complaint filed by Shinoda, and in count 11, he was found culpable of failure to respond to a similar request concerning the check matter. As previously indicated, an order of discipline filed by the Attorney Discipline Board of the State of Michigan confirmed the suspension of respondent from the practice of law in that state for a three-year period commencing on May 6, 1998. The order included a requirement that respondent make restitution to Christie in the sum of $16,429.58 within 180 days.[6] As also indicated, the Michigan Attorney Discipline Board dismissed the charges in the check matter, except it did find respondent culpable of failure to respond to the investigation of the dishonored check.

Discussion of Parties' Contentions

As the result of *Freydl I* and the discipline imposed in that proceeding, the State Bar acknowledges "that the substantive allegations concerning [Shinoda] are not properly at issue in

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contrary to justice, ethics, honesty, or good morals); MCR 9.104(4) (conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court); Michigan Rules of Professional Conduct (MRPC) 1.4(a) and 1.4(b) (failure to keep client reasonably informed); MRPC 1.15(a) and (b) (failure to maintain client funds in an account separate from the attorney's own funds, to render an accounting on request, or to promptly deliver funds to the client); and MRPC 8.4(a) and (b) (violation of the rules of professional conduct and conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer).

In count two, also involving Christie, respondent was found culpable of MCR 9.104(4) (violation of the standards or rules of professional responsibility); MRPC 1.1(c) (neglect of a legal matter entrusted to a lawyer); MRPC 1.4(a) (failure to keep a client reasonably informed of the status of a case); and MRPC 8.4(a) (violation of the rules of professional conduct).

We have treated these charges as subsumed into the enunciated California misconduct.

[6]The record does not reveal whether any portion of that ordered sum was paid.

the instant proceedings." [Emphasis in original.]

In the Michigan proceedings, the first client matter involved Melissa Christie and her employment of respondent to dissolve a business entity known as "Magnolias," while in the second client matter respondent was retained to represent Lawrence Shinoda in contract negotiations with Gibson Guitar Company. In the Christie and Shinoda matters, respondent was found culpable of professional misconduct in Michigan in November 1998 by order of the Michigan Attorney Discipline Board. At some point during the pendency of the Christie and Shinoda matters, additional charges involving Killen were filed in Michigan against respondent. Although there are references to the Killen charges in the record, including testimony by respondent, no copy of the charges, evidence introduced to support those charges, or disposition of those charges is before us.

Freydl I did not include any reference to, or charges relating to, the Christie matter, nor had a complaint been made to the State Bar on behalf of Christie. The investigation by the State Bar of the *Freydl I* matters commenced no later than April 30, 1996, and charges were filed in California on June 2, 1997. Respondent knew of the Michigan investigations no later than March 1996. By March 1997, the State Bar knew of the proceedings in Michigan. Rule 133(a)(12), Rules of Procedure of the State Bar (rules), requiring the State Bar to advise a party entering into a stipulation disposing of a disciplinary matter of any additional pending disciplinary investigations against that party, was in effect at the time of entering into the stipulation in *Freydl I.* In conjunction with the stipulation, the State Bar advised respondent, in writing, ". . . there are no additional State Bar investigations pending against you."

The record clearly establishes that the disciplinary agencies in both California and Michigan were each aware of the proceedings being prosecuted in the other state, and particularly that the State Bar was aware of all of the specific charges and of the fact that Michigan was prosecuting respondent in the Christie matter. In December 1999, the State Bar filed the present

proceeding against respondent under the authority of section 6049.1. Attached to the California notice of disciplinary charges (NDC) in the present proceedings was a copy of the final Michigan disciplinary order and the opinion of the Attorney Discipline Board, which described the actions of respondent leading to the finding of misconduct and further described the specific charges of which he was found culpable. Included in that order and opinion are the charges relating to both the Christie and the Shinoda matters.

As indicated, the State Bar has conceded that the Michigan findings of misconduct in the Shinoda matter are not a proper matter for discipline in the present proceeding because those charges were the subject of prior discipline in California in *Freydl I*. We agree. The remaining question is whether or not the order and findings of the Michigan Attorney Discipline Board concerning respondent's conduct in the Christie matter both permit and warrant California discipline against respondent.

Respondent argues that *Freydl I* bars the present action and that his motion to dismiss filed in the hearing department ought to have been granted or that, based on the evidence introduced, the State Bar is barred from relying on the Michigan record. He relies on rule 133(a)(12), requiring that all stipulations as to facts, conclusions of law or dispositions relating to disciplinary matters include a statement that the respondent has been advised in writing of any pending investigations or proceedings not resolved by that stipulation, except for investigations by criminal law enforcement agencies. Respondent contends that the Christie matter was a "pending proceeding" within the meaning of rule 133(a)(12) and that by virtue of that rule the State Bar is barred from relying on the Michigan proceedings in the Christie matter for California discipline. He argues further that in reliance on the stipulation in *Freydl I* to have disposed of any California disciplinary consequences as the result of his misconduct in Michigan, he did not appeal the decision of the Michigan Attorney Discipline Board to the Michigan Supreme Court. We reject these arguments of respondent.

Both respondent and the State Bar knew of the Michigan proceedings at the time the stipulation in *Freydl I* was entered into. The four corners of the stipulation did not purport, in any way, to deal with the California consequences of the Michigan matter, nor is there any evidence that the Michigan proceedings were included in the discussions leading to that stipulation.

Respondent's reliance on rule 133(a)(12) is misplaced. In *Smith v. State Bar* (1985) 38 Cal.3d 525, Smith entered into a stipulation with the State Bar concerning two separate client matters. Unknown to respondent and the attorney representing the State Bar, there was a pending investigation of Smith by the State Bar concerning a third client matter. (*Id*. at pp. 530-531.) Smith sought to set aside the stipulation on the grounds that the State Bar had not advised him of the pending investigation as required by the predecessor to rule 133(a)(12). The court held that "[a] stipulation cannot be expected to include information which is not yet known to either party." (*Id*. at p. 533.) We note that such ruling was made even though the existence of the investigation was known to the State Bar, although not to the attorney prosecuting the proceedings. Here, we have a situation where the information was known to both parties, yet the stipulation was silent as to the existence of the Michigan matter. Respondent was in fact participating in the Michigan proceedings during the time that the stipulation in *Freydl I* was signed.[7] Nonetheless, respondent entered into the stipulation without any inquiry about including that matter in the stipulation. We can only conclude that his failure to inquire was deliberate. We also note that the statute concerning the effect of discipline in other jurisdictions (section 6049.1) in California has been in its present form since 1985.

Respondent argues that the Michigan matter must be found to be a pending proceeding within the meaning of rule 133(a)(12). We disagree. The State Bar had no control over the

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[7]There was a concern that the setting of trial in *Freydl I* would conflict with respondent's appearance in Michigan for the continued trial of that matter.

Michigan proceedings, nor did it have any way to evaluate the seriousness of the proceedings in that foreign jurisdiction. The clear purpose of rule 133(a)(12) is to require the State Bar to give notice to respondents before the State Bar Court or to attorneys being investigated by the State Bar of the pendency of such matters. As the Supreme Court has noted, "[i]t is not unreasonable to expect the State Bar to keep a central record of all complaints lodged against an attorney." (*Smith v. State Bar, supra,* 38 Cal.3d at p. 533, fn. 7.) That reference was to complaints lodged with the State Bar against a California attorney. To expand that requirement to include complaints lodged in all other jurisdictions within the United States would impose a far greater burden than that contemplated by the Supreme Court.

Respondent was fully acquainted with the proceedings in Michigan, and if he contemplated they were to be covered by his stipulation in *Freydl I* it was incumbent on him to see that such a provision was included within that stipulation. The stipulation was silent concerning the Christie matter, even though both parties to the stipulation knew that matter was pending in Michigan and, at least presumptively, knew of the provisions of section 6049.1.

The disposition of the Christie matter was an issue that existed at the time of that stipulation and was not included in that agreement. In *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677-680, the Supreme Court held that a compromise agreement that did not deal with costs of suit and attorney's fees that were statutorily authorized did not preclude a claim for such items following the approval of the compromise. The Supreme Court pointed out "that neither costs nor fees were discussed during settlement negotiations." (*Id*. at p. 681.) We note that there is no contention that the disposition of the Christie matter was included in the discussions leading to the stipulation in *Freydl I* and that at the time of the stipulation, section 6049.1 authorized the prosecution of attorney disciplinary matters in California based on the final record of discipline in a sister state. We conclude that the stipulation in *Freydl I* did not dispose of the Christie matter.

During oral argument respondent asserted, for the first time, that section 6049.1 was being unconstitutionally applied because a Michigan disciplinary action requires only a preponderance of the evidence for a finding of culpability and that California reliance on that lower standard deprived respondent of due process and equal protection of the law. No such position had been asserted in the hearing department, nor did any such argument appear in respondent's brief. Respondent having failed to raise the issue before the hearing department or in his briefs, it is deemed waived. (Cf. *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 521-522 [due process issue]; *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 491 [due process]; see also State Bar Rules of Practice, rule 1320.)[8]

Without further comment, we reject respondent's arguments purported to be addressed to res judicata, full faith and credit, and judicial comity. We also reject, as approaching frivolous, respondent's argument that *Freydl I* included the issues of the Christie matter and thus barred California's reliance in the present proceedings on the Michigan findings of culpability in that matter.

The certified copy of the final disciplinary order of the State of Michigan, finding respondent culpable of misconduct in the Christie matter, conclusively establishes that respondent is culpable of professional misconduct in California. (§ 6049.1; *In the Matter of Jenkins*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 162.) The only exceptions are whether, as a matter of law, the misconduct found in the other jurisdiction would not warrant imposing discipline in California and whether the other jurisdiction's proceedings lacked fundamental constitutional protection. (§ 6049.1, subds. (a) and (b).) The attorney bears the burden to establish that the exceptions do not warrant imposing discipline." (*In the Matter of Jenkins*, *supra*, at p. 162.)

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[8]Although we do not make a recommendation concerning the issue (see *In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 433, fn. 11), it seems clear that the absences of constitutional infirmity in the Michigan proceedings gives California every right to rely on the Michigan findings of culpability.

Although respondent makes some complaint about the Michigan procedure, there is no serious challenge to the fundamental constitutional protection afforded him in the Michigan proceedings. There can be no question that the misconduct found in Michigan warrants discipline in this state.

Evidence Available to Determine Discipline

The remaining issue for consideration in this proceeding is the degree of discipline to recommend. (§ 6049.1, subd. (b)(1).)[9] The State Bar placed in evidence certified copies of the *Order of Suspension and Restitution*, the *Report of the Tri-County Hearing Panel - #83*, the *Board Opinion*, and an *Order Modifying Findings of Misconduct and Affirming Suspension and Restitution*, constituting the final record of discipline in the State of Michigan. No portion of the underlying evidentiary record in the Christie matter was placed in evidence.[10]

The findings of fact issued in the *Report of the Tri-County Hearing Panel - #83* and the *Board Opinion* of the Attorney Discipline Board set forth the surrounding circumstances of the charges of which respondent was found culpable. Many of those findings would serve to act as aggravation to the charges as found. However, each of those findings of fact was made under a

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[9]We note that respondent has been convicted of a misdemeanor charge of practicing law in violation of section 6125. By order dated July 31, 2001, in case number 00-C-15473, we referred that conviction to the hearing department for a finding of the facts and circumstances surrounding that conviction. We do not consider that conviction or the circumstances surrounding it in the matter before us. Rather we note that, under the provisions of rule 216(a), it may be appropriate for the hearing department to consider either our recommendation or the final order of the Supreme Court in this matter in the event that department reaches the issue of recommending discipline in that criminal conviction matter.

[10]Respondent introduced a portion of the transcript of the Michigan Shinoda matter. Apparently Michigan had planned to produce evidence on the Christie matter on that same day. The Christie matter was continued for more than a month. The only portion of that record relating to Christie was that, on learning her matter would not be heard that day, Christie expressed concern relating to the delay.

preponderance of the evidence standard.[11]

Section 6049.1, subdivision (a), makes clear that we accept the findings of professional misconduct of a sister state as conclusive. However, subdivision (b)(1) of that section makes equally clear that the degree of discipline remains an issue to be determined under California law. (See *In the Matter of Jenkins*, *supra*, 4 Cal. State Bar Ct. Rptr. 157, 163-164.) The record before us is replete with references establishing that various acts of respondent in the Christie matter were found to be true by a preponderance of the evidence. It is fundamental that in this state all showings of both aggravation and mitigation must be by clear and convincing evidence. (Std. 1.2(b) & (e), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (stds.); *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 222, 224-225; see *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation].

The underlying evidence in the Michigan proceedings is not before us, and the Michigan opinions do not give any clear indication that a higher standard than a preponderance of the evidence was shown in the Michigan proceedings.

In its supplemental brief, the State Bar argues that under the provisions of section 6049.1, subdivision (a), the determination by a sister state of professional misconduct "shall be conclusive evidence that [an attorney] is culpable of professional misconduct in this state, . . ." We agree. However, that position avoids the issue we address. Following the quoted language that section provides: "subject only to the exceptions set forth in subdivision (b)." Subdivision (b) sets forth the exceptions: (1) the degree of discipline; (2) whether the foreign finding would warrant discipline in California; and (3) whether the foreign proceeding lacked fundamental

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[11]Although not briefed by the parties, we advised the parties of our concern that the facts and circumstances surrounding the finding of culpability on which we would ordinarily rely to aid in determining discipline were not shown under a clear and convincing standard of proof, and we invited their briefs on that issue before oral argument pursuant to rule 305(b). A brief was filed by the State Bar. None was filed by respondent.

constitutional protection. We conclude that the requirement that the discipline be determined in California carries with it the California standards for weighing evidence to show aggravation. (*In the Matter of Jenkins*, *supra*, 4 Cal. State Bar Ct. Rptr. 157, 163-164.) That standard requires clear and convincing evidence (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 933; std. 1.2(b).)

As a consequence, we have no ability to weigh a purported showing of the facts and circumstances found in Michigan to surround the misconduct found in Michigan under the required California standard of clear and convincing evidence. Therefore, in determining discipline we must weigh the misconduct found in Michigan with only the aggravation and mitigation separately shown in this proceeding.

We are able to identify the charges in the Michigan Christie case by virtue of an *Amended Formal Complaint* issued by an attorney for the Attorney Grievance Commission and placed in evidence by respondent. By reading the various documents together we are able to determine that respondent was found culpable in Michigan of misappropriation of $12,500 of Christie's funds, failure to account, failure to respond to a client's reasonable inquiries, failure to pay to a client funds to which she was entitled, and moral turpitude. He was also found culpable of failure to take necessary legal action to protect his client's interest and failure to respond to her inquiries concerning the status of her funds. Respondent was additionally found culpable of failure to respond to the Michigan Christie investigation, and finally he was found culpable of failure to respond to the Michigan investigation of the check matter.

To determine the specific charge of which respondent was found culpable we take the lesser of the charges in each count, and we accept the Michigan findings of culpability as conclusive evidence of that found misconduct in California. (§ 6049.1, subd. (a).) We must base our determination of discipline on these findings of culpability, and not on the recitations of facts found by a preponderance of the evidence as set forth in the Michigan opinions. (§ 6049.1, subd. (b)(i); *In the Matter of Jenkins*, *supra*, 4 Cal. State Bar Ct. Rptr. 157, 163-164.)

Discussion of Appropriate Discipline

In mitigation, the hearing judge found that respondent has been candid and cooperative, noting particularly that respondent stipulated to the use of a declaration of a witness, thereby avoiding the necessity of bringing that witness from Michigan to testify. There is authority that a respondent is entitled to mitigating consideration for such conduct. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 156 [respondent allowed complaining witness to testify by telephone].) We give respondent some mitigating credit for candor and cooperation. No other evidence in mitigation was offered in the present proceeding.

In aggravation, respondent has a record of prior discipline. In *Freydl I* in the Shinoda matter, respondent stipulated to borrowing $10,000 from a client on a no-interest loan and a verbal promise of repayment, without advising the client in writing of the client's right to seek independent advice concerning that transaction, and failure to keep the State Bar advised of his current address. Also in *Freydl I*, involving the Killen matter, respondent stipulated that he received $5,000 in advanced fees to file a copyright infringement action and failed to file that action, although he did perform some work on the case, failed to refund $2,500 in advanced fees, failed to respond to reasonable status inquiries from the client, and failed to keep the State Bar advised of his current address.[12] Respondent was actually suspended for a period of 45 days and until he made restitution to Killen in the sum of $2,500 as one of the conditions of two years' probation. Although respondent made restitution, he was subsequently charged with and found culpable of a violation of an additional condition of his probation. Respondent did not appear in that proceeding, his probation was revoked, and he was suspended for a period of six months in Supreme Court case number S068276 (*Freydl II*), after being placed on inactive enrollment by the State Bar Court, effective November 7, 1999.

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[12]Both the Shinoda and Killen matters were the subject of discipline in Michigan but are not included in our present finding of culpability under section 6049.1. Rather, we treat those matters as prior California discipline, in aggravation.

The aggravating weight of *Freydl I* is diminished because the misconduct underlying that prior discipline occurred during the same time period as did the underlying misconduct found in Michigan and relied on by us in finding culpability in the present matter. "Since part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms [citation], it is therefore appropriate to consider the fact that the misconduct involved here was contemporaneous with the misconduct in the prior case." (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.) Under the circumstances, we consider the totality of the charges brought in both cases in order to determine the appropriate discipline, had both cases been brought together. (*Ibid*.) We find no such limitation on considering the full impact of *Freydl II* as prior discipline.

A factor not mentioned by the hearing judge in her decision is respondent's repeated failure to respond to inquiries by clients as to the status of their cases and to investigation inquiries by professional organizations responsible for maintaining standards within the profession. We note that in the Christie matter, in addition to the misappropriation of $12,500 of the client's money, respondent was found culpable of failure to respond to her status inquiries, failure to keep Christie reasonably informed of the status of her matter and failure to respond to a request for investigation into her matter. The record shows that respondent further failed to respond to an investigation by the Michigan authorities concerning the check matter.[13] In *Freydl I*, respondent acknowledged that he failed to respond to Killen's reasonable status inquiries and that he failed to keep the State Bar advised of his current address. That latter failure becomes significant for disciplinary purposes when placed in context with his failure to respond to clients and responsible professional organizations. In *Freydl II*, following his failure to comply with the

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[13]Although a similar finding of culpability was made in Michigan in the Shinoda matter, we do not rely on that finding, as charges involving Shinoda were the subject of *Freydl I*.

terms of his probation, he failed to respond to that disciplinary charge or to appear on that matter. This combination of misconduct presents respondent's disregard for his obligations to his profession as well as his disregard for his obligations to his clients. We deem this found conduct by respondent to be a most serious aggravating circumstance. We note that the misappropriation of $12,500 from Christie and the borrowing of $10,000 from Shinoda evidence a similar effort to take advantage of clients, although we give far greater weight to the former. We find a similar showing of taking advantage of clients in his failure to return unearned fees after failing to file the complaint in the Killen matter.

In our search to recommend the proper discipline, we look first to the standards for guidance. By far the most serious of respondent's found Michigan offenses was his misappropriation of $12,500 from Christie. Because of the Michigan finding of moral turpitude it is clear that such misappropriation was willful. Standard 2.2 suggests disbarment for willful misappropriation unless the amount misappropriated is "insignificantly small" or "the most compelling mitigating circumstances clearly predominate." The amounts involved are not "insignificantly small," nor do mitigating circumstances clearly predominate. Nonetheless, we treat the standards as guidelines only, and not as directives that must be followed in each case. (*In re Young* (1989) 49 Cal.3d 257, 268.) We endeavor to recommend discipline consistent with prior Supreme Court holdings. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

The Supreme Court has consistently stated that misappropriation generally warrants disbarment in the absence of clearly mitigating circumstances. (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656; see *Waysman v. State Bar* (1986) 41 Cal.3d 452, 457; *Cain v. State Bar* (1979) 25 Cal.3d 956, 961.) It is clear that disbarment is most frequently imposed where there are several instances of misappropriation of large sums, involving multiple clients. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 658.) However, the Supreme Court has imposed disbarment on an attorney with no prior record of discipline in a case of a single misappropriation even though

there was substantial mitigation. (*In re Abbott* (1977) 19 Cal.3d 249 [taking of $29,500, showing of manic-depressive condition, prognosis uncertain].) In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, an attorney with slightly over 11 years of practice and no prior record of discipline was disbarred for misappropriating approximately $29,000 in law firm funds over an 8-month period, while in *Chang v. State Bar* (1989) 49 Cal.3d 114, an attorney misappropriated almost $7,900 from his law firm, coincident with his termination by that firm, and was disbarred.

Based on the recommendation of this court, the Supreme Court has ordered disbarment of an attorney with no prior record of discipline for misappropriation of approximately $55,000 from a single client. That case involved serious aggravation in that respondent used, for personal purposes, funds entrusted to him for a down payment on real property by a client with limited English skills. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170; see also *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 511 [misappropriation of nearly $40,000, misled client for a year, no prior discipline].)

In misappropriation cases, discipline of less than disbarment is warranted only where extenuating circumstances show that the misappropriation of entrusted funds is an isolated event. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1360-1361, 1366-1368.) In the matter before us, we consider the fact of respondent's misappropriation in connection with the additional misconduct found against him. In the Michigan case, limiting our consideration to the findings of culpability in the Christie matter, we find misappropriation of $12,500, moral turpitude, failure to account, failure to respond to client inquiries, failure to represent his client diligently, failure to respond to status inquiries and failure to respond to the investigation of that matter. Unfortunately, we do not have before us, in a form we may consider, the facts and circumstances surrounding this misconduct in Michigan. Nor do we have before us any mitigation, other than the hearing judge's finding of cooperation by respondent, which we consider but do not give great weight.

It is true that many of the cases have found "'clearly extenuating circumstances.'" (*Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 656.) Less than disbarment was imposed in *Finch v. State Bar* (1981) 28 Cal.3d 659, where the court recognized the attorney's alcoholism and subsequent rehabilitation; *Bate v. State Bar* (1983) 34 Cal.3d 920, where respondent used the funds to travel outside the country in the face of death threats in an unrelated action; and *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, where this court found severe emotional difficulties from which the attorney had been rehabilitated.

In *Freydl I*, respondent stipulated that although he received a $5,000 fee to represent Killen in a copyright infringement action, he failed to file the action within the time agreed upon, failed to return unearned fees in the amount of $2,500, failed to respond to Killen's reasonable inquiries and failed to keep the State Bar advised of his current address. He further stipulated to borrowing $10,000 from Shinoda on a verbal, no-interest loan, not advising Shinoda in writing to seek independent counsel, and failure to keep the State Bar advised of his current address. In *Freydl II*, following his failure to comply with the terms of probation imposed in *Freydl I,* respondent failed to respond to a motion to revoke his probation and failed to appear in the State Bar Court at a hearing on that motion.

We consider this record of prior discipline to reflect respondent's disregard for his clients and the obligations of the profession. Considering the found prior misconduct, respondent has misappropriated $12,500 from a client, failed to properly perform and respond to proper inquiries from that client, borrowed $10,000 from a second client on oral loan without complying with his duties to that client, and failed to promptly refund unearned fees and respond to reasonable status inquiries from a third client. To this we add two charges of failing to keep the State Bar advised of respondent's current address, his total disregard of a proceeding against him for a violation of his probation, and failure to cooperate in two Michigan investigations. There is nothing in this picture to cause us to believe that respondent's misappropriation in the Christie matter is an

isolated act of misconduct; rather it appears to represent an attorney's disregard for his ethical obligations to clients in favor of financial benefits for himself. Respondent's failure to comply with the terms of his prior probation and then failure to respond to the proceeding brought as the result of that failure to comply with those terms makes clear that such probation provisions have had no rehabilitative effect on respondent.

We find nothing in the record to warrant exemption of this matter from the Supreme Court's observation that "misappropriation generally warrants disbarment unless 'clearly extenuating circumstances' are present. [Citation.]." (*Kelly v. State Bar*, *supra*, 45 Cal.3d 649, 656.) In the matter before us we find no such extenuating circumstances, nor other circumstances that encourage us to move from the Supreme Court's recommended discipline of disbarment for misappropriation of client funds.

Although, as the concurring and dissenting opinion notes, the Michigan Attorney Discipline Board recommended suspension of respondent, not disbarment, section 6049.1 is not a "like discipline" statute but rather requires that discipline be decided anew in this state based on all relevant factors. In our weighing of discipline we have before us more adverse factors than did the Michigan Attorney Discipline Board even if we give weight to the degree of discipline imposed in Michigan.

Recommended Discipline

We recommend that respondent Thomas P. Freydl be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys admitted to practice in this state. We further recommend that respondent be ordered to comply with the provisions of rule 955, 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's order in this matter. We further recommend that the State Bar be awarded costs in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance

with Business and Professions Code section 6140.7.

Pursuant to the provisions of section 6007, subdivision (c)(4) and rule 220(c), Rules of Procedure of the State Bar, respondent is ordered enrolled inactive on personal service of this opinion or three days after service by mail, whichever is earlier.

OBRIEN, P. J.

I Concur:

STOVITZ, J.

Concurring and Dissenting Opinion of TALCOTT, J.

I concur with the majority opinion in all respects except as to the appropriate level of discipline. I respectfully dissent from the recommendation of Thomas P. Freydl's disbarment. In my view, disbarment is not warranted in this case in order to serve the primary purposes of disciplinary proceedings, i.e., the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.3 (standards); *In re Morse* (1995) 11 Cal.4th 184, 205.)

The majority opinion itself reflects that respondent practiced law for approximately 30 years before discipline was imposed against him in California, and his two prior California disciplinary proceedings did not result in lengthy periods of actual suspension. Instead, respondent's first prior case (*Freydl I*), involving misconduct in the Shinoda and Killen matters, resulted in the imposition of an actual suspension of only 45 days, along with periods of stayed suspension and probation.[1] Due to respondent's failure to comply with an unspecified condition of the probation imposed in *Freydl I*, respondent was subsequently suspended for six months in *Freydl II*.

While I recognize that the misconduct and aggravating circumstances in this case are quite serious and include misappropriation along with moral turpitude, it should be noted that even in Michigan, the jurisdiction where the charged misconduct occurred, respondent was suspended for three years rather than disbarred as a result of violations which were, with only a

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[1]As the majority states, the aggravating weight of *Freydl I* is diminished because the misconduct underlying that case occurred during the same time period as did the misconduct underlying the present case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.)

few exceptions,[2] identical to the violations we consider here. Moreover, the hearing judge, who considered the identical misconduct involved in this case, recommended an actual suspension of two years.[3] In light of all factors involved in this case, I view disbarment as unduly harsh. I would instead recommend that respondent be suspended from the practice of law in the State of California for a period of three years, that the three-year period of suspension be stayed, and that respondent be placed on probation for a period of four years on condition that respondent be actually suspended from the practice of law in this state for three years and until respondent shows, in accordance with standard 1.4(c)(ii), proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law.

TALCOTT, J.[*]

Talcott, J., sat in place of Watai, J., who was disqualified.

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[2]The majority opinion points to the following aggravating circumstances established in this case which were not included in the underlying Michigan proceedings: (1) in *Freydl I*, respondent acknowledged that he had failed to keep the California State Bar apprised of his current address and had failed to respond to reasonable status inquiries of his client Killen; (2) as established in *Freydl II*, respondent failed to comply with a condition of the probation imposed in *Freydl I*; and (3) respondent failed to respond to the disciplinary charges or to appear in *Freydl II*.

[3]I am aware that because of the review department's obligation to independently review the record, it must not rely too heavily on other disciplinary recommendations. (*In re Morse*, *supra*, 11 Cal. 4th at p. 207.) I refer to these other recommendations simply to point out that I am not alone in my view that disbarment is not warranted under the facts of this case.

[*]Hearing Judge of the State Bar Court assigned by the Presiding Judge under rule 305(e) of the Rules of Procedure of the State Bar.

Case No. 99-J-11781

In the Matter of Thomas P. Freydl

Hearing Judge

Nancy Roberts Lonsdale

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