

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

HOWARD KUEKER

A Member of the State Bar

[No. 85-O-15884]

Filed June 7, 1991

SUMMARY

Respondent was found culpable of misappropriating over \$66,000 in client trust funds and repeatedly lying to the client's agent to conceal the theft. In aggravation, respondent was neither cooperative nor candid during the State Bar's investigation of his misconduct. The hearing department recommended a five-year stayed suspension with actual suspension for two years and until restitution was made. (Howard M. Fields, Hearing Referee.)

Respondent sought review, contending that the hearing referee was biased, that there were errors in the findings, and that the recommended discipline was excessive. The review department rejected the contention of bias, but modified the referee's findings and conclusions, particularly with regard to restitution. Based on Supreme Court precedent, the review department recommended that respondent be disbarred. (Pearlman, P.J., dissented and filed a separate opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Dominique Snyder

For Respondent: Howard Kueker, in pro. per.

HEADNOTES

[1 a, b] 103 Procedure—Disqualification/Bias of Judge  
169 Standard of Proof or Review—Miscellaneous

Party claiming judicial bias has burden to clearly establish such bias and to show specific prejudice; disagreement with how referee weighed issues, and showing of immaterial factual errors, did not establish bias on part of referee who acted in patient, fair, and commendable manner during hearing.

- [2]      **135      Procedure—Rules of Procedure**  
**166      Independent Review of Record**  
Pursuant to Transitional Rules of Procedure 453(a), review department's independent fact finding authority permits it to delete erroneous finding from hearing department's decision.
- [3 a-c]   **171      Discipline—Restitution**  
**277.60   Rule 3-700(D)(2) [former 2-111(A)(3)]**  
**290.00   Rule 4-200 (former 2-107)**  
Attorney who rendered services to client before committing misconduct was entitled to collect fee earned prior to commencement of misconduct.
- [4]      **822.10   Standards—Misappropriation—Disbarment**  
Both under Supreme Court case law and under the standards, an attorney's misappropriation of client funds, being a gross or grievous breach of morality, warrants disbarment in the absence of clearly extenuating circumstances, or unless the amount taken was insignificant or the most compelling mitigating circumstances clearly predominate.
- [5]      **831.40   Standards—Moral Turpitude—Disbarment**  
An attorney's acts of deceit are very serious, and under the standards warrant suspension or disbarment.
- [6]      **521      Aggravation—Multiple Acts—Found**  
**541      Aggravation—Bad Faith, Dishonesty—Found**  
**795      Mitigation—Other—Declined to Find**  
**831.20   Standards—Moral Turpitude—Disbarment**  
**831.50   Standards—Moral Turpitude—Disbarment**  
Attorney's deceit of client's agent on 11 separate occasions over a considerable period was an aggravating factor, and militated strongly against considering attorney's misconduct as one-time or aberrant.
- [7]      **591      Aggravation—Indifference—Found**  
**745.39   Mitigation—Remorse/Restitution—Found but Discounted**  
Attorney's failure to make full restitution was an aggravating factor, where partial restitution was made largely out of attempt to deceive client; client's refusal to accept further restitution after State Bar complaint was filed did not extinguish attorney's moral obligation to complete restitution.
- [8]      **822.10   Standards—Misappropriation—Disbarment**  
**831.30   Standards—Moral Turpitude—Disbarment**  
**831.40   Standards—Moral Turpitude—Disbarment**  
**831.50   Standards—Moral Turpitude—Disbarment**  
Where attorney committed serious offenses including misappropriation of large sum from client and subsequent deceit of client's agent, issue before State Bar Court was whether mitigating circumstances clearly outweighed or predominated in order to warrant recommendation of less than disbarment.
- [9]      **710.35   Mitigation—No Prior Record—Found but Discounted**  
Record of 14 years of practice without prior discipline was mitigating circumstance but could not outweigh seriousness of attorney's misconduct and aggravating circumstances.

- [10 a, b] **725.36 Mitigation—Disability/Illness—Found but Discounted**  
**802.30 Standards—Purposes of Sanctions**  
Evidence of psychological problems was not compelling mitigation where attorney's expert witness testified that he needed further treatment before he could be considered rehabilitated; primary function of attorney discipline is to fulfill proper professional standards regardless of cause for attorney's failure to do so.
- [11] **541 Aggravation—Bad Faith, Dishonesty—Found**  
**601 Aggravation—Lack of Candor—Victim—Found**  
**822.10 Standards—Misappropriation—Disbarment**  
Suspension rather than disbarment might be appropriate for isolated misappropriation that is unlikely to be repeated, but was not appropriate where misappropriation was accompanied by lengthy practice of deceit on client's agent and lack of forthrightness during State Bar investigation.
- [12] **802.30 Standards—Purposes of Sanctions**  
**802.69 Standards—Appropriate Sanction—Generally**  
In determining appropriate discipline, all relevant factors must be considered, including the purposes of imposing discipline, which include: protection of the public, courts, and legal profession; maintenance of high professional standards; and maintenance of integrity of and public confidence in the legal profession.
- [13 a, b] **822.10 Standards—Misappropriation—Disbarment**  
Disbarment was called for in light of attorney's misappropriation of extremely large sum, extensive and prolonged deceit, lack of extraordinary mitigation, lack of forthrightness in dealing with misconduct, and lack of sufficient evidence of rehabilitation to assure public that offense would not recur.
- [14] **2504 Reinstatement—Burden of Proof**  
Disbarred attorneys may qualify for reinstatement upon sufficient passage of time and adequate proof of rehabilitation, present moral fitness and learning and ability in the general law.
- [15] **802.69 Standards—Appropriate Sanction—Generally**  
**822.10 Standards—Misappropriation—Disbarment**  
**2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof**  
**2504 Reinstatement—Burden of Proof**  
Where attorney had committed extremely serious misconduct over long period of time, and questions remained concerning attorney's rehabilitation, requiring standard 1.4(c)(ii) showing in lieu of disbarment would not be sufficient to protect the public and maintain the integrity of the profession.

#### ADDITIONAL ANALYSIS

#### Culpability

##### Found

- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

**Not Found**

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2

**Aggravation****Found**

- 582.10 Harm to Client
- 611 Lack of Candor—Bar

**Mitigation****Declined to Find**

- 740.51 Good Character
- 740.52 Good Character
- 760.53 Personal/Financial Problems

**Discipline**

- 1010 Disbarment

## OPINION

STOVITZ, J.:

A referee of the former volunteer State Bar Court has recommended that respondent, Howard Kueker, a member of the State Bar since 1975 and with no prior record of discipline, be suspended for five years, stayed on conditions including actual suspension for two years and until he makes restitution. The referee's decision rests largely on stipulated facts and a record in which it was established beyond dispute that respondent misappropriated over \$66,000 in trust funds and repeatedly lied to his client's agent over an 18-month period about his mishandling of funds. In aggravation, respondent was neither cooperative nor candid during the State Bar investigation. He admitted his misconduct for the first time at the outset of the State Bar Court hearing, eight years after his misdeeds started.

Before us, respondent seeks review urging that the referee was biased, the findings are incorrect and the referee's suspension recommendation is excessive and that he should be actually suspended for only 30 or 60 days. Upon our independent review of the record, we find no procedural error but will adopt modified findings and conclusions. Considering all relevant factors and principles of our Supreme Court in misappropriation cases, we have concluded that, since respondent's grievous offenses are not outweighed by clear mitigating circumstances, to fulfill the purposes of attorney discipline, respondent should be disbarred as urged below and before us by the State Bar examiner and we shall so recommend to the Supreme Court.

### I. FACTS.

#### A. Introduction.

At trial, respondent was represented by experi-

enced counsel. Respondent admitted all charges in the first amended notice to show cause against him. (1 R.T. pp. 10, 15.)<sup>1</sup> The charges he admitted were that he failed to place his client's funds in a trust account, that he failed to promptly notify his client that the third-party debtor had paid the debt in full, that he failed to promptly deliver to his client his share of funds and misappropriated them and that he misrepresented to his client that he was still negotiating a settlement with the debtor.<sup>2</sup>

Despite respondent's admission of all the charges against him, the parties presented extensive testimonial and documentary evidence found in two volumes of reporter's transcript of testimony and thirty-six exhibits. Nevertheless, the facts of this very serious matter are not complex.

After respondent's admission to practice law in Massachusetts in 1966, he practiced creditors' rights and bankruptcy law with a downtown Boston firm. Seeking better weather, he moved to California in 1975, was admitted to practice that year in this state and started practice also that year with an Anaheim firm doing similar work to what he had done in Boston. (2 R.T. pp. 51-53.) In about 1978, he left the Anaheim firm and started solo practice in Newport Beach, also handling creditors' rights and bankruptcy matters. He did not do well financially in sole practice, estimating that his yearly net income (over office expenses) was between \$5,000 and \$10,000. (2 R.T. pp. 54-55.) Respondent's misconduct arose while in sole practice.

#### B. Respondent's Receipt and Misappropriation of Trust Funds.

Sometime prior to September of 1980, an Austrian bank owed one Frank James Lucas of Orange County, California, the sum of *Austrian schillings* 84,875.62 or *US* \$ 6,730.64 at the then-current exchange rate. However, the Austrian bank's agent,

1. For convenience, the reporter's transcript of the March 10, 1989 hearing before the referee will be referred to as "1 R.T." and the transcript of the March 22, 1989 hearing as "2 R.T."

2. Respondent admitted violating the following rules and statutes charged in the amended notice to show cause: Business and Professions Code sections 6068 (a), 6103 and 6106

and former rules 8-101(A), 8-101(B)(1), and 8-101(B)(4), Rules of Professional Conduct of the State Bar. Unless otherwise noted, all citations to sections are to the Business and Professions Code and citations to rules are to the Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

European American Bank ("Bank"), mistakenly paid Lucas US \$ 84,875.62, thus overpaying him by the exchange rate difference of US \$ 78,144.98. (Exh. 28.) The Bank hired a New York collection agency, Harold Adler, Inc. ("Adler"), to recover the overpayment and Adler hired respondent. Respondent considered the Bank his client. (Exhs. 2, 28.)<sup>3</sup>

By a letter dated August 22, 1980, respondent recommended to Adler that Bank authorize respondent to file suit and apply for a prejudgment attachment against Lucas. If the Bank agreed, respondent asked Adler that he send respondent \$285 in costs and have certain documents completed by a Bank officer and returned to respondent. (Exh. 3.) Adler agreed to have respondent file suit against Lucas; but on September 23, 1980, two days before respondent filed the suit, Lucas paid respondent the entire disputed amount, \$78,144.98. On that same day, September 23, 1980, respondent gave Lucas a notarized release of Bank's claim. (Compare exhs. 1 and 2 with exh. 28.)

The timing of the suit filing leads to one of the few areas of dispute in this proceeding: whether respondent was entitled to a fee for his services; and if he was, the size of his fee (and therefore the size of the client's share of recovery). As we shall discuss, *post*, we have concluded that respondent is entitled to fees on the amount he recovered before he committed his misconduct. That leaves us with the task of determining the amount of fees respondent earned. Respondent did not introduce in evidence any written fee agreement. Testimony showed that he was to receive a fee of 15 percent of the recovery if no suit were filed and 20 percent if suit were filed. (1 R.T. pp. 31-32; 2 R.T. p. 61.)

At the State Bar Court trial, a dispute arose concerning whether or not respondent knew that Lucas had paid the sum before the suit was filed. To bolster his position that he filed suit before Lucas paid, respondent introduced his office's cover memo to an attorney service dated September 8, 1980, written on the attorney service's form, instructing that service to file the complaint against Lucas. (Exh.

H.) Just below a space on this form for its receipt stamp by the attorney service, appeared the stamp, "1980 SEP 25 PM 12:34" and a court filing stamp of "SEP 25 1980." Further, the copies of respondent's complaint and attachment application which he forwarded to the attorney service for court filing bore dates of September 8 and 9, 1980, respectively.

The hearing referee found unconvincing respondent's explanation that the attorney service delayed in filing the suit. Regardless of whether the respondent or the attorney service delayed the filing of suit, it is clear that suit was not filed until after respondent received the full amount of funds due Bank. We conclude, therefore, that respondent is entitled to only a 15 percent fee at best and therefore the client's share of the funds was \$66,423.23.

Respondent's explanations of what he did with the Bank's \$66,423.23 varied somewhat. During discovery, he stated that he used the sum to pay "ordinary expenses of his law office and household." According to respondent, his income from the practice of law was not sufficient to cover these expenses. (Further response to interrogatories, filed February 21, 1989, p. 7, response to question 22.) In his testimony, he stated that a part-time secretary placed the \$78,144.98 check in respondent's general, not trust, bank account and checks for office expenses of an unknown sum were drawn on those funds before respondent was aware of the incorrect deposit of the check. (2 R.T. p. 60.) He also testified that he gave some of Bank's money to one of his secretaries who had deposited Lucas's \$78,144.98 check and who had demanded money from respondent, threatening to divulge untrue matters about respondent, and the rest "went to pay bills in the ordinary course of business." (2 R.T. pp. 61, 89.)

### C. Respondent's Deceit of Adler Concerning His Misappropriation.

Although Lucas had paid respondent the full amount of Bank's claim on September 23, 1980, starting just seven days later and continuing to March

3. For a somewhat similar fact situation, see *Chang v. State Bar* (1989) 49 Cal.3d 114, 118-122.

1982, respondent actively deceived Adler that Lucas had not paid but small amounts which respondent remitted to Adler sporadically. In total, respondent sent 11 letters to Adler perpetuating this deceit. (Exhs. 4-16.) The date and gist of each letter is as follows:

<i>Date</i>	<i>Gist of Respondent's Letters to Adler</i>
9/30/80	Debtor demands proof of claim; have sued and will pursue vigorously.
12/4/80	Optimistic we can negotiate with Lucas. If he does not agree, will move suit along.
1/20/81	Negotiating seriously with Lucas to get him to stipulate to full judgment and costs. Will Bank accept \$5,000 per month? [\$4,000 sent to Adler (\$5,000 less \$1,000 fees deducted) on 2/24/81.]
6/8/81	Lucas is overdue in payment. Will report further on June 29. [Another \$4,000 sent to Adler (\$5,000 less \$1,000 fees deducted) on 6/29/81.]
7/30/81	Lucas is late on July payment. Continuing to get him to pay.
8/21/81	Lucas is late again. Will continue to press.
10/6/81	Received \$1,000 by cashier's check from Lucas. Will remit separately.
11/5/81	Can only communicate with Lucas by mail. Do not have an explanation but Lucas just sent another good faith payment and will remit separately. Believe Lucas will eventually pay. Will keep after him.
12/17/81	Lucas is late again. Will have more to report by 12/31/81.
1/25/82	Pleased to report receipt of \$1,000. Will remit on February 25.
3/18/82	Lucas is late again. Pressing for payment and will pursue vigorously.

Adler testified that until about March 1982, he believed respondent's representations that Lucas had paid only partial, sporadic sums. Adler then wrote

directly to Lucas to verify payments and Lucas sent a photocopy of his September 1980, \$78,144.98 check to respondent. (1 R.T. pp. 38-49; see also Lucas testimony at 1 R.T. p 21.) When Adler received this information from Lucas, he tried to get respondent's explanation. At first, respondent told him that he had finally received the funds from Lucas but an employee had absconded with them. (1 R.T. pp. 58-59.) When Adler pressed respondent in a later telephone conversation, respondent said he would not say what happened. (1 R.T. pp. 60-61.)<sup>4</sup> Respondent feared that if he told Adler what had happened, Adler would send him no more collection matters and his practice would disintegrate. (2 R.T. pp. 63-64.)

The evidence as to the total amount of repayment respondent made to Adler on Bank's behalf differs slightly. According to Adler, between 1981 and 1985, respondent repaid the gross sum of \$35,688.58 which included \$30,488.66 in cash and the balance in commissions due to respondent from Adler in the Lucas or other collection matters which Adler had referred to respondent. (1 R.T. pp. 63-65.) According to respondent, he repaid a gross sum of \$33,935.66, including commissions. (Further response to interrogatories, filed February 21, 1989, p. 7, response to question 23.) Adler's figure was derived by his consulting notes he had prepared of his recoveries by year and we adopt it as the amount of respondent's restitution.

The Lucas claim was by far the largest that Adler had referred to respondent for collection. (1 R.T. pp. 100-101.) In order to permit respondent to repay the Lucas funds, Adler continued to send respondent other small claims for collection on a one-by-one basis and he monitored respondent carefully. The amount of commissions earned by respondent served to reduce slightly the balance in the Lucas matter. (1 R.T. pp. 84-86.) Respondent paid over to Adler all funds collected on these other matters. (1 R.T. p. 100.)

4. As Adler testified: "He [respondent] indicated he could not tell me what happened. And I questioned him as to how could it be possible that this amount of money could get into his trust account without his being aware of it. He reiterated that he just could not tell me. It was, to use the words he used, he said it would be like peeling an onion, each layer would lead to

another layer and I asked him to tell me the truth. Tell me what happened. Did it have anything to do with drugs, gambling, women. Did he buy something [?] Maybe we could get something as collateral. He said he just couldn't discuss it because he was getting into serious other problems and he never would discuss it." (1 R.T. pp. 61-62, emphasis added.)

In September 1984, the Bank requested Adler to obtain a promissory note from respondent for the unpaid balance of the Lucas funds plus 10 percent interest. (Exh. B.) On November 14, 1984, respondent signed a promissory note for \$34,613.83 plus the 10 percent requested interest. (Exh. D.) Adler did not consider respondent's note satisfactory since it discounted what he was obliged to repay by taking into account his commission on the unpaid balance. (1 R.T. pp. 64-67.) Respondent did make some payments after he signed this promissory note; but at some later time, when Bank filed a complaint with the State Bar about respondent's handling of the Lucas funds, it declined to accept any further payments from respondent on the ground it would not be ethical to do so. (1 R.T. pp. 91, 93.)

#### D. Respondent's Posture During State Bar Investigation.

Respondent was not charged with failing to cooperate during State Bar investigation (Bus. & Prof. Code, § 6068 (i)), nor was he charged with making misrepresentations to the State Bar during its investigation of Bank's complaint. However, the record shows that a substantial portion of the more than 20-month State Bar investigation into Bank's complaint was expended in the State Bar attempting to obtain from respondent information he promised to furnish about his handling of Bank's funds. Other responses of his during the investigation period were neither complete nor candid.<sup>5</sup>

#### E. Respondent's Evidence in Mitigation.

Respondent presented testimony of three character witnesses. Gary DePerine, Esq., a lawyer in practice for 15 years, knew respondent since 1976 and saw him in court on appearances. According to DePerine, respondent's skills as an attorney were excellent. After speaking with respondent's counsel, DePerine became familiar with the charges against respondent. Although he could not condone respondent's misconduct, he expressed the view that it was highly out of character. (1 R.T. pp. 111-120.)

Nicholas Zaccheo, a district sales manager for a financial service company, testified he knew respondent since 1976, that he and respondent were friends and he had been a client of respondent. (2 R.T. pp. 120, 122-123.) Zaccheo was familiar with the nature of the misappropriation charges against respondent but not familiar with charges about his deceit of Adler or the Bank. Zaccheo assessed respondent's character as the highest and he would have no hesitation in hiring respondent again to represent him. (2 R.T. pp. 124-127.)

Donald Wayne, owner of a department store for designers and decorators, knew respondent for three or four years as a customer and a client. (2 R.T. pp. 128-130.) Wayne was familiar with most of the charges against respondent but from his knowledge of respondent's moral character, he did not think respondent would do these acts. Wayne had no

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5. On February 28, 1986, a State Bar investigator wrote to respondent summarizing the Bank's complaint and seeking respondent's reply. (Exh. 18.) On March 19, 1986, respondent answered by stating the Bank knew about "this situation" (which he did not define) for three or four years and respondent did not understand why the Bank "turned to the Bar after all this time." Respondent accepted responsibility for what happened (which he did not define), and stated that he gave the Bank a promissory note and repaid over \$30,000. Respondent wrote the investigator that he would make himself available if it was necessary to pursue the matter further. (Exh. 19.) Two days later, the investigator wrote respondent again, asking for a copy of the promissory note and all checks given in repayment. (Exh. 20.) About two weeks later, respondent replied, stating that he had not had time to respond but would do so after his return from a trip to Chicago. He asked whether the Bank couldn't confirm the note and payments. (Exh. 21.) On September 12, 1986, the investigator wrote respondent asking

for additional information concerning the deposit and removal of the Lucas funds and on October 3, 1986, the investigator sent respondent a follow-up letter when he did not reply. (Exhs. 22-23.) On November 18, 1986, respondent replied with a typed note on the foot of the investigator's September 25th letter asking the investigator to call him after November 25th. (Exh. 23.) On August 24, 1987, another investigator again wrote respondent asking for the information earlier requested and cited respondent to section 6068 (i). (Exh. 25.) Two months later, and a year and eight months after the investigator's first letter to respondent, he replied that he was single-handedly running his sole practice and had no time to look for the requested documents. He noted he had cooperated in the past, asked the investigator to bear with him during this "difficult time" and stated that he had deposited the check from Lucas in a regular account, not a trust account and named the bank. (Exh. 26.)

reservation about his continuing to represent him in legal matters. (2 R.T. pp. 131-133.)

Respondent also testified in mitigation. In 1980, he and his wife were beginning to have communication problems and one of his two daughters had a physical and learning disability which placed an added stress on family life. (2 R.T. pp. 56-59.) Respondent first saw a family counselor, Dr. Laura Schlesinger,<sup>6</sup> in March of 1981. (2 R.T. pp. 5-8; exh. G.) Respondent treated only briefly with Dr. Schlesinger in 1981 and 1985 due to financial limits. In 1988, after marital separation, respondent resumed that treatment for a three- to four-month period. In 1981, Dr. Schlesinger administered to respondent the Minnesota Multiphasic Personality Test. He tested quite high in depression and she recalled he was tremendously sad about his marriage, having kept a lot of emotion inside and having displayed low self-esteem. (2 R.T. pp. 9-12.)

Dr. Schlesinger did not consider that respondent had a personality disorder in either 1981 or 1985 but he did have certain personality traits or chronic emotional difficulties. (2 R.T. pp. 12, 18-19.) According to Dr. Schlesinger, respondent is a highly moral, ethical person who expressed remorse over his behavior which she described as out of character. She ascribed respondent's behavior to his life-long difficulties with self-esteem and intimacy and not to criminal intent.<sup>7</sup> Both in her testimony and written report, Dr. Schlesinger opined that respondent needed further treatment. (2 R.T. pp. 23-24; exh. G.) When asked her opinion of the likelihood that respondent would engage in misuse of funds again, Dr. Schlesinger testified, "I would think the likelihood would be nil, *especially if we continued therapy together*, because a lot of the pent-up kinds of feelings and fears which lead to a secretive way of fixing a problem, namely this issue with the money, would not be the only alternative available." (2 R.T. p. 26, emphasis supplied.)

In 1988, respondent closed his Newport Beach practice. He did not accept new cases because he did not want to do so with these State Bar proceedings "hanging over" him. He worked at a swap meet to earn enough money to support his estranged wife and children. In March 1989, he joined a five-attorney law office in the field of mechanics' lien law. (2 R.T. pp. 81-83.) When asked for his feelings on misappropriating the Lucas funds, he stated that it was the "stupidest" thing he had ever done. He regretted doing it because it was something that a person, especially a lawyer, should not do. (2 R.T. p. 84.)

#### F. The Referee's Findings and Conclusions.

The referee's findings include a great many background and detailed facts. Included therein are the referee's determinations that respondent failed to deposit Lucas's payment into a trust account as required, failed to notify Bank that Lucas had paid the funds, failed to "properly" deliver funds to which the client was entitled and misappropriated those funds. Although the referee did not specifically link those findings to the specified statutes or rules violated, he noted that respondent had stipulated to the notice to show cause charges of violation of rules 8-101(A), 8-101(B)(1), 8-101(B)(4) and sections 6068 (a), 6103 and 6106. (Decision, pp. 4-5.)

Without any discussion, the referee recited that respondent's misappropriation was of the full amount of Lucas's payment of \$78,144.98. (*Id.* at pp. 7, 11.) The referee observed that respondent's written response during State Bar investigation was not completely candid or cooperative and that he did not respond to discovery in this proceeding until the examiner filed a motion to compel and a motion to seek compliance with an inspection demand. The referee recited the evidence of domestic difficulties offered by respondent, Dr. Schlesinger's opinion of respondent's maladjustment and therapy and the testimony of respondent's character witnesses. The

6. Dr. Schlesinger testified that she was licensed in California as a marriage and family therapist. She held a Ph.D. degree in physiology and a post-doctoral certificate in marriage and family therapy. She has taught human relations at the University of Southern California and advanced psychology at Pepperdine University. (2 R.T. pp. 6-7, 27-29.)

7. In recounting her understanding of respondent's offense, Dr. Schlesinger focused only on his misuse of client funds. She gave no testimony that showed whether or not she was aware of respondent's practice of deceit. (2 R.T. pp. 20-21, 36-38.)

referee described respondent's demeanor in the proceeding as cooperative but less than candid. The referee also expressed doubts as to the genuineness of respondent's remorse and was troubled by respondent's taking of credits for attorney fees and interest in calculating the amount remaining to be repaid to the Bank. (*Id.* at p. 11.)

The referee noted decisional law of the Supreme Court providing for disbarment for misappropriation of funds absent the most exceptional of cases and noted that there was evidence of mitigation, such as respondent's lack of a prior discipline record, evidence that his offense was an isolated instance and no evidence to doubt whether respondent would conform his conduct to the law in the future. The referee cited three disbarment cases, distinguished one of them, pointed to the mitigating factors but concluded, without explaining how the factor weighed in the balance, that the gravity of respondent's misconduct should "not result in any windfall for respondent." (*Id.* at p. 13.)

## II. DISCUSSION.

### A. Culpability.

[1a] Before us, respondent urges that the hearing referee was biased against him. However, he fails to sustain his burden to clearly establish such bias and to show how he was specifically prejudiced. (See *Weber v. State Bar* (1988) 47 Cal.3d 492, 504; *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 635.) The instances of claimed bias demonstrate no more than respondent's disagreement with the manner in which the referee weighed the evidence and concern mostly issues not material to either culpability or degree of discipline. (Compare *Cannon v. State Bar* (1990) 51 Cal.3d 1103, 1107.) [2] To the extent that the referee erred in his decision by reciting that respondent lived with one of his character witnesses, we see no prejudice arising therefrom and our independent fact-finding authority permits us to delete that finding. (See rule 453(a), Trans. Rules Proc. of State Bar.) [1b] Our independent review of the record shows that throughout the hearing, the referee acted in a manner that was "patient, fair and commendable." (*Marquette v. State Bar* (1988) 44 Cal.3d 253, 261.)

Respondent complains next of errors that the referee made in assertedly concluding that he did not make restitution and that he did not give the civil complaint against Lucas to his attorney service before Lucas paid in full the obligation to Bank. Both claims are without merit.

Respondent errs in characterizing the referee's decision as standing for the finding that no restitution was made. The referee's decision recites that respondent paid the Bank \$23,000 and attempted no restitution after the Bank had "lost interest" in collecting it. We have earlier determined the amount of respondent's restitution as \$35,688.58. (See rule 453, Trans. Rules Proc. of State Bar.) The record shows that respondent did nothing further to aid restitution after the Bank chose to accept no further payments (once it had filed a complaint with the State Bar). We shall discuss this point further when we discuss issues bearing on degree of discipline, *post*.

With regard to the timing of the civil complaint, we have earlier stated that it is clear that that complaint was not filed until two days after Lucas had paid the Bank's claim in full. It is thus immaterial when respondent gave the complaint to the attorney service.

Respondent does not and cannot dispute his culpability of commingling of trust funds with personal funds, his misappropriation of a very large sum of client trust funds and his misrepresentations to Adler. His culpability of those offenses is established by his stipulation to the charges at the outset of the State Bar Court hearing and is further supported beyond any dispute by independent evidence. [3a] The only significant point in dispute about respondent's offenses is whether he is entitled to a fee for legal services for recovering the Lucas funds. Resolution of this issue is important to assess the amount of funds misappropriated by respondent. Without resolving that issue, the referee found that respondent had misappropriated the entire sum of \$78,144.98. We must disagree.

[3b] The examiner cites *Jeffrey v. Pounds* (1977) 67 Cal.App.3d 6 to support her contention that respondent should receive no fee at all for his services. Her reliance on that case is misplaced for two rea-

sons. First, the case did not involve an attorney who misappropriated funds but rather one who performed services for a certain time and then engaged in the representation of conflicting interests. Second, the court of appeal reversed the trial court and directed it to allow fees for services up to the start of the conflicting representation. (*Jeffrey v. Pounds, supra*, 67 Cal.App.3d at p. 12.)

[3c] The examiner next seeks to deny respondent's fee entitlement by stating that he recovered the full amount of Bank's claim by sending only one letter to Lucas and the misappropriation was simultaneous with collection of the funds. The examiner's former claim appears to go to the issue of whether respondent charged an unconscionable fee. (See rule 2-107.) Respondent was never charged with such a violation and no evidence was presented as to the appropriateness of his fee. Nor did the examiner present evidence as to the exact timing of the misappropriation. Respondent's testimony at trial suggests that the misappropriation was not immediate but occurred over an unspecified but probably fairly short period of time. There is no evidence that respondent committed any misconduct before he received Bank's funds from Lucas. We therefore follow the customary analysis by the Supreme Court and State Bar Court in similar matters and recognize respondent's fee which, as we noted above, we have determined to be 15 percent of gross recovery before suit was filed. (Compare, e.g., *Boehme v. State Bar* (1988) 47 Cal.3d 448, 451; *Weller v. State Bar* (1989) 49 Cal.3d 670, 672.)

In our analysis, we start by adopting the appropriate findings and conclusions regarding respondent's culpability. We note at the outset that the hearing referee's decision combines the style of a judicial opinion with recitals of the evidence and does not contain a single, concise set of findings of fact. While we could adopt individual aspects of the referee's decision and while we deem many of the referee's background facts supported by the record, for the convenience of the litigants and the Supreme Court, we set forth the ultimate findings and conclusions which the record supports regarding culpability.

## B. Findings of Fact.

1. From a debtor of his client, the Bank, respondent recovered \$78,144.98 on September 23, 1980. Respondent recovered this sum for the Bank prior to filing suit and was therefore entitled to a fee of 15 percent of the recovery. After deducting respondent's legal fee, the Bank's share of the recovery was \$66,423.23.

2. Respondent failed to promptly report receipt of the \$66,423.23 either to the Bank or to the Bank's collection agent, Adler. Further, respondent failed to deposit or maintain that sum in a trust account and he misappropriated the entire \$66,423.23, using most of the funds for office or personal expenses.

3. Between September 1980 and March 1982, usually in response to Adler's requests for information and action on the Bank's claim, respondent misrepresented to Adler on 11 occasions the status of payments made by the Bank's debtor. As part of his deceit of the Bank, respondent sporadically remitted small amounts to Adler. Together with some additional restitution after Adler learned that respondent had received all funds from the Bank's debtor in about September 1980, the total amount repaid by respondent was \$35,658.58. Respondent owes the Bank the principal amount of \$30,764.65.

## C. Conclusions of Law.

1. From the facts stated in findings 1 and 2, respondent wilfully violated rule 8-101(A) by failing to deposit and maintain the Bank's share of client trust funds in a proper trust account.

2. From the facts stated in findings 1 and 2, respondent wilfully violated rule 8-101(B)(1) by failing to promptly notify his client as to the receipt of client funds.

3. From the facts stated in findings 1, 2 and 3, respondent wilfully violated rule 8-101(B)(4) by failing to pay the Bank promptly, in response to Adler's requests, the amount of trust funds owing the Bank.

4. From the facts stated in findings 1, 2 and 3, respondent violated section 6106 both by intentionally misappropriating trust funds due his client and by misrepresenting to his client the status of trust funds he had received.

5. Respondent's acts did not constitute a violation of his duties as an attorney under sections 6068 (a) or 6103. (E.g., *Sugarman v. State Bar* (1990) 51 Cal.3d 609, 617-618; *Middleton v. State Bar* (1990) 51 Cal.3d 548, 561.)

#### D. Degree of Discipline.

We now turn to the critical issue in this proceeding, the degree of discipline to recommend.

[4] On innumerable occasions, our Supreme Court has stated that an attorney's misappropriation of client funds, being a gross or grievous breach of morality, warrants disbarment in the absence of clearly extenuating circumstances. (Among many cases, see *Chang v. State Bar, supra*, 49 Cal.3d at p. 128; *Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 708; *In re Demergian* (1989) 48 Cal.3d 284, 293; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) If we consult the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ["stds."]), we are also guided to recommend disbarment for that offense unless the amount taken was insignificant or the most compelling mitigating circumstances clearly predominate. (Std. 2.2(a).) Far from being an insignificant amount, respondent converted over \$66,000 of trust funds—the largest recovery by far he had ever obtained for a matter referred by Adler. Moreover, respondent's serious misconduct was not limited to his grievous money offense but included an extended practice of deceit on Adler over an 18-month period to forestall Adler from discovering respondent's misuse of funds. [5] The Supreme Court has identified the very serious nature of an attorney's acts of deceit. (See *Harford v. State Bar* (1990) 52 Cal.3d 93, 102; *Chang v. State Bar, supra*, 49 Cal.3d at p. 128; *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147.) If we are guided by the standards cited above, respondent's acts of deceit would by themselves warrant suspension or disbarment. (Std. 2.3.)

Apart from the extremely serious nature of the misconduct before us, we see aggravating circumstances as well. Respondent's misconduct involved multiple acts and was extended. [6] He deceived his client's agent on 11 separate instances over a considerable period. (Std. 1.2(b)(ii).) This militates strongly against considering his offenses as one-time or aberrant. In addition, he deprived his client for years of funds clearly owed it on account of a mistaken overpayment. (See std. 1.2(b)(iv).) [7] Respondent's partial restitution was largely out of his attempt to deceive his client. While his client perhaps acted too conservatively in refusing restitution once a State Bar complaint was filed, that act clearly did not extinguish respondent's moral obligation to complete restitution. Yet the facts show that respondent has taken no steps in recent years even to set money aside to make amends and he owes over \$30,000 in restitution. (See std. 1.2(b)(v).) Finally, the record shows that respondent was not candid or cooperative in the nearly two-year State Bar investigation period, failing to acknowledge his misdeeds until the day of the State Bar Court hearing and over eight years after he started committing them. (See std. 1.2(b)(vi).) Indeed the hearing referee recited his concerns in his decision over respondent's lack of candor and the genuineness of his remorse, but inexplicably recommended suspension.

[8] Considering that respondent's offenses were so serious, we believe that the ultimate issue for us is whether mitigating circumstances clearly outweigh or predominate in order to warrant less than a disbarment recommendation. (See *Baca v. State Bar* (1990) 52 Cal.3d 294, 306; *Coombs v. State Bar* (1989) 49 Cal.3d 679, 697.) We must conclude that they do not.

[9] The record does reveal a mitigating circumstance. Before respondent's misconduct started, he had been admitted to practice law (in Massachusetts and California combined) for a total of 14 years with no prior record of discipline. (See *Levin v. State Bar, supra*, 47 Cal.3d at p. 1148.) Yet this circumstance cannot outweigh either the seriousness of respondent's offenses or their aggravating circumstances. (See *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *Borre v. State Bar* (1991) 52 Cal.3d 1047, 1053.) Although respondent offered

favorable character testimony, it was not of a "wide range" of references and one of his three witnesses was not familiar with all aspects of his misconduct. (Std. 1.2(e)(vi); see also *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939.) [10a] Similarly, although respondent presented evidence of some family and financial difficulties, it did not seem that they were of a compelling nature that would excuse his dishonest acts; and if the evidence from his therapist is credited, he needs further treatment for his personality problems before he can be considered rehabilitated. (See std. 1.2(e)(iv), (viii); compare *In re Lamb* (1989) 49 Cal.3d 239, 248.)<sup>8</sup> [10b - see fn. 8] Respondent's low income from sole practice was unusual but appeared to be of his own making since he had practiced in law firm settings in the past, apparently successfully.

In their respective trial briefs, the examiner urged upon the referee that respondent be disbarred and respondent urged a five-year suspension, stayed on conditions including a one-year actual suspension. For reasons we do not fully understand, the examiner did not seek review from the referee's decision, only the respondent did. Yet before us, in this proceeding where review of the record is independent, the examiner again urges disbarment. [11] We have carefully considered and weighed the referee's recommendation of a five-year stayed suspension with actual suspension for two years and until respondent completes restitution. However, we are unable to understand how the referee applied the relevant factors in this case to arrive at his recommendation, particularly after he cited some Supreme Court opinions disbarring attorneys for less serious conduct than occurred here and noted the several aggravating circumstances in opposition to the mitigating ones. By its emphasis in the referee's decision, we can only infer that the referee deemed respondent's offenses isolated and unlikely to be repeated, therefore justifying suspension. That might be true of respondent's single act of misappropriation; but as we noted above, the referee's own decision and our independent record review show that

respondent's misconduct was not isolated, but extended by his lengthy practice of deceit on his client's agent, followed by his lack of forthrightness during State Bar investigation.

[12] We acknowledge that all relevant factors must be considered, including the purposes of imposing discipline. Those purposes are several-fold: protection of the public, courts and legal profession, the maintenance of high professional standards and the maintenance of integrity of and public confidence in the legal profession. (Std. 1.3; *Baca v. State Bar, supra*, 52 Cal.3d at p. 305; *Cannon v. State Bar, supra*, 51 Cal.3d at pp. 1114-1115; *Baker v. State Bar* (1989) 49 Cal.3d 804, 822; *In re Basinger* (1988) 45 Cal.3d 1348, 1360.) [13a] In our view, the gravity of the misappropriation and accompanying deceit, surrounded by no extraordinary mitigation which could explain the offense, followed by lack of sufficient evidence of rehabilitation to reasonably assure the public that the offense would not recur calls for disbarment both to properly protect the public and to assure the integrity of the profession. (See *Kaplan v. State Bar, supra*, 52 Cal.3d at pp. 1071-1073; *In re Basinger, supra*, 45 Cal.3d at p. 1360.)

We are guided significantly by the Supreme Court's recent decision in *Kaplan v. State Bar, supra*, 52 Cal.3d 1067, a case very similar to the one before us. Attorney Kaplan had many years of practice without prior misconduct as did respondent. Kaplan's theft of law partnership funds totalling \$29,000 occurred on a number of instances over a seven-month period in 1985 and was followed by several instances of deceit to his partner and the State Bar. Respondent's theft of more than twice that amount was from client funds and was followed by 11 instances of deceit over 18 months with an additional 2-year period of lack of forthrightness during State Bar investigation. Kaplan appeared to have offered a stronger character showing than did respondent and appeared to have suffered from perhaps slightly more of an emotional strain than respondent. As in this case, the hearing panel in *Kaplan* recom-

8. [10b] The Supreme Court has observed that psychoneurotic problems often "underlie professional misconduct and moral turpitude" but that the Court's primary function must be to fulfil proper professional standards, "whatever the unfortu-

nate cause, emotional or otherwise, for the attorney's failure to do so." (*Grove v. State Bar* (1967) 66 Cal.2d 680, 685; *In re Nevill* (1985) 39 Cal.3d 729, 736, and cases cited.)

mended suspension but the majority of the review department, disbarment.

In its unanimous opinion disbaring attorney Kaplan, the Supreme Court rejected the claim made in his behalf that his behavior was sufficiently aberrational to lower the review department's recommendation. We have previously noted the extended nature of respondent's dishonest acts which we submit warrant a similar conclusion. The Court in *Kaplan* also noted that, absent the action of Kaplan's partners, he would not have ceased his misconduct. Here too, not until Adler confronted respondent with the truth Adler learned directly from Lucas did respondent stop deceiving Adler and it appears that respondent never told Adler exactly what he did with Bank's funds.

As in *Kaplan*, we read the record as showing that respondent's rehabilitation is not complete, that additional treatment is needed to assure that there is no risk of reoccurrence. While it does appear that Kaplan's need for the misappropriated funds was less than respondent's, both used the money to foster the appearance of greater financial success.

Although the recommendation of the department is not unanimous in this matter, even the dissent acknowledges the serious nature of respondent's misconduct, including the serious aspects of his deceit. [13b] When we look at all the factors in this matter taken together—an extremely large misappropriation,<sup>9</sup> a practice of deceit far more extensive and prolonged than seen in cases cited by the dissent, a lack of forthrightness in dealing with the misconduct until the start of the State Bar Court hearings and a lack of mitigation sufficient to overcome respondent's serious offenses—we must conclude that disbarment, rather than suspension, is the appropriate discipline and is fully proportional to the grave nature of respondent's misconduct. (See *ante*, pp. 594-595.)

[14] We observe that in California, disbarment

affords the opportunity to qualify for reinstatement upon sufficient passage of time and adequate proof of rehabilitation, present moral fitness and learning and ability in the general law. (See *In re Lamb, supra*, 49 Cal.3d at p. 248; rules 662 et seq., Trans. Rules Proc. of State Bar.)

[15] We do not consider the lesser showing afforded by procedures under standard 1.4(c)(ii) to be sufficient to protect the public and maintain the integrity of the profession, given the extreme seriousness of respondent's offenses, the length of time over which they spanned and the questions we have concerning whether respondent's rehabilitation is complete.

### III. RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, Howard Kueker, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state. We also recommend that respondent be required 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.

I Concur:

NORIAN, J.

PEARLMAN, P.J., dissenting:

I respectfully dissent. The majority characterizes the facts in a way which I do not believe the required deference to the referee's credibility determination permits. I do not see how we can reject the referee's finding that "the 1980 incident was an isolated instance of misappropriation" resulting from "great difficulties in [his] personal and professional life and not indicative of how he conducted himself as an attorney during his legal career." I also disagree

9. Although respondent's misappropriation of funds occurred many years ago, much of the passage of time since can be attributed to his active deceit of his client, forestalling discov-

ery of wrongdoing, followed by his repeated failure to respond openly to requests of State Bar investigators for information when looking into the Bank's complaint.

with the majority's conclusion that a single offense by a practitioner with over 20 years of an otherwise unblemished record does not constitute aberrational misconduct under the controlling case law. Thirdly, I believe we are required by controlling case law to weigh all of the mitigating factors more heavily than the majority has done, particularly in light of the fact that, if not disbarred, respondent was found to pose no threat of repeating the misconduct. Based upon my analysis of the record in light of the Supreme Court precedent, I have concluded that principles repeatedly enunciated by the Supreme Court establish that lengthy suspension is the appropriate discipline in the present case. Neither the guidelines set forth in the standards, nor the case law, mandate disbarment here.

As the Supreme Court explained in *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958, rejecting disbarment for a first offense in favor of five years stayed suspension on conditions, including one year's actual suspension, "The proven misconduct in this case is serious, involves moral turpitude, and is of the kind which undermines public confidence in the legal system. Even where deceit is involved, however, we generally have not ordered disbarment except where there is other serious *and habitual* misconduct. [Citations.]" (*Id.*, emphasis in original; see also *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074.)

Standard 2.2(a) provides for disbarment absent "the most compelling mitigating circumstances." That standard provides a starting point for analysis of the proffered mitigation under controlling Supreme Court case law. The Supreme Court has repeatedly declined to disbar upon findings of mitigating circumstances comparable to those found by the referee at the hearing below. Thus, disbarment is not warranted where, as here, aberrational misconduct is involved with little or no risk of repetition (*Friedman v. State Bar* (1990) 50 Cal.3d 235); where there is a "substantial previous unblemished record" (*In re Kelley* (1990) 52 Cal.3d 487; *Schneider v. State Bar* (1987) 43 Cal.3d 784, 798-799); where severe emotional distress from personal pressures which no longer pertain is found to be directly responsible for the misconduct (*Amante v. State Bar* (1990) 50 Cal.3d 247, 254; *Bradpiece v. State Bar* (1974) 10

Cal.3d 742, 746) and "successful therapeutic rehabilitation or a strong prognosis for future rehabilitation is established." (*Porter v. State Bar* (1991) 52 Cal.3d 518, 528; *Ballard v. State Bar* (1983) 35 Cal.3d 274, 289.)

For a first offense of misappropriation by a practitioner the more common discipline is one year of actual suspension. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 628, citing *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367-1368.) There is no question that respondent's serious misconduct merits significantly more than one year's suspension. It involved both a substantial amount of money and the aggravating circumstances of a prolonged cover-up thereafter, albeit in the course of commencing restitution. However, in determining the appropriate discipline our Supreme Court has repeatedly directed that we look at the record in light of the purposes served by discipline. (See, e.g., *Maltaman v. State Bar, supra*, 43 Cal.3d at p. 958 ["we have no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public. (Citations.)"]; see also *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316 ["The imposition of attorney discipline does not issue from a fixed formula but from a balanced consideration of all relevant factors, including aggravating and mitigating circumstances. (Citation.)"].)

The majority concludes that respondent's practice of deceit in the course of making restitution for his misappropriation over close to a two-year period renders his conduct non-aberrational and by itself warrants suspension or disbarment. (Maj. opn., ante, p. 594, citing standard 2.3, Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ["standard(s)"]; *Harford v. State Bar* (1990) 52 Cal.3d 93, 102; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 and *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147.) While deceit of a client is a serious matter, the majority departs from Supreme Court precedent in treating the deceit as a basis for converting the case from a suspension case to a disbarment case when it was unaccompanied by "other serious *and habitual* misconduct." (*Maltaman v. State Bar, supra*, 43 Cal.3d at p. 958, emphasis in original; *Rodgers v. State Bar, supra*, 48 Cal.3d

300;<sup>1</sup> see also *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 131-132.) In *Levin v. State Bar*, *supra*, 47 Cal.3d at p. 1147, the Supreme Court noted "no aspect of Levin's conduct is more reprehensible than his acts of dishonesty." Yet the result was that the respondent received six months actual suspension.

The Supreme Court has repeatedly recognized the principle that discipline should be consistent with and proportional to that imposed in similar recent cases. (See, e.g., *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1309.) In *Snyder*, the Court concluded that disbarment was inappropriate for misappropriation and commingling and other trust account violations in light of the petitioner's emotional breakdown resulting from severe personal stress and voluntary termination of practice for a period of three years, despite his short period of prior practice and his need for continued psychiatric therapy as part of his discipline. It found the case similar to *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, and declined to deviate from the hearing panel's recommendation of two years suspension since the panel "had the first-hand opportunity to observe petitioner's demeanor." (*Snyder v. State Bar*, *supra*, 49 Cal.3d at pp. 1309-1310.) Here, as in *Snyder v. State Bar*, *supra*, the referee found that respondent had emotional problems resulting from his foundering marriage, responsibilities for a disabled teenage daughter, and serious financial problems. In some respects, respondent's case differs from *Snyder's*. While the amount of respondent's misappropriation and his subsequent cover-up were significantly more serious than the misconduct in *Snyder*, unlike *Snyder*, re-

spondent also had a lengthy period of blemish-free prior practice.

The case most comparable to this one appears to be *Friedman v. State Bar*, *supra*, 50 Cal.3d 235 in which the Supreme Court rejected a disbarment recommendation in favor of three years actual suspension with a standard 1.4(c)(ii) hearing required before the respondent could resume practice. Like *Friedman*, respondent was found to have committed an aberrational act of misappropriation aggravated by deceit and other misconduct over a period of years.<sup>2</sup> Although the Supreme Court described *Friedman's* conduct as very serious, it also characterized *Friedman's* conduct as aberrational because it was in the context of an otherwise unblemished 20-year career and because it was attributable in part to stresses he experienced arising from marital problems. (*Friedman*, *supra*, 50 Cal.3d at p. 245.)

The Supreme Court did not find disbarment necessary even though *Friedman* repeatedly lied in the course of the State Bar investigation, committed perjury at the hearing and attempted to manufacture evidence—conduct far more egregious than respondent's initial lack of complete candor and cooperation with the State Bar before he stipulated to culpability at the outset of the hearing below. Here, as in *Friedman v. State Bar*, *supra*, the referee likewise found that the 1980 incident was aberrational and resulted from "great difficulties in [his] personal and professional life." The referee further found that "respondent if he is not disbarred, imposes no threat of repeating the misconduct." The exam-

1. In *Rodgers v. State Bar*, *supra*, 48 Cal.3d 300, as in *Friedman v. State Bar*, *supra*, the Supreme Court rejected a disbarment recommendation despite *Rodgers's* repeated evasions and deceit of the court and opposing counsel. The Court stated that "No act of concealment or dishonesty is more reprehensible than *Rodgers's* attempts to mislead the probate court." (*Rodgers v. State Bar*, *supra*, 48 Cal.3d at p. 315.) It noted that the recommendation of disbarment was available for dishonesty in violation of section 6106, but found that it was disproportional to the discipline imposed by the Court under similar circumstances in the past. (*Id.* at pp. 317-318.) Taking into account such cases and *Rodgers's* prior clean record, it imposed two years actual suspension with five years probation to ensure his rehabilitation. (*Id.* at pp. 318-319.)

2. The Supreme Court compared *Friedman v. State Bar*, *supra*, 50 Cal.3d 235 to *Weller v. State Bar* (1989) 49 Cal.3d 670, in which it imposed similar discipline. (*Friedman v. State Bar*, *supra*, 50 Cal.3d at p. 245.) *Weller* was found to have misappropriated a substantial sum of money from two separate clients over a two-year period. (*Weller v. State Bar*, *supra*, 49 Cal.3d at p. 677.) In addition, *Weller* had two prior disciplinary proceedings including a separate instance of misappropriation from a third client. The high court noted that absent mitigating evidence, this course of conduct would almost certainly have warranted disbarment. (*Id.*, citing *Chang v. State Bar*, *supra*, 49 Cal.3d at p. 128 and *Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 657.) But the mitigating evidence reduced the discipline for misappropriation from two clients to three years actual suspension, notwithstanding two priors.

iner did not seek review of the ensuing decision recommending two years actual suspension based on such findings.

In rejecting the referee's recommendation of lengthy suspension, the majority gives no deference to the referee's finding, based upon personal observation of respondent and the credibility of his testimony and that of other witnesses, including expert opinion, that his misconduct was the direct result of extreme emotional difficulties and that he poses no threat of repeating the misconduct. (See standard 1.2(e)(iv.) On matters of credibility, the Supreme Court has instructed us to give great deference to the hearing panel. (See *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1056 [reversing the former volunteer review department's substitution of its own credibility determination for that of the hearing referee]; *Snyder v. State Bar, supra*, 49 Cal.3d at pp. 1309-1310.)

The majority gives insufficient weight to respondent's 14-year unblemished record prior to 1980. The absence of a prior disciplinary record is in itself an important mitigating circumstance. (*In re Kelley, supra*, 52 Cal.3d at p. 498.)

Also, the Supreme Court takes into account an unblemished record *following* the misconduct when a substantial period of time has passed prior to review. (*Rodgers v. State Bar, supra*, 48 Cal.3d at pp. 316-317; *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 450.) Indeed, in *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, recommended discipline adopted, orders filed Feb. 14, 1991 (S017683)), we applied that principle in mitigation of an elaborate fraud designed for similar personal gain. The mitigation resulted in two years actual suspension. Here, the eight years following respondent's misconduct have permitted him to obtain psychological treatment and put on evidence of a lengthy period of subsequent rehabili-

tation to convince the hearing referee that he would not repeat his misconduct. This is specifically recognized by standard 1.2(e)(viii) as an appropriate mitigating factor.

In similar situations where substantial mitigating factors have been found, disbarment has been rejected as clearly inappropriate. (Compare *In re Chernik* (1989) 49 Cal.3d 467, 474 [one year actual suspension for felony conviction (18 U.S.C. § 371), where mitigating factors found, including a 13-year prior blemish-free record] with *In re Crooks* (1990) 51 Cal.3d 1090, 1101 [disbarment for felony conviction (18 U.S.C. § 371) where no mitigating circumstances found].)

As the Supreme Court explained in *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656-657, the most obvious candidates for disbarment are those who take large sums of money *from several clients*. "Such broad scale wrongdoing suggests that the attorney is likely to repeat his misconduct and is simply not worthy of the public trust. [Citation.]" (*Id.*)<sup>3</sup> The Supreme Court went on to address what other circumstances might also merit disbarment absent broad scale misconduct. In *Kelly v. State Bar, supra*, the respondent had only been a member of the State Bar for seven and one-half years. Ordering disbarment for two counts of misconduct including misappropriation of substantial client funds, the Supreme Court noted that "no mitigating factors—compelling or otherwise—were presented" and that respondent's unexcused and unmitigated conduct coupled with no explanation and a self-interest served by his misconduct suggested that he was capable of doing it again. (*Id.* at p. 659.) Similarly, in *Chang v. State Bar, supra*, 49 Cal.3d at p. 129, the Supreme Court found no mitigating circumstances whatsoever. Nonetheless, one justice dissented from the disbarment recommendation because the misappropriation involved only one client and one law firm. Here, in contrast, the referee found substantial mitigation and

3. Typical examples of such broad scale wrongdoing are cases such as *Coombs v. State Bar* (1989) 49 Cal.3d 679 (13 separate cases of misconduct), *Hitchcock v. State Bar* (1989) 48 Cal.3d 690 (six original client matters and grand theft conviction involving hundreds of thousands of dollars), *Cannon v. State*

*Bar* (1990) 51 Cal.3d 1103 (misconduct found in five client matters after inactive enrollment for ten other matters), and *Harford v. State Bar, supra*, 52 Cal.3d 93 (misappropriation, forgery, concealment and dishonesty in six client matters plus prior record of discipline).

also specifically found that respondent was not a threat to commit similar acts.<sup>4</sup>

The very recent case of *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, involved more flagrant misconduct. In *Kaplan*, the Supreme Court found that a partner in a major law firm under no financial pressure committed 24 separate acts of misappropriation over several months for no apparent reason except to live beyond his means. (*Id.* at p. 1072.) As the Court observed, the facts indicated that absent action taken by his law partners Kaplan would not have ceased his misappropriations. (*Id.*) In adopting the review department's disbarment recommendation, the Court noted the inapplicability of the line of cases considering financial difficulties and related personal pressures in mitigation (*Amante v. State Bar, supra*, 50 Cal.3d at p. 254; *Bradpiece v. State Bar, supra*, 10 Cal.3d at pp. 747-748) because Kaplan's misconduct was not caused by such problems. It also distinguished the line of cases involving "a few isolated incidents." (*Kaplan v. State Bar, supra*, 52 Cal.3d at p. 1071; see also *ibid.*, fn. 5.) The Court further noted the hearing panel had found no clear and convincing evidence that Kaplan no longer suffered from the emotional difficulties which prompted his two dozen thefts and that there was insufficient demonstration of changed circumstances. (*Id.* at pp. 1072-1073.)<sup>5</sup>

Here, in contrast, the referee made express findings in favor of the respondent on all of the mitigating factors which were absent in *Kaplan*.<sup>6</sup>

Indeed, the record shows that respondent acknowledged his misappropriation long before any complaint was made by the client to the State Bar, and that he executed a promissory note for the misappropriated funds and continued to make payments on such note until such time as he was advised by the bank's collection agent that the bank would no longer accept payments. (Decision, p. 7.) Since the bank refused further payments on the promissory note, it appears inappropriate to take the majority's view that his failure to put payments aside thereafter is evidence of indifference toward rectification or atonement under standard 1.2(b)(v), particularly in light of the lack of any evidence of his current financial situation.<sup>7</sup>

Other cases cited by the majority also involved far more egregious circumstances than are present here. In *In re Basinger* (1988) 45 Cal.3d 1348, an attorney with only eight years of practice became romantically involved with a secretary and joined her in perpetuating multiple thefts of over \$260,000 to cover his gambling losses and lied to cover his thefts. He made partial restitution only after the

4. The referee reached the conclusion that respondent posed no risk of repetition of his misconduct despite improperly voicing concern about respondent's remorse based on respondent's claim to credit for fees earned prior to the misappropriation. As the majority points out, respondent was entitled to credit for fees earned and his assertion of a claim thereto at the hearing cannot be considered as a sign of lack of remorse.

5. Although the majority quotes the testimony below of Dr. Schlesinger as indicating that continued therapy would "especially" render nil the likelihood of repeated misconduct, such qualification still meets the Supreme Court's requirement of "establishing a strong prognosis for rehabilitation." (*Porter v. State Bar, supra*, 52 Cal.3d at p. 528.) Indeed, the majority does not directly address the referee's determination that respondent represented no current risk based on the testimony of all the witnesses, including respondent. The findings of the referee in this regard are based on evidence far more reliable than the hearsay belatedly proffered on appeal in *In re Lamb* (1989) 49 Cal.3d 239, 247. Disbarment is clearly not necessary to take care of any lingering concern on this issue. (*Snyder v. State Bar, supra*, 49 Cal.3d 1302, 1309-1310 [adopting recommendation of two years actual suspension

conditioned on prescribed mandatory continuing psychiatric therapy]; cf. *Maltaman v. State Bar, supra*, 43 Cal.3d at p. 958.) Similarly to *Snyder v. State Bar, supra*, we could more than adequately protect the public by simply adding to the conditions of the stayed suspension a requirement of either continued therapy or certification of no further need for therapy as a precondition to a standard 1.4(c)(ii) showing.

6. As the majority notes, respondent was a solo practitioner making a below subsistence level \$5,000 to \$10,000 per year. This factor, by itself, is not entitled to great weight absent clear evidence as to whether these severe financial pressures were reasonably foreseeable or beyond his control. (*In re Naney* (1990) 51 Cal.3d 186, 196.) However, where such factor is combined with great personal stress the combination has been repeatedly recognized as a factor in mitigation. (See, e.g., *Amante v. State Bar, supra*, 50 Cal.3d at p. 254.)

7. Respondent may be permitted to show that he has made restitutionary payments to the best of his ability and his financial situation has rendered him unable to complete restitution by such time. (Cf. *Galardi v. State Bar* (1987) 43 Cal.3d 683, 694-695.)

police intervened. *In re Abbott* (1977) 19 Cal.3d 249, *In re Demergian* (1989) 48 Cal.3d 284, 294, and *In re Ewaniszyk* (1990) 50 Cal.3d 543, 553 all involved grand theft convictions.<sup>8</sup>

The very recent decision in *Grim v. State Bar* (1991) 53 Cal.3d 21 is also more egregious than the current case since in aggravation of the charged misappropriation, the record disclosed a number of other instances when the respondent's trust account had been overdrawn over a two-year period; the respondent had a prior record of discipline which included commingling of funds and failure to perform services; restitution commenced only after State Bar proceedings were instituted; there was no sustained period of clean conduct after the charged misappropriation and there was no finding by the referee of no threat of repetition of the misconduct or other harm to the public. (*Id.* at pp. 32, 25.) Even so, one justice dissented on the ground that disbarment was excessive. (*Id.* at p. 36 (dis. opn. of Mosk, J.))

Thus, even on far more egregious facts with greater risk to the public, the Supreme Court has split on the propriety of disbarment. Where acts of similar seriousness were committed by attorneys with long periods of otherwise unblemished practice, the Supreme Court has repeatedly declined to disbar, often by unanimous vote. Instead, the Court has ordered varying lengths of suspension depending on other mitigating factors. (See, e.g., *In re Chernik*, *supra*, 49 Cal.3d at p. 474; *Friedman v. State Bar*, *supra*, 50 Cal.3d at p. 245; *Rodgers v. State Bar*, *supra*, 48 Cal.3d at p. 318.)

Disbarment is not necessary to protect the public here. I would recommend five years stayed suspension and five years probation, conditioned on

actual suspension for three years and until respondent makes restitution. During probation, respondent should be required to continue therapy, unless a psychiatrist or qualified psychologist certifies that therapy is no longer necessary. For further protection of the public, I would also require that before respondent is allowed to resume the practice of law, he must prove rehabilitation, fitness to practice law, and learning and ability in the general law at a hearing pursuant to standard 1.4(c)(ii).

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8. In *In re Abbott*, *supra*, the respondent only commenced partial restitution after he was criminally convicted and restitution was made a condition of probation. Also, his prognosis for recovery from manic-depressive psychosis was not uniformly favorable. (19 Cal.3d at p. 254.) The respondents in both *Demergian* and *Ewaniszyk* had cocaine and alcohol abuse problems and periods of prior practice so short that they were not deemed of significance as mitigating factors. Justices Kaufman and Panelli dissented in *In re Demergian* on the basis that Demergian had made an adequate showing of rehabilitation. (*In re Demergian*, *supra*, 48 Cal.3d at pp. 298,

299 (dis. and conc. opn. of Kaufman, J.)) Justices Mosk and Broussard likewise dissented in *In re Ewaniszyk*, *supra*, 50 Cal.3d at p. 552 and would have imposed a lengthy suspension instead. (Cf. *Baker v. State Bar* (1989) 49 Cal.3d 804 [rejecting a disbarment recommendation and ordering one year suspension of an attorney who committed multiple acts of misappropriation from several clients but who established rehabilitation from alcohol and cocaine dependency to demonstrate that disbarment was not reasonably necessary to protect the public].)