

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

H. TED HERTZ

A Member of the State Bar

[No. 85-O-15434]

Filed April 26, 1991; as modified, May 10, 1991

SUMMARY

Respondent was found culpable of disbursing to himself and his client, without authorization, \$15,000 which respondent was to have held in trust for his client and the client's ex-spouse in a marital dissolution matter. Respondent had disbursed \$10,000 to the client to reimburse the client for paying community debts, and had taken \$5,000 for his own fees, which he later replaced. Respondent had also misled opposing counsel, the trial court, the Court of Appeal, and the State Bar investigator as to the location of the entrusted funds. Although the State Bar examiner requested only a one-year actual suspension, the hearing referee recommended that respondent be disbarred. (Elliot R. Smith, Hearing Referee.)

Respondent sought review, claiming prejudicial error on the part of the hearing referee. Specifically, respondent contended that the referee should have granted his motion for a mistrial based on the allegedly prejudicial effect on the referee of the then-examiner's revelation during trial that the examiner had accepted employment as counsel to the State Bar Court. Respondent also challenged the admission into evidence of his ex-wife's testimony on the grounds of confidentiality of marital communications. The review department found no prejudicial error on these issues.

Although it adopted most of the referee's findings, the review department deleted a finding that respondent committed acts of moral turpitude in making the unauthorized disbursements, based on the lack of clear notice of such a charge in the notice to show cause, and relevant case law making moral turpitude questionable given the facts of the matter. The review department also added findings in mitigation, and reduced the recommended discipline from disbarment to a five-year suspension, stayed, five years probation, and actual suspension for two years and until respondent complied with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

COUNSEL FOR PARTIES

For Office of Trials: Harriet J. Cohen

For Respondent: H. Ted Hertz, in pro. per.

HEADNOTES

- [1] **106.20 Procedure—Pleadings—Notice of Charges**
 204.90 Culpability—General Substantive Issues
 561 Aggravation—Uncharged Violations—Found
Where notice to show cause charged respondent with making misrepresentations to opposing counsel and at trial, and respondent testified at disciplinary hearing that similar misrepresentations were also made to court of appeal and to State Bar investigator, this later conduct was properly treated not as bearing on substantive culpability, but on the issue of discipline.
- [2 a, b] **103 Procedure—Disqualification/Bias of Judge**
 162.20 Proof—Respondent’s Burden
To prevail on a claim of error by the hearing referee in denying respondent’s motion for mistrial based on the assertedly prejudicial effect on the referee of the examiner’s revelation during the hearing that the examiner had been hired as State Bar Court counsel, respondent was required to do more than hint at bias. Where respondent failed to show how any bias specifically prejudiced him, and record showed no error or bias, motion for mistrial was properly denied.
- [3 a, b] **130 Procedure—Procedure on Review**
 135 Procedure—Rules of Procedure
An attorney seeking review of a disciplinary decision must present all points when filing the request for review, as the State Bar Court’s rules do not provide for bifurcated review. (Trans. Rules Proc. of State Bar, rules 450-455.) A respondent could not file a second brief addressing the merits of the matter after the review department rejected respondent’s claims of procedural error.
- [4] **125 Procedure—Post-Trial Motions**
 161 Duty to Present Evidence
 162.20 Proof—Respondent’s Burden
Attorneys facing charges of professional misconduct must present to the hearing department all evidence favorable to themselves. A failure to do so may justify denial of a motion for rehearing to present additional evidence.
- [5] **148 Evidence—Witnesses**
 159 Evidence—Miscellaneous
Confidentiality for marital communications does not apply to testimony concerning matters prior to the marriage or after the couple’s estrangement.
- [6] **120 Procedure—Conduct of Trial**
 148 Evidence—Witnesses
 159 Evidence—Miscellaneous
The hearing department has wide latitude to receive all admissible evidence, especially since it sits without a jury. Where respondent’s ex-spouse’s testimony was properly admitted, but because there was little corroboration and due to the marital dissolution the chance of bias was great, the hearing department properly disregarded such testimony, respondent could not successfully claim prejudicial error.

- [7 a, b] **213.40 State Bar Act—Section 6068(a)**
 221.00 State Bar Act—Section 6106
 320.00 Rule 5-200 [former 7-105(1)]
 490.00 Miscellaneous Misconduct
 Where respondent had asked a witness a question, knowing that the witness would testify falsely, in order to mislead the court, respondent was culpable of deceiving the court and of moral turpitude, but in the absence of evidence of an agreement between respondent and the witness, there was no proof that respondent suborned perjury. A determination of subornation of perjury requires clear and convincing proof of a corrupt agreement between the witness and the respondent for the witness to testify falsely.
- [8] **106.20 Procedure—Pleadings—Notice of Charges**
 221.00 State Bar Act—Section 6106
 280.00 Rule 4-100(A) [former 8-101(A)]
 420.00 Misappropriation
 General charges in a notice to show cause of disbursing trust funds without permission or knowledge of the beneficiary did not give adequate notice of a charge of misappropriation of such funds, without further specification as to the facts giving rise to the accompanying charge of committing acts of moral turpitude.
- [9] **221.00 State Bar Act—Section 6106**
 280.00 Rule 4-100(A) [former 8-101(A)]
 430.00 Breach of Fiduciary Duty
 Improper withdrawal of entrusted funds in violation of duty to maintain funds in trust, and of fiduciary duty to opposing party, does not necessarily rise to the level of an act of moral turpitude.
- [10 a-c] **221.00 State Bar Act—Section 6106**
 280.00 Rule 4-100(A) [former 8-101(A)]
 541 Aggravation—Bad Faith, Dishonesty—Found
 In a matter in which respondent prematurely disbursed entrusted funds to repay client for expenses later determined to have been properly reimbursable, and also withdrew funds for attorney's fees but later replaced those funds, the gravamen of the case, for the purpose of assessing the appropriate discipline, was the prolonged deceit perpetuated by respondent on opposing counsel and the courts regarding the unauthorized disbursements. Respondent's extended practice of deceit on courts and counsel made respondent's case far more serious as to discipline than the trust violations.
- [11] **280.00 Rule 4-100(A) [former 8-101(A)]**
 824.54 Standards—Commingling/Trust Account—Declined to Apply
 Premature withdrawal of trust funds in a marital dissolution to pay community debts, without misrepresentations or financial loss to the opposing party or opposing counsel, combined with impressive character testimony, would warrant discipline in the neighborhood of 30 days actual suspension, not lengthy suspension or disbarment.
- [12 a, b] **740.10 Mitigation—Good Character—Found**
 765.10 Mitigation—Pro Bono Work—Found
 Testimony of several highly reputable character witnesses attesting to respondent's otherwise high standing in the legal community and high ethical standards and demonstration of diligence on behalf of clients, as well as substantial community service and pro bono activities, should have been given more than a little weight in mitigation; review department found it to be significant.

- [13] **802.69 Standards—Appropriate Sanction—Generally**
 1091 Substantive Issues re Discipline—Proportionality
 1099 Substantive Issues re Discipline—Miscellaneous
In cases involving attorney discipline for serious offenses, the Supreme Court has: (1) stated that serious offenses call for severe discipline and warrant disbarment in the absence of clear or compelling mitigation; (2) recited similar language but evaluated the type of misconduct as a lesser offense; or (3) emphasized that there is no fixed formula as to discipline, and that appropriate discipline can only be arrived at by a balanced consideration of relevant factors, on a case-by-case basis.
- [14] **802.30 Standards—Purposes of Sanctions**
The Supreme Court has been consistent in measuring discipline against the purposes of attorney discipline, which are the protection of the public, courts and legal profession, maintenance of integrity of the profession and high professional standards and preservation of public confidence in the legal profession.
- [15] **802.69 Standards—Appropriate Sanction—Generally**
 833.90 Standards—Moral Turpitude—Suspension
 1092 Substantive Issues re Discipline—Excessiveness
Disbarment will not be ordered where there is no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public.
- [16] **221.00 State Bar Act—Section 6106**
 280.00 Rule 4-100(A) [former 8-101(A)]
 420.00 Misappropriation
 822.51 Standards—Misappropriation—Declined to Apply
Violations of trust account rules which do not involve a misappropriation found to constitute an act of moral turpitude are not treated, for the purpose of determining appropriate discipline, as misappropriations within the contemplation of standard 2.2(a), Standards for Attorney Sanctions for Professional Misconduct, for which disbarment is the presumed sanction.
- [17] **710.53 Mitigation—No Prior Record—Declined to Find**
Where respondent had practiced for only four years prior to his misconduct, his lack of prior discipline was not mitigating.
- [18] **120 Procedure—Conduct of Trial**
 735.10 Mitigation—Candor—Bar—Found
Respondent's stipulation to the charges at the outset of the hearing constituted cooperation carrying mitigating weight.
- [19] **204.90 Culpability—General Substantive Issues**
 213.40 State Bar Act—Section 6068(d)
 320.00 Rule 5-200 [former 7-105(1)]
 430.00 Breach of Fiduciary Duty
 541 Aggravation—Bad Faith, Dishonesty—Found
Attorneys are expected to be forceful advocates for clients' legitimate causes, but role played by attorneys in honest administration of justice is critical. Attorneys, by adherence to their high fiduciary duties and the truth, can sharply reduce or eliminate clashes and ease the way to dispute

settlement. Where parties to marital dissolution matter agreed to allow husband's counsel to hold community funds in trust pending resolution of dispute regarding property settlement, relying on counsel's duty as an attorney to honor the trust nature of the money, attorney's misconduct in improperly disbursing funds and then misrepresenting to wife's counsel and courts that funds were still held in trust account was especially regrettable.

- [20 a-c] 176 **Discipline—Standard 1.4(c)(ii)**
 213.40 **State Bar Act—Section 6068(d)**
 320.00 **Rule 5-200 [former 7-105(1)]**
 802.30 **Standards—Purposes of Sanctions**
 833.40 **Standards—Moral Turpitude—Suspension**
 833.90 **Standards—Moral Turpitude—Suspension**
 1092 **Substantive Issues re Discipline—Excessiveness**

First offense deceit has not resulted in disbarment in Supreme Court cases. No act of concealment or dishonesty is more reprehensible than attempts to mislead a court; nonetheless, disbarment for such misconduct may be too drastic and unnecessary to achieve the goals of attorney discipline. Where respondent presented evidence of general good character, discipline of five years stayed suspension, five years probation, and two years actual suspension, with standard 1.4(c)(ii) requirement, was adequate.

ADDITIONAL ANALYSIS

Culpability

Found

- 213.41 Section 6068(d)
- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 320.01 Rule 5-200 [former 7-105(1)]
- 430.01 Breach of Fiduciary Duty

Not Found

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2
- 221.50 Section 6106
- 420.55 Misappropriation—Valid Claim to Funds
- 490.05 Miscellaneous Misconduct

Aggravation

Found

- 521 Multiple Acts
- 531 Pattern
- 571 Refusal/Inability to Account
- 588.10 Harm—Generally
- 611 Lack of Candor—Bar

Mitigation

Found but Discounted

- 745.32 Remorse/Restitution

Declined to Find

- 760.52 Personal/Financial Problems

Standards

- 824.10 Commingling/Trust Account Violations

Discipline

1013.11 Stayed Suspension—5 Years

1015.08 Actual Suspension—2 Years

1017.11 Probation—5 Years

Probation Conditions

1022.10 Probation Monitor Appointed

1024 Ethics Exam/School

1026 Trust Account Auditing

1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, J.:

Respondent, H. Ted Hertz, a member of the State Bar of California since 1977, who has no prior record of discipline, seeks review of a disbarment recommendation of a referee of the former volunteer State Bar Court. The referee rejected the lesser discipline of at least one year of actual suspension sought at trial by the examiner.

The referee found that in 1981 respondent held \$15,000 in trust in a family law matter while representing the husband. Without knowledge or consent of opposing counsel or the opposing party, respondent issued \$10,000 to his client to pay community debts. Respondent later took the remaining \$5,000 for his attorney fees, but replaced the \$5,000 during the pendency of the case on appeal. During and after the period that he took the action of disbursing the money respondent deceived opposing counsel and the superior court that he had kept the entire \$15,000 in trust.

The referee found that during the superior court trial respondent did not suborn his client's perjury as charged in the notice to show cause. However, the referee found respondent knew that his client would commit perjury if asked about respondent's possession of the \$15,000 and that respondent misled both the court of appeal and the State Bar investigator while continuing to mislead opposing counsel.

The referee found that respondent's improper use of the \$15,000 and deceit of both opposing counsel and the trial court derived from respondent's stipulation. Before us respondent presses claims of procedural and substantive errors contending they justify a new trial.

Upon our independent review of the record we adopt in most part the referee's findings of fact. We add findings in mitigation. We look to recent opinions of the Supreme Court pertinent to this matter in

characterizing respondent's misconduct and in arriving at our recommended discipline. We modify the discipline recommendation of the hearing referee; and as we describe *post*, we recommend that respondent not be disbarred, but that he be suspended from the practice of law for five years, stayed, on conditions of two years actual suspension and until proof of compliance with standard 1.4(c)(ii).

I. THE RECORD

A. The Charges and Respondent's Stipulation at Trial

On October 24, 1988, the State Bar's Office of Trial Counsel filed its notice to show cause in this matter. It alleged that in 1981, respondent represented Herbert Cook ("Herbert") in a marriage dissolution action against his wife, Mary. On October 14, 1981, with consent of Mary and her attorney, respondent received \$15,000 to be held in trust for both spouses. About one month later, respondent disbursed \$10,000 of that sum to Herbert. During March and April 1982, respondent withdrew the remaining \$5,000 as payment of his own legal fees due from Herbert. Respondent made both disbursements without the knowledge or consent of Mary or her attorney. Meanwhile, in about December 1981, respondent misrepresented to Mary's attorney that he still held the entire \$15,000 in trust and repeated that misrepresentation to the court trying the Cook dissolution in January 1983. Respondent was also charged with suborning perjury from Herbert by eliciting from him testimony that respondent still held the monies in trust.

The notice to show cause charged respondent with the following violations of the Business and Professions Code:¹ section 6068 (a) (duty to support the laws), 6068 (d) (duty to employ truthful means and not mislead a judge), 6103 (violation of duties is ground for suspension or disbarment) and 6106 (act of moral turpitude, dishonesty or corruption). It also charged that respondent violated the following Rules of Professional Conduct of the State Bar:² 7-105(1)

1. Unless otherwise noted, all references to "section" are to sections of the State Bar Act set forth in the Business and Professions Code.

2. Unless otherwise noted, all references to "rules" are to the Rules of Professional Conduct of the State Bar in effect from January 1, 1975, through May 26, 1989.

(obligation to employ truthful means and not to mislead a judge) and 8-101(A) (obligation to avoid commingling of trust funds).

Near the outset of the State Bar Court trial, respondent, represented by experienced counsel, stipulated to all charges of the notice to show cause except for the one charge that he suborned his client's perjury. (1 R.T. pp. 15-19.)³

B. Additional Stipulated Facts and Supplemental Evidence

In addition to trying the issue of whether respondent suborned the perjury of Herbert, respondent offered evidence to attempt to explain or justify his handling of the \$15,000. Further, respondent offered evidence in mitigation including testimony of character witnesses. We summarize this evidence below.

1. Respondent's Receipt of \$15,000 of Community Property Funds to Hold in Trust

On January 30, 1980, Herbert, in pro per, filed a petition in Superior Court, Orange County, for dissolution of his 11-year marriage to Mary.⁴ Two weeks later, Mary, represented by Patricia Herzog, filed her response. (Exh. 8: A.A. pp. 1-4.)⁵ After two orders to show cause initiated by Herzog which caused a financial burden on Herbert, he hired respondent to represent him. (1 R.T. pp. 105-107.) According to respondent, Herbert was not only a client but a friend and respondent discussed his personal life with Herbert. As respondent testified, "[t]here was nothing [Herbert] wouldn't do to help me, nor, really, I

him under his circumstances." (1 R.T. pp. 131-132.). Respondent also testified that about half of his practice was in family law. (2 R.T. pp. 34, 111-112.)

In about June 1980, Herzog drafted a marital settlement agreement and proposed a settlement based thereon. The proposal included a recitation of \$12,185 in unpaid community debts. It was stipulated at the State Bar Court hearing that this agreement was prepared without formal discovery and was never reduced to a judgment. (1 R.T. pp. 19-23.) Herbert could not agree to all of the terms of the proposed settlement; nevertheless he wished to remarry. On December 19, 1980, the superior court issued a final order of dissolution nunc pro tunc to July 24, 1980, and reserved all of the property settlement and related matters. (Exh. 8: A.A. pp. 25-26.)

By August 1981, the superior court had issued an order restraining either party from disposing of community property (exh. 8, A.A. p. 23) and respondent was aware of the order. (2 R.T. pp. 35-37.) The major community asset was the couple's Huntington Beach home. In the summer of 1981, the couple decided to sell that home; but since they could not agree on how to dispose of all of the sale proceeds,⁶ Herzog and her client and respondent and his client agreed that \$15,000 would be withheld from escrow and placed in respondent's trust account until, in Herzog's words, "we agreed on how it would be disbursed." (2 R.T. pp. 184; see also respondent's testimony at 1 R.T. pp. 121-122.)

On October 14, 1981, respondent received the \$15,000 in community funds from the close of

3. For convenience, the reporter's transcript of the April 20, 1989 hearing will be cited as "1 R.T."; that of the April 11, 1989 hearing as "2 R.T."; that of the April 14, 1989 hearing as "3 R.T."; that of the July 12, 1989 hearing as "4 R.T." and that of the August 7, 1989 hearing as "5 R.T."

4. At the time of the State Bar hearing, Herbert was retired. Prior to 1966, he had a combined 25 years of service with the Los Angeles Police Department and Los Angeles County Sheriff's Department, rising to rank of lieutenant. Between 1966 and 1975, he was employed in the title insurance field and after that in the life insurance field. (1 R.T. pp. 55-56.)

5. The parties introduced portions of the record of *Marriage of Cook* as several different exhibits. In almost all instances, we have found it convenient to refer to that record as part of exhibit 8, copy of the file of the Court of Appeal, Fourth Appellate District, G 000418. Part of that file includes the appellant's appendix in lieu of clerk's transcript (see rule 5.1, Cal. Rules of Court), which we abbreviate "A.A." (See exh. 8: A.A. pp. 237-238.)

6. After other obligations of the Cooks were paid from the escrow of the community home sale, Mary received \$18,257.50 and Herbert received \$4,436.47. (Exh. 6: document labeled "Escrow Receipts" for escrow number 181304, dated 10-14-81.)

escrow. A memorandum attached to the check prepared by the escrow company stated that the check represented “[f]unds to be put in trust for account of [Herbert and Mary] FOR PROPERTY SETTLEMENT,” (Exh. 6.) On October 26, 1981, respondent deposited this check into his trust account at Crocker Bank. (*Id.*)

2. Respondent’s Disbursement of the \$15,000 Without Consent of Opposing Counsel

As already noted, respondent stipulated that on about November 11, 1981, he disbursed to his client, Herbert, \$10,000 of the funds he held in trust, without consent of Herzog or her client Mary. (See also exh 6.) Respondent acted because Herbert “pleaded with [him] a number of times” that he had to have the money to repay his new wife who had advanced that amount of money for Herbert to repay creditors of his prior marriage. (1 R.T. pp. 122-123, 133.) Respondent testified that he accepted the estimate set forth in the proposed marital settlement agreement drafted by Herzog that there were \$12,185 in community bills. Respondent was sure that the trust funds he distributed to Herbert at Herbert’s request were going to be Herbert’s as repayment to him of community debts he had paid. (*Id.* at pp. 133-135.) Respondent’s decision to pay Herbert \$10,000 from the trust funds was based largely on Herbert’s choice of the sum he thought appropriate. (1 R.T. pp. 123-124; 2 R.T. pp. 58-59.)⁷

At the State Bar Court hearing below, respondent freely admitted the charges that he disbursed the \$10,000 without knowledge or consent of Herzog,

advancing various theories to support what he had done. He testified that he believed he had an “understanding” with Herzog that he could reimburse Herbert for community debts while admitting that he had no binding agreement with Herzog. (2 R.T. pp. 54-60.) He also claimed authority under Civil Code section 5113.5⁸ to act as trustee to pay the parties’ community debts but he admittedly had no explicit agreement to operate under that section. (1 R.T. pp. 129-130; 2 R.T. pp. 114, 141-146.) Elsewhere, respondent was equivocal in his testimony as to whether he needed Herzog’s permission before paying the \$10,000 to Herbert. (1 R.T. pp. 128-129.)

As respondent stipulated, during March and April 1982, without Herzog’s knowledge or consent, he withdrew the remaining \$5,000 as payment of his own legal fees due from Herbert. Respondent had no written fee agreement with Herbert, his fee arrangement with him was “loose” but respondent believed that if he could settle the entire matter for a total of \$15,000, Herbert had authorized him to take as his fees anything over \$10,000. (1 R.T. pp. 125-126.) Herbert’s testimony was generally consistent with respondent’s on this point. Herbert did not specifically authorize respondent to use \$5,000 for his fees but gave respondent “sort of a carte blanche” as all that Herbert was concerned about was paying his bills and the \$10,000 gave him enough to do that. (1 R.T. pp. 65-66.) Respondent ultimately testified, however, that his unilateral taking of the \$5,000 as his fees was wrong. (2 R.T. p. 141.) In recognition of this, he put the \$5,000 back into trust in 1984 before its absence was discovered by Herzog or her client.

7. As respondent testified: “Well, as I say, [Herbert] wanted to repay his wife \$10,000. There were other bills that were alleged as—or set out in my trial brief as well, as point of reference here, but he agreed that—I asked him to choose a sum that would be appropriate, based on his knowledge of the matter, because at this juncture, in October, I wasn’t as completely versed on the case as I would become.” (1 R.T. p. 124.) The trial court later held Cook was entitled to credit for proving community debts totalling \$9,185.20. The \$814.80 difference between the \$10,000 prematurely taken and the \$9,185.20 credit ultimately allowed was part of the judgment satisfied by Cook following his unsuccessful appeal.

8. Civil Code section 5113.5 was enacted in 1969 but repealed effective July 1, 1987, at which time it was recodified as Civil Code section 5110.150. During the time of *Marriage of Cook*, section 5113.5 applied to community property transferred by the spouses to a trust and permitted the trustee to convey any trust property in accord with trust provisions without spousal consent unless the trust required such consent. The record contains no evidence that any trust agreement was created as envisioned by the statute and even if one had been made, the statute would have allowed respondent to act only within the agreement’s terms.

3. Respondent's Deceit of Opposing Counsel and Courts Concerning the \$15,000 He Was to Hold in Trust

Although respondent had disbursed the \$10,000 in November 1981 and had taken as his fees the remaining \$5,000 about five months later, it was stipulated that not until December 1984 did Herzog learn that respondent had disbursed the \$10,000. Not until March 1986 did she learn that respondent had used the remaining \$5,000 for a period of two years and she learned that from the State Bar. (1 R.T. pp. 23-25.) The record shows that during most of the intervening time (between 1981 and 1985) respondent actively deceived Herzog, the superior court and the Court of Appeal that he maintained the \$15,000 in his trust account throughout such period.⁹ [1 - see fn. 9]

Respondent's first deceit about these funds was in his December 21, 1981 letter to Herzog, over a month after he had disbursed \$10,000 to Herbert. (Exh. 3.) In that letter, respondent referred to "the entire sum of \$15,000 we are presently holding in our trust account," urged that it be paid to Herbert and respondent proposed to do so on January 15, 1982, unless Herzog objected. On January 11, 1982, Herzog wrote to respondent that he was not authorized to disburse the funds he held in trust. (Exh. 4.)

The property issues were tried in superior court in January 1983, eight months after respondent disbursed the last of the \$15,000. (Exh. 8: A.A. p. 83.) On January 3, 1983, respondent filed a trial brief in which he again referred to the \$15,000, stated it was one of the major issues before the court, that it was given him by escrow and urged the court to "confirm" the entire sum to Herbert. (Exh. 8: A.A. pp. 58-62.) Respondent did not expressly state that he still had the sum in his trust account but neither did he state that he had long ago disbursed the very sum in controversy.

At the trial, in response to a question from respondent as to where the \$15,000 was, Herbert testified that "it's held in trust in your [respondent's] office." (Exh. 7 [excerpt of reporter's transcript of January 3, 1983 trial, p. I-140].) At the State Bar Court hearing, Herbert testified that he did not recall the exact testimony he had given at the family law trial but that respondent told him to tell the truth. (1 R.T. pp. 57-58.) According to respondent, when he asked Herbert at the family law trial about the whereabouts of the \$15,000, he was "taken aback" by Herbert's answer that it was in respondent's trust account. (3 R.T. pp. 75-76.)

In closing argument in the superior court trial, respondent falsely represented that the \$15,000 had been withheld and was "in escrow or in my trust account." (3 R.T. pp. 82-83; exh. 7 [excerpt of reporter's transcript of January 3, 1983 trial, p. I-140].) Herzog's trial brief showed that she believed that respondent did then hold the \$15,000 in trust. (Exh. 8: A.A. pp. 53.) Moreover both the superior court's memorandum of intended decision filed January 23, 1983, and its formal judgment stated that respondent held this sum in trust. (Exh. 8: A.A. pp. 86-87, 110.) From the \$15,000, the court ordered only \$5,820.12 paid to or on behalf of Herbert. (Exh. 8: A.A. pp. 112-113.)

In August 1983, respondent prepared a proposed amended judgment on reserved issues for the superior court trial judge's signature. This document purported to order that certain sums be paid from "the trust fund account of \$15,000." (Exh. 8: A.A. pp. 195-196.)

On September 28, 1983, respondent filed objections to an amended decision proposed by Herzog. Therein, he referred to that proposal's payment of certain sums from the \$15,000 held in trust but did not reveal that all of that money was disbursed from trust. (Exh. 8: A.A. p. 202.) Meanwhile, on Septem-

9. [1] The notice to show cause charged respondent with deceit of Herzog and the superior court at trial (January 1983). At the hearing, respondent testified freely as to his statements to the Court of Appeal and to a State Bar investigator in later years

and we, like the referee, will consider this post-1983 conduct not as bearing on substantive culpability, but on the issue of discipline.

ber 1, 1983, respondent appealed from the May 1983 judgment but, due to many extensions, did not file his opening brief until February 1985. (Exh. 8.)

Because of respondent's delay in filing his appellant's opening brief, Herzog became concerned about the \$15,000. In December 1984, she wrote to respondent asking to see proof that the \$15,000 was being held in trust. Respondent replied with a one-page Sunwest Bank statement dated September 28, 1984, showing a prior balance of zero and a current balance of \$5,135.57. Herzog phoned respondent in December 1984 and he told her for the first time that he had disbursed \$10,000 to Herbert much earlier. He did not tell her however that in August 1984, he had made a deposit of \$5,000 of his own money, representing a return of the legal fees he had unilaterally taken, into an account at Sunwest Bank which he had set up as a trustee for Herbert. (2 R.T. pp. 157-159; exh. 6; exh. 7: Decl. of Herzog, filed August 8, 1985, p. 3.)¹⁰

On January 10, 1985, respondent wrote Herzog that he had disbursed \$10,000 to Herbert in 1981 but maintained that the Sunwest Bank account (which then stood at \$5,207.15) was the "balance, with accrued interest, on the original \$15,000." (Exh. 7: Decl. of Herzog, filed August 8, 1985, attached exh. D.)

Respondent filed his opening brief in the *Marriage of Cook* appeal on February 15, 1985. (Exh. 8.) In his brief, respondent stated that the division of community property, including the \$15,000 sent him from escrow was one of the issues to be decided at trial. He also stated in his brief that the "uncontroverted testimony" was that the \$15,000 was "set aside" for payment of community debts. (*Id.* at pp. 4, 9.) However, respondent did advise the court that he had "reimbursed" Herbert from the \$15,000 for community debts. Petitioner did not state when he had done so nor in what amount but claimed authority to do so under Civil Code section 5113.5. (See *ante.*)

Now suspicious of respondent's handling of funds, Herzog issued a subpoena to Crocker Bank in which respondent had placed the funds in 1981. In July 1985, respondent moved to quash that subpoena. Supporting his motion with his declaration under penalty of perjury, respondent stated on page 5 thereof, that "all information concerning the funds of the parties has been made available" to Herzog and no lawful purpose would be served by the subpoena. The court refused to quash Herzog's subpoena. (Exh. 7: Declaration of H. Ted Hertz, dated July 3, 1985, p. 5.)

In her reply brief in the family law appeal, Herzog urged that respondent's appeal was untimely and in any event, because respondent had apparently disbursed much of the \$15,000 well before trial, without her consent, "the trial, the motion for new trial, and the appeal . . . are exercises in futility." She urged that the Court of Appeal dismiss the appeal and impose sanctions on respondent for bringing a frivolous appeal. (Exh. 8: Respondent's Brief and Request for Sanctions, filed July 22, 1985, pp. 1-2.) In his reply brief filed on August 8, 1985, respondent accused Herzog of misleading the court concerning whether the \$15,000 was to be used to satisfy community debts. He contended that the crux of problems in this matter was the decision of the parties to place \$15,000 with him in trust in the first place and blamed Herzog for the "reams of paper" generated in this appeal. (Exh. 8: Appellant's Reply Brief, filed August 8, 1985, pp. 8-10.)

On January 31, 1986, respondent wrote a statement to a State Bar investigator, who had inquired into a complaint regarding respondent's handling of the \$15,000. While respondent did acknowledge that he determined with Herbert that the \$15,000 would be used for Herbert's benefit, he did not state that his decision was without the consent of Herzog or Mary and that Herzog had specifically objected to respondent using any part of the \$15,000. Respondent's statement was also misleading in several other areas,

10. As noted *ante*, respondent had originally placed the \$15,000 in his trust account at Crocker Bank. Respondent set up the Sunwest account specifically to hold the \$5,000 fee portion long after respondent had taken it as his own. Respondent's testimony about his creation of the new trust account showed his apprehension at being discovered and further emphasized his unilateral decision in taking his fee from trust funds: "As

time progressed in this case and as I now was at the appellate level, I was more scared as time went by that I was going to get burned. I knew that the bills were legit, and I knew that those could be shown. But as to the other [\$5,000], I know [sic] I was going to have to rely only on what I alone decided and that wasn't good. And there came a time where I put the money back." (2 R.T. pp. 159-160, emphasis added.)

such as the effect of what was only a proposed marital settlement agreement and as to whether Herzog had acknowledged that Herbert had advanced money to pay community debts (Exh. 6.)

On September 29, 1986, the Court of Appeal, in an opinion not for publication, dismissed the appeal on account of respondent's untimely filing of the notice of appeal. (Exh. 7.)¹¹ The appellate court declined to impose sanctions. While noting that Herzog's request for them was "technically sound," the Court of Appeal determined that the trial court made errors in its judgment and the appellate court could not say that respondent brought the appeal for an improper motive.¹² (Exh. 7.)

Subsequently, respondent and Herbert satisfied the superior court judgment in Mary's favor by paying about \$7,800. (1 R.T. p. 148; exh. 7: satisfaction of judgment filed March 8, 1988.)

Respondent admits he made misrepresentations to Herzog and the courts. In his words, he "dug a hole" and "didn't know how to extricate" himself from it. (1 R.T. pp. 146-147; 2 R.T. pp. 34-35.) Although respondent testified that he did not set out to deceive the superior court (3 R.T. pp. 58-69), he also testified to deliberate misrepresentations he made to that court. (3 R.T. pp. 86-92, 97.)

In January 1987, Mary, represented by new counsel, filed suit against respondent and Herbert for fraud and deceit, breach of fiduciary duty and for "violation of Business and Professions Code" based on his mishandling of the \$15,000 and deceit about it. (Exh. 9: *Cook v. Hertz, et al.*, Municipal Court, Central Orange County Judicial District No. 202113.) In December 1987, after trial, the court ordered judgment for Mary solely against respondent for \$5,600 plus costs. Respondent appealed from that judgment, abandoned the appeal in April 1988 and paid the judgment. (Exh. 9; 1 R.T. p. 152.)

C. Evidence in Mitigation

At the hearing below, respondent expressed regret at having deceived Herzog regarding his handling of trust funds. (1 R.T. pp. 134-135.) He also presented six character witnesses, three of whom were judges. The witnesses were most impressive in their opinion of respondent's character, although not every witness knew of all of the details of respondent's deceit and not every witness knew respondent for an extensive length of time. One witness, Eugene E. Dunnington, an attorney who had been president of his local bar association, testified to respondent's active involvement in local bar activities in serving as president of the local bar association and as a board member of a county bar association. (1 R.T. pp. 160-162.) Respondent has no prior record of discipline since his 1977 admission to practice law in California.

D. Findings of the Hearing Referee

The hearing referee issued a 23-page decision setting forth the procedural history of the case, the facts related to the charges, the facts relating to evidence of respondent's deceit beyond those charged and bearing on discipline, a discussion of the referee's evaluation of the credibility of witnesses at the State Bar Court hearing and an extensive discussion of considerations bearing on discipline. Consistent with respondent's stipulation, the referee found that respondent had disbursed the \$15,000 of trust funds without authority and had deceived opposing counsel and the trial court about his mishandling of those funds. The referee determined that the notice to show cause charged respondent with misappropriation of funds and respondent had committed that act. However, the referee found that the evidence fell short of proving that respondent had suborned the perjury of his client Herbert. As facts bearing on discipline, the referee found that respondent continued to deceive or mislead Herzog, the trial court and Court of Appeal and

11. Although the opinion of the Court of Appeal in *Marriage of Cook* was not for publication, it may be considered by us. (Cal. Rules of Court, rule 977(b)(2).)

12. Respondent was not charged with nor found culpable of any impropriety in bringing the appeal for any improper purpose.

incurred a civil judgment when Mary sued both respondent and Herbert for fraud and breach of fiduciary duty on account of respondent's misconduct relating to the \$15,000. Further, in 1986, respondent misled a State Bar investigator inquiring into respondent's conduct in handling the \$15,000.

The referee considered all mitigating circumstances offered but concluded that many were of limited weight. Although respondent had no prior record of discipline, he had been licensed to practice for only four years when he started his misconduct. Some of his character witnesses had not been told of the full extent of his misconduct and others had not known him for a very long time. Respondent's remorse was superficial and shown only at the State Bar Court hearing. Respondent did not show that his marriage dissolution and other problems caused his misconduct which spanned a long period of time, "most of which saw [him] in a stable emotional and family setting." (Hearing panel's decision, filed July 16, 1990, p. 20 [hereafter "decision"].) In aggravation, the referee found that respondent's misconduct showed both multiple acts and a pattern involving wrongdoing throughout the case, it was surrounded by bad faith, dishonesty and persistent refusal to account for trust funds, it significantly harmed Mary who incurred large attorney fees and had to file a separate lawsuit to get recompense, it harmed the administration of justice and demonstrated respondent's lack of candor and cooperation.

After "long and difficult reflection," the referee came to his disbarment recommendation despite noting that the examiner had recommended a one-year actual suspension. (Decision, p. 22.) The referee offered several bases for his disbarment recommendation: that respondent committed severe ethical violations "at every opportunity presented to him," that respondent's misconduct destroyed the trust that is the foundation of the legal profession and judicial

system; his disbarment was necessary to prevent further erosion of public confidence in the legal profession; and that while respondent may be rehabilitated in the future, he had not yet established that quality. (Decision, p. 23.)¹³

II. DISCUSSION

A. Respondent's Procedural Contentions

At the outset, we resolve respondent's procedural contentions.

[2a] Respondent contends first that the referee erred in denying his motion for mistrial. Respondent made his motion when then-examiner George Scott stated at the outset of the third trial day that he had learned two days earlier that his application to serve as an attorney for the State Bar Court had been successful and he had been offered such a position but would not start his new duties for three weeks. Scott revealed his imminent change in employment as he thought that it could create a potential conflict should he continue to act as examiner even before the start of his new duties. (3 R.T. pp. 4-5, 14.) Respondent's counsel articulated the conflict as affecting how the hearing referee might view Scott's work since he would soon become part of the office advising the referee and expressed concern for the objectivity of any review before the review department which would also be advised by the court counsel attorneys whom Scott would be joining. Respondent's counsel believed that Scott's new position tainted everything in the trial record to date and called for a new trial. (3 R.T. pp. 4-14.) After extended colloquy and very careful consideration of respondent's motion, the referee denied it, concluding that there was no proof of any current conflict and the chance of any potential conflict was too remote to justify relief. (3 R.T. pp. 18-21.) During this colloquy, Scott stated that he would be recused from

13. The referee stated as follows concerning his assessment of respondent's rehabilitation: "Rehabilitation may be possible, but in the context of the multiple acts of misconduct it is recommended that the burden be placed on Respondent to show such rehabilitation once the statutory [sic] period after disbarment has passed. It is hard to conceive of a bar-moni-

tored rehabilitation program that would cure the fundamental ethical shortcomings Respondent has demonstrated in his commission of both the quality and quantity of violations described herein. The panel feels he may be able to successfully demonstrate rehabilitation in the future, but this has yet to be proven." (Decision, p. 22.)

further participation in the matter and the referee directed Scott not to discuss the case with anyone. Scott completed the third day of hearing as examiner. On May 8, 1989, the Office of Trial Counsel filed a substitution replacing Scott with examiner Harriet Cohen. The record shows that after May 8, Scott participated no further in this matter.

[2b] We reject respondent's claim. To prevail on his claim of error, respondent must do more than hint at bias. He must show clearly how any bias specifically prejudiced him. (See *Weber v. State Bar* (1988) 47 Cal.3d 492, 504; *Rosenthal v. State Bar* (1987) 43 Cal.3d 612.) He has failed to do so either at hearing or on review and on review he has neither set forth any evidence of error or bias whatever on the part of the referee nor has he cited any authority supporting his claim. Our review of the record shows no error or bias. At the start of the first trial day, respondent stipulated to all charges against him but one and contrary to respondent's assertion, the referee resolved in respondent's favor the one remaining charge of suborning Herbert's perjury. Similarly, the referee's analysis of the case to reach his discipline recommendation was objective and there is no evidence that the referee either spoke with Scott about the case after his substitution or that he was affected in any way by Scott's new role for the court.¹⁴

[3a] We similarly deny respondent's request to be allowed a further opportunity to file his brief "in chief" upon our denial of his foregoing request for relief. [4] The Supreme Court has long required attorneys facing charges of professional misconduct to present to the hearing referee all evidence favorable to themselves. As the Court observed in *Warner v. State Bar* (1983) 34 Cal.3d 36, 42-43, a member of the bar has a duty to present at the hearing all evidence he deems favorable to himself and a failure to do so may justify a denial of a motion for rehearing for the purpose of presenting additional evidence. (See also *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 447, and cases

cited.) We believe that the analogous principle should apply equally to our review of the hearing referee's decision. [3b] A member seeking review must present all points when filing the request for review and our rules provide for no bifurcated review. (Rules 450-455, Trans. Rules Proc. of State Bar.)

Respondent next urges that the referee erred by allowing testimony of Sandra Hertz, respondent's former secretary and ex-spouse. Again, citing no authority, respondent suggests this testimony was privileged and asserts it was prejudicial and inflammatory. We hold that the referee did not err and that no prejudice has occurred. [5] The referee admitted the testimony of Ms. Hertz after concluding that the testimony concerned matters either before her marriage to respondent or after the couple became estranged. Under those circumstances, the confidentiality for marital communications (Evid. Code, § 980) did not apply. (Cf. *Tracy v. Tracy* (1963) 213 Cal.App.2d 359, 363.) [6] The referee had a wide latitude to receive all admissible evidence (see Evid. Code, § 351; rule 556, Trans. Rules Proc. of State Bar), especially sitting without a jury. Ms. Hertz's testimony was relevant on the issue of discipline. Nevertheless, the referee recognized that there was little corroboration for Ms. Hertz's testimony, the chance of bias was too great in view of the marriage dissolution and related matters and the referee disregarded her testimony and refused to weigh any of its revelations against respondent. (Referee's decision, pp. 17-18; see also Evid. Code, § 352.) Under these circumstances, respondent has no cause for complaint. As did the hearing referee, we disregard Ms. Hertz's testimony as well.

B. Respondent's Culpability

There can be no doubt as to respondent's culpability of improper disbursement of the \$15,000 in Cook trust funds without Herzog's or Mary's knowledge or consent in violation of former rule 8-101, and his subsequent deceit of Herzog and the trial court

14. Respondent complains that Scott discussed some aspects of the case with his successor examiner Cohen and thus failed to adhere to the referee's admonition not to discuss the case with anyone. However, respondent's argument shows nothing more than that Scott conveyed to Cohen formalistic information

which was ultimately contained in the reporter's transcript as to who had testified. There is no evidence that Scott discussed with Cohen the substance of the witnesses' testimony or the merits of the case itself.

until 1983 in violation of section 6106 that the funds remained intact. [7a] Respondent's deceit of the superior court violated rule 7-105 as well as sections 6068 (d) and 6106. In addition to respondent's stipulation to those charges, they were established conclusively at trial, including by respondent's own testimony.

On the authority of *Sugarman v. State Bar* (1990) 51 Cal.3d 609, 617 and *Baker v. State Bar* (1989) 49 Cal.3d 804, 815-816, we decline to adopt the referee's conclusion that respondent's conduct violated sections 6068 (a) and 6103.

[7b] We uphold the referee's findings that the evidence was not clear and convincing to find that respondent suborned Herbert's perjury. On review, the examiner does not dispute this finding. As the referee correctly observed, a determination of subornation of perjury would require proof of a corrupt agreement between Herbert and respondent for Herbert to testify falsely. (*People v. Jones* (1967) 254 Cal.App.2d 200, 217, cert. den. (1968) 390 U.S. 980.) Like the referee, we do not find the proof of any such agreement clear and convincing. At the same time, we adopt the referee's finding, as amply supported by the record, that, in order to mislead the court, respondent asked Herbert at trial about the location of the trust funds knowing that Herbert would testify falsely. Respondent on his own had decided much earlier than trial to conceal from Herzog, Mary and the superior court his misuse of the trust funds and respondent's examination of his own client on the witness stand at the family law trial was entirely consistent with his deceptive aims.

[8] The only finding of culpability made by the referee which is disputed by respondent is that he was culpable of misappropriation of funds in violation of section 6106. We agree with respondent. The notice did not use the term misappropriation of funds, it charged respondent with disbursing trust funds without the permission or knowledge of Mary, a trust beneficiary or her counsel, Herzog. The notice cited respondent to rule 8-101(A), prohibiting improper

commingling of trust funds with personal funds and requiring trust funds to remain in a proper trust account. It also cited respondent to section 6106 (making acts of dishonesty, moral turpitude or corruption subject to suspension or disbarment) but did not indicate what facts gave rise to that charge which could have been based solely on the alleged misrepresentations and allegations of subornation of perjury.

[9] There is no question that respondent improperly withdrew funds in violation of rule 8-101(A) and his fiduciary obligation to the opposing party and her counsel. (See *Crooks v. State Bar* (1970) 3 Cal.3d 346, 355; *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 978-979.) But this does not necessarily rise to the level of an act of moral turpitude in and of itself. In neither *Crooks, supra*, nor *Guzzetta, supra*, was a violation of section 6106 found to have occurred in the trust account violations which breached the member's fiduciary duty. The Supreme Court recently readdressed this very issue in *Sternlieb v. State Bar* (1990) 52 Cal.3d 317. There, an attorney was charged with violation of section 6106 solely on the basis of alleged misappropriation of trust account funds and the review department recommended a finding that section 6106 was violated as well as former rules 8-101(B)(3) and 8-101(B)(4). The Supreme Court disagreed.

There, as here, the attorney was found to have improperly withdrawn several thousand dollars for fees from her trust account without reasonable belief that she had received authorization to use the funds. The Court found that the mismanagement was not dishonest and therefore found 8-101 rule violations but not a violation of Business and Professions Code section 6106. Earlier in *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, the Court found numerous trust account violations in the removal of client funds from a trust account and delayed payment to the client which it described as "technically wilful" misappropriation but characterized for purposes of determining the degree of discipline as "falling between wilful misappropriation and simple commingling." (*Id.* at pp. 1367-1368.) No section 6106 violation was found in *Lawhorn* either.¹⁵

15. However, in *Lawhorn*, other aggravating circumstances including deceit of the client were found. (See discussion in *Hipolito v. State Bar* (1989) 48 Cal.3d 621, at p. 627.)

In light of the unclear basis for the charged violation of section 6106 in the notice to show cause and the relevant case law making such a violation questionable on these facts, we decline to adopt the conclusion that respondent was culpable of violating section 6106 by his trust account violations although he was properly found culpable of violating section 6106 by his extensive misrepresentations.

C. Discipline

We now discuss the prime issue in this case, appropriate discipline.

[10a] For purposes of assessing the appropriate discipline we believe that the gravamen of the case is the prolonged deceit perpetuated by respondent on opposing counsel and the courts. [11] Had the only charge been the premature withdrawal of trust funds to pay community debts, and had respondent been honest with Herzog from the outset about his premature withdrawal of funds to accede to his client's wishes, in light of his character witnesses' testimony, it is doubtful that a discipline recommendation much different from the 30 days actual suspension ordered in *Sternlieb v. State Bar, supra*, would have been appropriate. Community debts in that approximate amount were in fact paid and no harm occurred to Mary Cook by the extinguishment of that debt on her behalf. Indeed, she received at the time of judgment the exact amount ordered by the court and thus never suffered any pecuniary harm from the premature withdrawal of funds from the trust account to pay community debts. While the unauthorized withdrawal of attorneys fees was more serious, no pecuniary harm resulted to Herzog or her client because respondent made the trust account whole before any funds were required to be released.¹⁶ This does not excuse respondent's misconduct, just as *Sternlieb* was found culpable of similar unauthorized withdrawals of attorneys fees albeit for a shorter period of time. But lengthy suspension or disbarment would likely not have been the recommended sanc-

tion, any more than it was in *Sternlieb* or other cases involving similar misconduct. (See, e.g., *Crooks v. State Bar, supra*, 3 Cal.3d at p. 355.) However, unlike *Sternlieb*, what was of grave concern to the referee and is of grave concern to us is respondent's conduct after his improper withdrawal of funds from his trust account.

The referee adopted extensive findings bearing on discipline. (Referee's decision, page 8, line 5 to page 14, line 19 and page 15, line 23 to page 20 line 17.) On our independent review of the record, we adopt those findings except as expressly modified herein. [10b] The findings show that respondent's trust account violations were aggravated by a pattern of nine acts of deceit to forestall discovery of his breach of trust. His victims included opposing counsel and her client and, as to six of the acts, a superior court. He extended his deceit to the Court of Appeal and a State Bar investigator. Respondent went to extraordinary lengths over nearly five years to keep Herzog and the courts from learning that he had abused his trust responsibilities, exposing himself and his client to perjury and opening a bank account to perpetuate his deceit. Respondent's deception resulted in separate civil proceedings which burdened the administration of justice.

[12a] We modify the findings in mitigation to note that although respondent showed extremely poor judgment in this instance, he had several highly reputable character witnesses who attested to his otherwise high standing in the legal community and high ethical standards and demonstration of diligence on behalf of clients. Evidence of substantial community service and pro bono activities was also introduced. Although the referee considered these as mitigating factors, he apparently gave them little weight in recommending disbarment. We have concluded, however, that the mitigation produced below was similar to that offered in *Sternlieb v. State Bar, supra*, 52 Cal.3d at p. 331, and is entitled to more weight than recommended below.

16. We thus disagree with the referee and find no basis in the record for concluding the appeal was frivolous or that the deception caused any delay in the collection of the judgment.

We note that the Court of Appeal expressly denied a motion for sanctions on this issue.

[13] Different cases discussing attorney discipline for serious offenses often display one or the other of several different threads of Supreme Court expressions. First, in what may be called the “serious offense” thread, the Supreme Court has emphasized the seriousness of the attorney’s offense(s) as calling for severe discipline and has sometimes stated that such offenses warrant disbarment in the absence of clear or compelling mitigation. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128; *In re Basinger* (1988) 45 Cal.3d 1348, 1358.) Other cases recite similar language but clearly evaluate the type of misconduct as a lesser offense. (See, e.g., *In re Vaughn* (1985) 38 Cal.3d 614, 618-619 [public reproof for trust account violations including misappropriation].) In another thread which might be referred to as the “individualized balancing” thread, the Supreme Court has emphasized that there is no fixed formula as to discipline and that discipline in such matters arises from a balanced consideration of relevant factors, on a case-by-case basis. (*Stevens v. State Bar* (1990) 51 Cal.3d 283, 288-289; *Stanley v. State Bar* (1990) 50 Cal.3d 555, 565, and cases cited; *In re Billings* (1990) 50 Cal.3d 358, 366.)

[14] Despite these seemingly different threads, the Supreme Court has used consistent cloth in defining the purposes of attorney discipline and in measuring discipline against those purposes. The Court’s paramount concern, as ours must be, has been stated over many years to be the protection of the public, courts and legal profession, the maintenance of integrity of the profession and high professional standards and preservation of public confidence in the legal profession. (See *In re Billings, supra*, 50 Cal.3d at pp. 365-366; *Twohy v. State Bar* (1989) 48 Cal.3d 502, 512; *Gary v. State Bar* (1988) 44 Cal.3d 820, 827; *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 198; *Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 576.)

[15] The Court has often stated that disbarment will not be ordered where it has no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958; cf. *Rimel v. State Bar* (1983) 34 Cal.3d 128, 131-132; see also *Friedman v. State Bar* (1990) 50 Cal.3d 235, 244-245; and *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316-318.)

As discussed more fully below, we conclude that the appropriate sanction here is lengthy suspension with a requirement of a standard 1.4(c)(ii) hearing prior to resumption of practice. We start with the Standards for Attorney Sanctions for Professional Misconduct (“stds.”) (Trans. Rules Proc. of State Bar, div. V) as guidelines which are commended to us to aid in achieving consistency in discipline for similar offenses. (*In re Naney* (1990) 51 Cal.3d 186, 190.)

[16] As in *Sternlieb, supra*, and *Lawhorn, supra*, we do not treat the violations as misappropriations within the contemplation of standard 2.2(a), for which disbarment is the presumed sanction, but construe standard 2.2(a) to refer to those misappropriations to which moral turpitude attaches in violation of section 6106. We note that the examiner either came to a similar conclusion in recommending to the hearing referee a one-year suspension rather than disbarment or concluded that compelling mitigating circumstances justified a suspension recommendation based on recent decisions of the Supreme Court imposing suspension, rather than disbarment in certain misappropriation of funds cases. (See, e.g., *Friedman v. State Bar, supra*, 50 Cal.3d at pp. 239-241, 244; *Wellerv. State Bar* (1989) 49 Cal.3d 670, 677; *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 628, fn. 4.)

We note that if, consistent with *Lawhorn*, we treat respondent’s trust account violations for purposes of discipline as not being classified as a true misappropriation case, the misconduct warrants a minimum of three months suspension under standard 2.2(b). Respondent’s deceit to Herzog and the courts warrants disbarment or suspension depending on the extent to which the victim is harmed or misled and depending on the magnitude of the deceit and degree to which it related to respondent’s acts within the practice of law. (Std. 2.3.) [10c] Here, respondent’s deceit while representing a client in a contested family law matter actually misled Herzog, her client and the trial court for several years. We believe that his extended practice of deceit on courts and counsel makes his case far more serious as to appropriate discipline than the trust account violations. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300; std. 1.2(b)(iii).)

When we compare this case to other similar cases we cannot agree with the referee's assessment that respondent's offenses, taking into account both mitigating and aggravating circumstances, require disbarment. [17] We do agree that respondent had been practicing for only four years when he started committing his misconduct. His lack of a prior record therefore cannot be mitigating. (*In re Naney, supra*, 51 Cal.3d at p. 196.)

Although respondent did suffer from some office and marital problems, they did not underlie his misconduct to serve as mitigating. (See *In re Naney, supra*, 51 Cal.3d at pp. 196-197.) [12b] However, we do find his character evidence to be significant mitigating evidence. (*Sternlieb v. State Bar, supra*, 52 Cal.3d at pp. 331-332.)

[18] We also note that respondent did stipulate to the charges at the outset of the hearing before the referee, and that cooperation carries mitigating weight.

The referee did not cite any cases in support of his recommendation of disbarment but relied solely on the standards, particularly standards 2.2(a) and 2.3. We understand the referee's concern which prompted the recommendation of disbarment. [19] While an attorney is expected to be a forceful advocate for a client's legitimate causes (see *Ramirez v. State Bar* (1980) 28 Cal.3d 402, 414; *Gallagher v. Municipal Court* (1948) 31 Cal.2d 784, 795-796), in this society of limited court resources challenged by growing volumes of litigation, the role played by attorneys in the honest administration of justice is more critical than ever. Contested family law matters can be especially acrimonious and trying to the litigants, their attorneys and the courts, even without fault and wrong as grounds for relief. (See *In re Marriage of McKim* (1972) 6 Cal.3d 673, 679.) Attorneys, by adherence to their high fiduciary duties and the truth, can sharply reduce or eliminate clashes and ease the way to dispute settlement. Mary agreed that although she and Herbert disputed the amount of the property settlement, the community home could be sold and the disputed \$15,000 of after-sale proceeds could rest in respondent's trust account until resolution, relying on respondent's duties as an attorney to honor the trust nature of that money. Thus, it is especially regrettable that

respondent's actions in this marriage dissolution matter exacerbated conflict and burdened the litigants and courts. Respondent's disregard of his duties was serious and prolonged.

[20a] Nonetheless, first offense deceit of this nature has not resulted in disbarment in other cases. (See, e.g., *In re Kristovich* (1976) 18 Cal.3d 468, 476-477 [three months actual suspension for perjury after otherwise lengthy, unblemished practice]; *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149-1150 [six months actual suspension for numerous dishonest acts and careless handling of client's affairs].) Most closely analogous is *Rodgers v. State Bar, supra*, 48 Cal.3d 300, in which the volunteer review department recommended disbarment of an attorney who, among other things, repeatedly deceived opposing counsel and the probate court. The Supreme Court noted that: "No act of concealment or dishonesty is more reprehensible than Rodgers's attempts to mislead the probate court." (*Id.* at p. 315.) It also noted that Rodgers had a lengthy period of otherwise unblemished practice but that there were also a host of aggravating circumstances, most significantly the fact that he consistently attempted to conceal his wrongful acts. (*Id.* at p. 317.)

[20b] Nonetheless, the Supreme Court held that disbarment of Rodgers was too drastic and unnecessary to achieve the goals of protecting the public, the profession and the courts. (*Id.* at p. 318.) In so ruling, it noted that disbarment was far greater than the discipline imposed by the Court under similar circumstances in the past, reviewing a number of cases with discipline ranging from 30 days actual suspension to two years actual suspension depending on the circumstances. It concluded that five years stayed suspension conditioned on two years actual suspension and probation for the remainder of the five-year period "is proportional to the harm Rodgers caused, comports with the discipline we have imposed in similar cases, and recognizes that Rodgers has no prior record of discipline." (*Id.* at pp. 318-319.) The harm caused by respondent is similar here. While his lack of a prior record of discipline carries no weight because of the shortness of his length of practice prior to the misconduct, he has demonstrated far more evidence of his general good character through testimony in mitigation than Rodgers demonstrated.

[20c] From the facts of this case, we believe that the referee did appropriately require proof of rehabilitation prior to respondent being allowed to resume practice. We therefore conclude that fulfilling the purposes of attorney discipline—protection of the public, courts and legal profession and the maintenance of integrity of and public confidence in that profession—calls on us to require that respondent show by a preponderance of the evidence in a standard 1.4(c)(ii) proceeding after two years of actual suspension that he has been rehabilitated and is fit to practice law before being allowed to do so again.

III. RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law for five years; that execution of such order be stayed; and that respondent be placed on probation for five years on the following conditions:

1. That during the first two years of said period of probation and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, he shall be suspended from the practice of law in the State of California;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date:)

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

4. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) that respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) money received for the account of a client and money received for the attorney's own account;

(2) money paid to or on behalf of a client and money paid for the attorney's own account;

(3) the amount of money held in trust for each client;

(b) that respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

(c) that respondent has maintained a permanent record showing:

(1) a statement of all trust account transactions sufficient to identify the client in whose behalf

the transaction occurred and the date and amount thereof;

(2) monthly total balances held in a bank or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(3) monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) that respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

5. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

6. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

7. That, except to the extent prohibited by the attorney client privilege and the privilege against self-incrimination, he shall answer fully, promptly

and truthfully to the Presiding Judge of the State Bar Court, her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

8. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective; and

9. That at the expiration of said probation period, if he has complied with terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of five years shall be satisfied and the suspension shall be terminated.

We further recommend that respondent be directed to comply with the requirements of rule 955 of the California Rules of Court within thirty (30) calendar days of the effective date of the Supreme Court order herein, and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the order showing his compliance with said order.

Finally, we recommend that respondent be required to take and pass the California Professional Responsibility Examination prior to the expiration of his actual suspension.

We concur:

PEARLMAN, P.J.
NORIAN, J.