

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KENNETH E. HAGEN

A Member of the State Bar

No. 84-O-15530

Filed July 30, 1992; reconsideration denied, September 24, 1992; as modified, November 5, 1992

SUMMARY

Based on a six-count notice to show cause, the hearing judge found that respondent misappropriated client funds in two matters, failed to return client funds after demand in four matters, was grossly negligent in issuing insufficiently funded checks to clients in four matters, and entered into improper business transactions with clients in two matters. Finding few mitigating factors and several aggravating factors, including a prior public reproof, the hearing judge recommended that respondent be suspended from the practice of law for four years, that the execution of the suspension be stayed, and that he be placed on probation for a period of four years on conditions including an actual suspension of eighteen months. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent requested review, contending that the actual suspension recommended by the hearing judge should be reduced to not more than 90 days because the misconduct occurred under strong mitigating circumstances and was the result of gross negligence as opposed to intentional wrongdoing. The review department concluded, among other things, that respondent was culpable of fewer acts of intentional dishonesty and his misconduct was surrounded by fewer aggravating and more mitigating circumstances than the hearing judge found. Based on its findings and conclusions, the review department recommended that respondent be suspended from the practice of law for a period of three years, stayed, that he be placed on probation for a period of three years, and that he be actually suspended for one year and until he makes restitution.

COUNSEL FOR PARTIES

For Office of Trials: Victoria Molloy

For Respondent: Ellen A. Pansky, R. Gerald Markle

HEADNOTES

- [1] **273.00 Rule 3-300 [former 5-101]**
The absence of security for a loan, when security would ordinarily be considered essential to the client, is an indication of unfairness in a business transaction between an attorney and a client. Thus, respondent's admission that he should have provided security for a loan from his client was an indication that the transaction was not fair and reasonable to the client.
- [2 a, b] **273.00 Rule 3-300 [former 5-101]**
The characterization of a transaction between an attorney and a client as a loan or an investment is not critical to whether there was a violation of the rule governing attorneys' business transactions with clients. The rule prohibits attorneys from entering into business transactions with clients or acquiring an adverse interest in a client's property without compliance with the rule.
- [3] **162.20 Proof—Respondent's Burden**
273.00 Rule 3-300 [former 5-101]
When an attorney-client business transaction is involved, the attorney bears the burden of showing that the dealings between the parties were fair and reasonable and were fully known and understood by the client. Attorneys are subject to discipline for inducing clients to invest in business enterprises without fully apprising them of the risks. Where respondent admitted entering into a business transaction with a client and failed to show full disclosure to the client regarding the risks involved in the transaction, a violation of the rule was established.
- [4] **273.00 Rule 3-300 [former 5-101]**
The Supreme Court has not overruled or otherwise negated the requirement that an attorney advise a client to seek independent counsel before entering into a business transaction with the attorney.
- [5] **204.90 Culpability—General Substantive Issues**
Violations of standards of professional conduct not yet clarified by case law are less reprehensible than violations of more clear-cut and well-established rules.
- [6] **273.00 Rule 3-300 [former 5-101]**
One of the purposes of the rule of professional conduct governing business transactions with clients is to protect clients from their attorneys' personal use of financial information gained from confidences disclosed during the attorney-client relationship.
- [7] **410.00 Failure to Communicate**
An attorney's failure to communicate with and inattention to the needs of a client are proper grounds for discipline.
- [8] **162.11 Proof—State Bar's Burden—Clear and Convincing**
410.00 Failure to Communicate
Where a client had difficulty communicating with respondent for a short period of time, but respondent did reply in some limited fashion to the client's status inquiries, and where it was not clear from the record whether any significant developments occurred with regard to the client's litigation during that period of time, there was not clear and convincing evidence of a failure to communicate.

- [9] **221.00 State Bar Act—Section 6106**
 420.00 Misappropriation
 A conclusion that an attorney engaged in acts of moral turpitude does not necessarily follow from a finding that the attorney misappropriated client funds.
- [10 a-e] **221.00 State Bar Act—Section 6106**
 280.00 Rule 4-100(A) [former 8-101(A)]
 420.00 Misappropriation
 An attorney's appropriation of client funds based on an unreasonable but honest belief of entitlement to the funds constitutes only a violation of the rule of professional conduct regarding client trust funds, and not an act of moral turpitude or dishonesty. However, where respondent could not have held an honest belief that he was entitled to some of the money he withdrew from a client trust account, his misappropriation of those funds not only violated the rule governing client trust funds, but also involved moral turpitude.
- [11] **280.00 Rule 4-100(A) [former 8-101(A)]**
 An attorney's withdrawal of client funds after the client disputed the attorney's right to receive that money was a violation of the rule of professional conduct requiring disputed client funds to be held in trust.
- [12] **221.00 State Bar Act—Section 6106**
 430.00 Breach of Fiduciary Duty
 An attorney's gross carelessness and negligence constitute violations of the attorney's oath to faithfully discharge duties to clients to the best of the attorney's knowledge and ability, and involve moral turpitude in that they breach the fiduciary relationship attorneys owe to clients.
- [13] **204.20 Culpability—Intent Requirement**
 221.00 State Bar Act—Section 6106
 An attorney's gross negligence in handling his clients' funds, which resulted in the issuance of several trust account checks that were not honored due to insufficient funds, involved moral turpitude even though there was no evidence of intentional wrongdoing or dishonest motive.
- [14 a-c] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
 An attorney's unjustified delay of over two months in paying client funds to the client after demand violated the rule of professional conduct requiring client funds to be paid promptly upon demand. Conversely, where a delay in payment to another client was minimal and not intentional, no violation of the rule occurred.
- [15] **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
 Even though notice to show cause did not expressly charge violation of rule requiring client funds to be held in trust, respondent could be found culpable of violating such rule by misappropriating client funds, where such charge was clearly encompassed within allegations in support of moral turpitude charge.

- [16] **740.51 Mitigation—Good Character—Declined to Find**
Testimony by three character witnesses was not entitled to significant weight in mitigation since it was not an extraordinary demonstration of good character attested to by a wide range of references.
- [17] **755.52 Mitigation—Prejudicial Delay—Declined to Find**
Respondent was not prejudiced by inability to corroborate testimony regarding trust account practices, due to destruction of respondent's trust account bank records, because hearing judge essentially accepted respondent's testimony regarding trust account practices, and respondent admitted gross negligence in handling clients' funds. Accordingly, delay in prosecution was not a mitigating factor.
- [18] **710.10 Mitigation—No Prior Record—Found**
Even though an attorney has a record of prior discipline, it is appropriate to consider a lengthy period of blemish-free practice prior to the attorney's first act of misconduct as a mitigating circumstance, where the prior misconduct occurred during the same time period as the present misconduct and both the prior and current misconduct occurred within a narrow time frame.
- [19] **513.10 Aggravation—Prior Record—Found but Discounted**
Whenever discipline is imposed, consideration is properly given to the presence of a prior disciplinary record, even where the facts giving rise to the prior discipline occurred during the same time period as the present misconduct. However, the aggravating force of the prior discipline is diminished when it occurred during the same time period as the present misconduct and thus did not provide the attorney with an opportunity to heed the import of that discipline.
- [20 a, b] **165 Adequacy of Hearing Decision**
802.61 Standards—Appropriate Sanction—Most Severe Applicable
1092 Substantive Issues re Discipline—Excessiveness
Where two or more acts of professional misconduct are found, the discipline should be the most severe of the several applicable sanctions, not the sum of the applicable standards. Accordingly, it was not appropriate to recommend 18-month actual suspension based on conclusion that one-year actual suspension was appropriate for misappropriation and six-month actual suspension was appropriate for writing insufficiently funded checks.
- [21 a-d] **822.34 Standards—Misappropriation—One Year Minimum**
833.40 Standards—Moral Turpitude—Suspension
The appropriate discipline for wilful misappropriation is disbarment in the absence of extenuating circumstances. However, extenuating circumstances sufficient to warrant less than disbarment have been found both in the attorney's background, demonstrating that the misconduct was aberrational and hence unlikely to recur, and in the facts relating to the misappropriation, recognizing that more severe discipline is warranted for intentional theft as opposed to negligent acts unaccompanied by evil intent. Where respondent's extensive misconduct, which included multiple acts of gross negligence in handling client funds as well as misappropriation and improper business transactions with clients, occurred during a three-year period after a 28-year blemish-free record, and was surrounded by circumstances indicating that the misconduct was aberrational, a one-year actual suspension and three years stayed suspension and probation were adequate discipline.

[22] 171 Discipline—Restitution

It was appropriate to order respondent to make restitution to client of client's funds which were applied to respondent's fees without client's authorization, even though respondent performed substantial legal services for client, because restitution would effectuate respondent's rehabilitation and protect public from similar future misconduct.

ADDITIONAL ANALYSIS

Culpability

Found

- 221.12 Section 6106—Gross Negligence
- 221.19 Section 6106—Other Factual Basis
- 273.01 Rule 3-300 [former 5-101]
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 420.13 Misappropriation—Wrongful Claim to Funds

Not Found

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2
- 221.50 Section 6106
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]
- 280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 320.05 Rule 5-200 [former 7-105(1)]

Aggravation

Found

- 521 Multiple Acts
- 582.10 Harm to Client

Declined to Find

- 545 Bad Faith, Dishonesty

Mitigation

Found

- 750.10 Mitigation—Rehabilitation—Found

Found but Discounted

- 745.31 Remorse/Restitution

Discipline

- 1013.09 Stayed Suspension—3 Years
- 1015.06 Actual Suspension—1 Year
- 1017.09 Probation—3 Years

Probation Conditions

- 1021 Restitution
- 1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge of the State Bar Court that respondent, Kenneth E. Hagen, be suspended from the practice of law for four years, that the execution of the suspension be stayed, and that he be placed on probation for a period of four years on conditions, including that he be actually suspended for a period of eighteen months. The hearing judge found, based on a six-count notice to show cause, that respondent misappropriated client funds in two matters, failed to return client funds after demand in four matters, was grossly negligent in issuing insufficiently funded checks in four matters, and entered into improper business transactions with clients in two matters. Finding few mitigating factors and several aggravating factors, including a prior public reproof, the hearing judge concluded that a substantial period of actual suspension was warranted.

Respondent requested review, arguing that the actual suspension recommended by the hearing judge should be reduced to not more than 90 days because the misconduct occurred under strong mitigating circumstances and was the result of gross negligence as opposed to intentional wrongdoing. The State Bar examiner disputes each of respondent's contentions, arguing that the hearing judge's findings should be sustained and that the actual suspension recommended by the hearing judge is the minimum warranted and, in the alternative, should be increased to three years.

We have independently reviewed the record and have concluded, among other things, that respondent is culpable of fewer acts of intentional dishonesty and his misconduct is surrounded by fewer aggravating and more mitigating circumstances than the hearing judge found. Based on our conclusions, we recommend that respondent be suspended from the practice of law for a period of three years, with the execution of the suspension stayed, and that he be placed on probation for a period of three years on the conditions specified below, including actual suspension for one year and until he makes restitution as set forth below.

FACTS AND FINDINGS

The hearing judge made the following factual findings and legal conclusions. The factual findings are for the most part undisputed by the parties and supported by the record. Accordingly, we adopt them with the minor modifications discussed below. Our modifications of the hearing judge's legal conclusions are more extensive and are discussed below.

Respondent was admitted to the practice of law in California in 1956. From 1983 through 1986, respondent maintained two types of trust accounts: non-interest bearing general trust accounts (check writing accounts) and interest bearing trust savings accounts and certificates of deposit (savings accounts). Respondent's practice was to deposit client funds that were to be held for more than a brief period of time into a savings account. Usually he would set up a separate savings account for each client, but he occasionally had money from more than one client in the same account. Small amounts of client funds or funds that were to be disbursed relatively quickly would be deposited into the check writing account.

Even though respondent may have had a particular client's money in a particular savings account, he treated all of the accounts as a whole. For example, if respondent had \$50,000 for client A in a savings account and \$5,000 for client B in a check writing account and he needed to disburse \$2,000 to or for the benefit of client A, he would do so by drawing the money from the check writing account. He would then balance the accounts at the end of the month. If client A needed \$6,000, respondent would write a check drawn on the check writing account and transfer enough money into the check writing account from the savings account to cover the check.

Counts one, two and three involve respondent's relationship with Miller Dial corporation (Miller Dial), its two sole shareholders, Philip Rutten (Rutten) and Leonard Kranser (Kranser), and other entities in which Rutten and Kranser were associated, including Building Account, a partnership involving the family trusts of Kranser and Rutten. Respondent first met Rutten and Kranser in the mid-1970's, and over the years variously represented Miller Dial and Building Account as well as Rutten individually on a few

minor matters. In March 1986, the various individuals and entities involved in counts one, two and three filed a malpractice action against respondent, which was settled in January 1990 with respondent paying the plaintiffs \$10,000 in full settlement of all claims.

Count One (Miller Dial)

In April 1985, Miller Dial hired respondent to handle a fee dispute between Miller Dial and a law firm relating to past due attorney fees owed by Miller Dial. Rutten instructed respondent to negotiate a discount of the amount owed and apply the difference, not to exceed \$600, to his fees. In early July 1985, Miller Dial gave respondent a check in the amount of \$7,201.80 for settlement of the dispute, which he deposited into his check writing account. On July 8, 1985, the balance in that account fell below the amount deposited; however, respondent had earmarked funds in a savings account sufficient to cover the difference.

In mid-September 1985, respondent informed Rutten about a proposed settlement and indicated that he was running up bills on other items. Rutten instructed respondent to negotiate a further reduction of \$600 from the amount owed and apply that money to his fee. On September 23, 1985, respondent confirmed his understanding of the conversation with Rutten by letter, which indicated that if the law firm did not promptly execute a new release, the remaining funds would be applied to Miller Dial's outstanding attorney's fees owed to respondent. Between September 23, 1985, and December 30, 1985, respondent applied the entire amount of money to the fees owed his office by Miller Dial and other associated entities.

On December 16, 1985, an attorney then representing Miller Dial sent a letter to respondent confirming respondent's discharge from all repre-

sentation of Miller Dial and requesting the return of all papers, documents and funds belonging to the client. On December 20, 1985, respondent returned some documents. By letter dated December 30, 1985, respondent rendered an accounting to Miller Dial, which indicated that since Miller Dial elected not to sign the release, respondent was authorized to and did apply the funds to the outstanding fees owed him in other matters. Neither Rutten or anyone authorized to speak for Miller Dial ever authorized respondent to apply more than \$1,200 to his fees.

Count one of the notice to show cause charged that respondent failed to return the funds held in trust and misappropriated such funds, in wilful violation of sections 6068 (a), 6103 and 6106 of the Business and Professions Code¹ and former rule 8-101(B)(4) of the Rules of Professional Conduct.² The hearing judge concluded that respondent had no authority to apply the funds to past due fees, had a duty to return the money after the demand contained in the December 16, 1985 letter, and wilfully violated rule 8-101(B)(4) by intentionally applying trust funds to past due fees without authority. The judge further concluded that respondent's "improper conversion" of the trust funds was a wilful misappropriation which was an act involving moral turpitude in violation of section 6106.³

Count Two (Atari)

Sometime in 1984, a dispute arose between Miller Dial and Atari Corporation (Atari). Respondent was retained by Miller Dial to pursue a claim for money owed by Atari to Miller Dial. On October 11, 1985, pursuant to a settlement agreement, an Atari check in the amount of \$1,900 was deposited into respondent's check writing account. Respondent was not authorized by Atari to disburse the proceeds of the settlement until all mutual releases had been executed and a dismissal of the action had been filed

1. All further references to statutes are to the Business and Professions Code, unless otherwise noted.

2. All references to rules herein, unless otherwise stated, are to the former Rules of Professional Conduct of the State Bar of California, in effect from January 1, 1975, to May 26, 1989.

3. All six counts charged respondent with violating sections 6068 (a) and 6103, which charges were rejected by the judge in all counts. The judge's conclusions in this regard are supported by the record and the case law and we adopt them as our own. (Cf. *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476.) As a result, no further discussion of these charges is contained in this opinion.

by Miller Dial. In addition, neither Rutten nor Miller Dial authorized respondent to withdraw any of the Atari funds. By October 31, 1985, the balance in the check writing account fell well below \$1,900. Respondent maintained sufficient funds in one of the interest bearing savings accounts to cover the difference.

Prior to finalization of the Atari settlement, respondent was discharged from representing Miller Dial and on December 16, 1985, Miller Dial's new counsel demanded that respondent release the Atari settlement money. Nevertheless, respondent continued to finalize the Atari settlement apparently with the approval of his client. By March 1986 the settlement was finalized with the signing of mutual releases and dismissal of the court action. On March 6, 1986, Miller Dial filed a civil action against respondent alleging that he had wrongfully withheld the Atari settlement funds. Shortly thereafter, respondent gave Miller Dial its share of the settlement money by check dated March 25, 1986. That check was returned for insufficient funds and on April 24, 1986, was redeposited and honored. Respondent was substituted out of the case in April 1986.

Count two of the notice to show cause alleged that respondent misappropriated the settlement funds and that the check he issued to Miller Dial was not honored due to insufficient funds in wilful violation of rule 8-101(B)(4) and section 6106. The hearing judge concluded that respondent's failure to "present Miller Dial with a sufficiently funded check" in March 1986 when he accomplished the dismissal of the Atari action was a violation of rule 8-101(B)(4). The judge also concluded that respondent was grossly negligent in not ensuring that sufficient funds were transferred from other accounts to cover the checks he had written and his conduct of repeatedly issuing insufficiently funded checks to his clients constituted moral turpitude and violated section 6106.

Count Three (Building Account)

Cajon Business Park (Cajon) was a limited partnership formed in 1981 which acquired title to a parcel of undeveloped real property in California for the purposes of building commercial buildings, a strip shopping center, and small single family residences or a mobile home park. Respondent and

Charles King were the two general partners of Cajon and respondent served as general counsel. Cajon had a number of limited partners and respondent had a personal investment in the project in excess of \$50,000.

The development of the property was contingent upon obtaining sewers. The only practical means of achieving this was through annexation of the property by the adjacent city. The annexation ran into delays and Cajon did not have the funds to pay the note on the property. At some point in time which is not clear from the record, Cajon filed a chapter 11 bankruptcy proceeding. Under the bankruptcy proceeding, as long as Cajon made an active effort to get the property developed and as long as it maintained the interest payments on the note, foreclosure of the property was stayed. In late 1984 Cajon needed money for the note payments.

In November 1984, respondent telephoned Rutten and requested that he and Kranser invest in Cajon. Respondent gave Rutten a prospectus-type brochure that outlined the investment and the property to be developed. Prior to Rutten and Kranser making an investment in Cajon, respondent advised them that a number of approvals were required to be obtained from various governing bodies of counties and cities in order to accomplish annexation; that respondent hoped to be getting those approvals very shortly; that the property needed to be annexed by the city in order to be developed further; and that the property was in foreclosure. Respondent gave them a land appraisal; a title report; a capital account sheet listing the names of the limited partners; and a disclosure of respondent's interest in Cajon. In December 1984, Building Account invested \$80,000 in Cajon.

Prior to making the investment, Rutten and Kranser talked to an accountant and negotiated two amendments to the limited partnership agreement. Respondent did not advise Rutten or Kranser of their opportunity to obtain the advice of independent counsel relating to the Cajon transaction.

In January 1985, Building Account loaned Cajon \$12,000, which was evidenced by a promissory note executed by respondent on behalf of Cajon. In April

1985, respondent issued two checks from his trust account to repay the loan. Respondent, as a general partner and counsel for Cajon, disbursed funds on behalf of the partnership through his trust account. Thereafter, the two checks were not honored by the bank due to insufficient funds. Respondent explained that his bank put a hold on the funds to cover the checks because they were from out of state. Shortly thereafter, the checks were redeposited and were honored.

Count three alleged that respondent entered into a business transaction with Rutten without complying with rule 5-101, and that respondent issued two checks from his trust account knowing there were insufficient funds to cover the checks, in violation of rule 5-101 and section 6106. The hearing judge concluded that respondent wilfully violated rule 5-101 by failing to advise Rutten and Kranser of the opportunity to seek advice of independent counsel. As in count two, the judge also found respondent violated section 6106 by gross negligence in issuing insufficiently funded checks.

Count Four (Hwa)

Respondent represented Irving Hwa (Hwa) from time to time from the 1970's through Hwa's death in October 1985. In 1983, Hwa visited respondent's office in connection with another matter and observed maps related to the Cajon property and requested the opportunity to invest in the projects. At that time, respondent advised Hwa that there were no longer any partnership interests available because they all had been sold. In 1984, Hwa expressed a continued interest in investing in Cajon. As Cajon needed money for its interest payments, respondent described the Cajon investment to Hwa. Hwa indicated a potential interest in investing \$25,000. After reviewing a three-quarters-of-an-inch portfolio, Hwa said perhaps he would invest in Cajon and would let respondent know. About a week later, Hwa telephoned and said he was coming to the office with a check to invest in Cajon. On September 6, 1984, respondent received \$25,000 from Hwa and signed an unsecured promissory note in exchange for the investment. Respondent signed the note in his personal capacity because he had no authority from Cajon to issue a note on behalf of the partnership.

Respondent used the Hwa money to pay the next interest installment on Cajon's note.

On November 1, 1984, respondent prepared a letter to Hwa which confirmed Hwa's investment and confirmed Hwa could withdraw the investment if the partnership did not obtain approval for annexation or if sewer services were not obtained, or should Hwa have an emergency requiring the return of funds before the two conditions (annexation and sewer services) became a reality. Further, the letter confirmed that if Hwa exercised his right to have the funds returned, respondent would have a reasonable amount of time to return the money and a reasonable amount of time to find an alternate investor, or respondent could pay Hwa from the cash flow from respondent's practice. Hwa signed this letter underneath the words "APPROVED, ACCEPTED, RATIFIED." Subsequently, respondent prepared a draft amendment to the partnership agreement to reflect Hwa's interest in the partnership based upon Hwa's investment. The amendment was not formalized because after November 1, 1984, Hwa had a family problem and requested his money back.

On July 6, 1985, respondent signed in his personal capacity a new unsecured promissory note to Hwa. On October 1985 and March 1986, respondent issued two checks, drawn on his check writing account, payable to Hwa, in accordance with the promissory note. These checks were not honored due to insufficient funds. In October 1985, Hwa died. Hwa's daughter ultimately retained counsel to commence collection efforts on behalf of her father's estate, and in May 1987, respondent stipulated to judgment and paid off the obligation over a period of time.

Count four alleged that respondent entered into a business transaction with Hwa without complying with and in violation of rule 5-101 and that he issued checks to Hwa knowing there were insufficient funds to cover the checks in violation of section 6106. The hearing judge found that respondent wilfully violated rule 5-101 because he failed to advise Hwa of the opportunity to seek the advice of independent counsel, and the terms of the transaction were not fair and reasonable because respondent failed to provide security for the loan from Hwa and respondent did not disclose to Hwa his (respondent's) financial

condition. As in counts two and three, the judge also found respondent violated section 6106 by gross negligence in issuing insufficiently funded checks.

Count Five (Perry)

In May 1981, respondent was hired by Philip Perry to represent him in a civil matter. One of Perry's employees was involved in an automobile accident driving a truck that Perry was in the process of purchasing. Several actions were filed by the various parties, among which was an action respondent filed in September 1981 asserting that the ownership of the truck was still with the seller at the time of the accident and demanding rescission of the contract and the return of the purchase money.

In August 1983, Perry's insurance company paid respondent \$6,000 in settlement of any claims against that carrier for the damage to the truck. Respondent deposited the money into his trust account pending final settlement with all parties. During September and October 1983, Perry tried to determine from respondent the status of the lawsuit. Respondent repeatedly indicated that the status had not changed. In early 1984, Perry hired attorney Schwartz to represent him in the matter and Schwartz immediately requested that respondent substitute out, transfer the funds held in trust, and return Perry's papers. Respondent advised Schwartz that if the substitution was processed, he would return the \$6,000 to the carrier or interplead it with the court as respondent believed he had no authority to release the funds to Perry pending a final settlement because conflicting claims were made regarding ownership of the truck. Schwartz never proceeded with the substitution nor did he move to relieve respondent from representing Perry and respondent continued as Perry's attorney in the litigation through the settlement.

The money remained in respondent's trust account until disbursed pursuant to court order in a suit Schwartz filed in April 1984 on behalf of Perry against respondent for conversion, possession of personal property and damages. In October 1985,

pursuant to court order in this suit, respondent disbursed \$3,500 to Perry by check.⁴ That same day, Perry and Schwartz went to respondent's bank to cash the check but were unable to do so because there were insufficient funds in the account. Respondent wrote the check knowing that there were insufficient funds in the account but with the intent to transfer sufficient funds from a savings account immediately. When Perry learned that he could not cash the check, he immediately went to the police. A day or two later, the police advised Perry that they had a cashier's check in the amount of \$3,500. The officer advised Perry that he had contacted respondent, and that respondent was very upset and immediately went to the police station with the cashier's check.

Count five charged that respondent failed to communicate with Perry, misappropriated settlement funds, failed to substitute out of representation of Perry, failed to return documents and settlement funds to Perry, misrepresented to a court in a subsequent civil action that he continued to hold the settlement funds in trust, and issued a check to Perry pursuant to a court order knowing there were insufficient funds to cover the check, in violation of rules 2-111(A)(2), 6-101(A)(2), 7-105(1), and 8-101(B)(4), and section 6106. The hearing judge found that respondent wilfully violated rule 6-101(A)(2) by failing to communicate with Perry between September and November 1984; rule 8-101(B)(4) by failing to pay Perry part of the settlement funds promptly after being ordered by the court because he gave Perry an insufficiently funded check; and as in counts two through four, section 6106 by gross negligence in issuing insufficiently funded checks. No culpability was found on the remaining charges.

Count Six (Slater)

In July 1982, Shirley Slater (Slater) employed respondent to obtain an increase in her spousal support from her former husband, Dr. Slater. At that time Dr. Slater was already behind on spousal support. On July 13, 1982, Slater paid respondent \$1,500 with the agreement that respondent would charge an hourly

4. The court ultimately ordered respondent to pay Perry all of the \$6,000 except \$359.

rate and would deduct his fee from the advance payment.⁵ From December 1983 through late 1985, respondent and Gabriel Poll, respondent's associate, represented Slater in this motion to increase support and in opposing a subsequent motion to decrease spousal support.

Prior to June 1984, respondent had some difficulty collecting past due attorney's fees from Slater. In June 1984, respondent received a cashier's check from Dr. Slater in the amount of \$6,325 for past due spousal support for Slater, which respondent deposited into his trust account. At about the same time, respondent received \$1,498 pursuant to a writ of execution on Dr. Slater's property, which he also deposited into his trust account. On or about July 3, 1984, Slater owed respondent's law office \$6,894.57 in past due attorney's fees. At that time, respondent was holding \$7,823 in trust for Slater.

In early August 1984, Slater had a meeting with Poll wherein he requested that Slater authorize the application of the trust funds to the past due fees. Shortly thereafter, Poll sent Slater a letter confirming this request and requested that she acknowledge and approve that action by signing a copy of the letter. Shortly thereafter and without waiting for Slater to sign and return the letter, respondent applied the \$7,823 to his fees. Slater did not sign the letter. In late August 1984, Slater's father, Ben Staal, disputed the accounting of disbursements on Slater's behalf, including the amount of attorney's fees. Staal requested that the trust funds be released to Slater. From August 1984 through January 1985, Staal continued to request that respondent release Slater's funds and reduce his bill, but respondent refused. Respondent never sent any funds to Slater.

Count six alleged that respondent misappropriated client funds, that he misrepresented to Slater the amount of her money he was actually holding, and that after a fee dispute developed, he failed to maintain the disputed portion of the funds in trust until the dispute was resolved, in violation of rules 8-101(A)(2)

and 8-101(B)(4), and section 6106. The hearing judge found that respondent wilfully violated: rule 8-101(A)(2) by failing to maintain the disputed portion of the Slater's money in trust after he was notified of a fee dispute in August 1984; rule 8-101(B)(4) by applying the trust funds to past due fees without authority; and section 6106 by "improper conversion" of the trust funds to pay his fees.

Mitigation and Aggravation

In mitigation, the hearing judge found: Respondent presented three character witnesses (one judge, one attorney and one client), attesting to his good character and expressing an awareness of the fact that respondent had been found culpable of misappropriation of client funds; respondent presented evidence that he can responsibly handle funds entrusted to him; and he repaid the funds he wrongfully withheld to all former clients except Slater. However, the hearing judge did not accord the restitution efforts significant weight in mitigation because they were made under pressure of the impending trial in the State Bar proceeding, or the potential of criminal prosecution, or as a result of the likelihood of a civil judgment after the expenditure of substantial client resources.

In aggravation, the hearing judge found: The misconduct found in the present proceeding involved multiple acts of wrongdoing towards four different clients; respondent's misconduct in counts four and six was surrounded by bad faith to the clients; Slater, Miller Dial, Hwa and Perry suffered harm from respondent's misconduct in that payments were delayed or not disbursed for substantial periods of time and some had to incur legal costs and attorneys' fees to recoup monies owed them by respondent; and respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct toward Slater in that even after the State Bar hearing judge found that he wrongfully withheld monies from Slater, respondent did not pay her any of the trust funds which he wrongfully withheld.

5. Slater paid respondent a total of \$3,900 in attorney's fees: the \$1,500 in July 1982, \$2,000 in January 1984 and \$400 in February/March 1984.

The hearing judge also found as a factor in aggravation that respondent has a record of prior discipline, having been publicly reprovved in December 1986. The record indicates that in 1984 respondent failed to turn over a client's case file after he was discharged. After repeated requests from the client and after a court order was obtained directing him to turn over the file and sanctioning him, respondent turned over the files and paid the sanctions. In mitigation, respondent practiced for 28 years with no prior discipline, was candid and cooperative and expressed remorse.

DISCUSSION

Respondent asserts on review that his violations of rule 5-101 were technical violations for which no actual suspension is warranted; there was no failure to communicate in count five; and the violations of rule 8-101 were the result of gross negligence and not wilful misappropriation. The examiner disputes each of respondent's contentions, arguing that the hearing judge's findings should be sustained and that the actual suspension recommended is the minimum warranted and in the alternative should be increased to three years. The examiner does not assert that culpability exists for any of the charges that were dismissed by the hearing judge and after independently reviewing the record, we concur with the dismissal of these charges.

Rule 5-101 Violations

Respondent's argument that the rule 5-101 violations do not warrant actual suspension is essentially twofold: First, that the transaction in the Hwa matter was not inherently unfair to Hwa as the judge found, and second, that the Supreme Court has retreated from the requirement set forth in *Ritter v. State Bar* (1985) 40 Cal.3d 595, 602, that in order to comply with rule 5-101 an attorney must affirmatively advise the client to seek independent counsel. Under respondent's analysis of the facts in counts three and four, the transaction in the Hwa matter was an investment in Cajon and not a personal loan to respondent, and he did all he could do to see that Hwa's money was returned, which included paying Hwa from his personal funds; and he complied with the Supreme Court's current view of rule 5-101 by

providing the clients in both counts with ample opportunity to consult with independent counsel, even though he did not expressly advise them to do so. Thus, respondent asserts that if there is a violation of rule 5-101 at all, it is merely technical and does not warrant actual suspension. Respondent also parenthetically asserts that there was no attorney-client relationship with Hwa at the time of the investment and that fact should be taken into account in determining whether the transaction was fair and reasonable to Hwa.

The hearing judge characterized the Hwa transaction as a loan from Hwa to respondent which was converted into an investment in Cajon and then converted back to a loan to respondent. She based her conclusion that the transaction was not fair and reasonable on respondent's failure to disclose his personal financial condition to Hwa prior to the loan and his failure to provide security for the loan. Respondent conceded in his brief on review that he should have provided security. [1] The absence of security, when security would ordinarily be considered essential to the client, is an indication of unfairness. (*Hunnecutt v. State Bar* (1988) 44 Cal.3d 362, 373.) Thus, respondent's admission that he should have provided security for the loan is an indication that the transaction was not fair and reasonable to Hwa.

The problem with characterizing the Hwa transaction arises from the clear intent of the parties to the transaction and the vehicle they used to accomplish that intent. As the hearing judge's factual findings make clear, Hwa intended to invest in Cajon. From Hwa's initial inquiry regarding the project after he observed maps at respondent's office to respondent's letter confirming the transaction, Cajon was the object of the investment. However, because respondent did not have authority to issue a note on behalf of the partnership, he did so in his personal capacity. Nevertheless, the promissory note was a binding document. During that period of time prior to the formalization of the investment, the transaction was a loan from Hwa to respondent, evidenced by the note. In fact, the transaction was never converted to an investment and remained the personal obligation of respondent. [2a] Even though we agree with the hearing judge that the transaction was a loan from

Hwa to respondent, the characterization of the transaction as a loan or investment is not critical to whether there was a violation of 5-101.

[2b] The hearing judge found based on the parties' written stipulation, filed April 30, 1990, that respondent entered into a business transaction with Hwa. Rule 5-101 prohibits attorneys from entering into business transactions with clients *or* acquiring an adverse interest in a client's property without compliance with the rule. Respondent has not requested that he be relieved of this stipulation and no reason for such relief appears from the record. Thus, the issue is whether the admitted business transaction complied with rule 5-101.

[3] Respondent asserts that the transaction was fair and reasonable to Hwa because he personally guaranteed the money and gave Hwa the option of withdrawing the funds if any of the contingencies regarding the property did not occur or if Hwa had an emergency requiring return of the money, and that he made substantial efforts to repay Hwa. "When an attorney-client transaction is involved, the attorney bears the burden of showing that the dealings between the parties were fair and reasonable and were fully known and understood by the client." (*Hunnicuttt v. State Bar, supra*, 44 Cal.3d at pp. 372-373.) Attorneys are subject to discipline for inducing clients to invest in enterprises without fully apprising them of the risks. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 812.) Respondent failed to show that he made full disclosure to Hwa regarding the risks involved in the loan to himself, no matter how temporary that was intended to be, or the risks involved in investing in Cajon, and thereby wilfully violated rule 5-101.

By his own admission, respondent personally guaranteed Hwa's money and therefore his ability to repay was material to the transaction. Respondent failed to establish that he disclosed to Hwa his personal financial condition prior to accepting the money. The personal guarantee, the option to with-

draw and/or the substantial efforts to repay did not satisfy respondent's obligation to make full disclosure of his own financial condition to Hwa prior to the loan.

In addition, the only information he provided to Hwa regarding Cajon was the "portfolio" type document and an oral explanation of the project and the need for annexation. When contrasted with the information he provided Building Account, this single document and conversation do not establish full disclosure. Of critical importance was Cajon's pending bankruptcy and the possibility of foreclosure of the major asset of the partnership. Respondent offered no evidence that he advised Hwa of the bankruptcy or foreclosure action. Thus, whether the transaction is characterized as a loan or investment, respondent failed to show that he fully explained to Hwa the risks involved.

[4] Respondent's argument that the Court has retreated from the requirement that an attorney advise a client to seek independent counsel as held in *Ritter v. State Bar, supra*, is without merit. There is no indication that the court has overruled *Ritter* or otherwise negated the advice requirement and none of the cases cited by respondent so held.⁶ [5] However, the rule 5-101 violations in both the Hwa and Building Account matters occurred in late 1984, which predates *Ritter*. Accordingly, respondent's failure to advise the clients is less reprehensible than would be the case for a violation of a more well-established rule. (*Hawk v. State Bar, supra*, 45 Cal.3d at p. 602 ["the fact that we have not previously held that an attorney who takes a note secured by a deed of trust automatically acquires an interest 'adverse' to his client, make[s] petitioner's conduct in this matter less reprehensible than would be a violation of a more clear-cut and well-established rule".]) Respondent's argument that no attorney-client relationship existed with Hwa at the time Hwa gave respondent the \$25,000 is also without merit. Respondent stipulated on the record that at the time he received Hwa's money (September 1984) and prior

6. Respondent cites *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 949 (rule 5-101 does not require the recommendation of a specific attorney); *Hawk v. State Bar* (1988) 45 Cal.3d 589, 601 (attorney who secures payment of fees by taking a note

and trust deed in client's property must comply with rule 5-101); and *Brockway v. State Bar* (1991) 53 Cal.3d 51, 62, fn. 10 (rule 5-101 does not require advice to seek independent counsel to be in writing).

thereto, he had an attorney-client relationship with Hwa. Again, respondent has not requested that he be relieved of this stipulation, which is supported by the record. Hwa apparently had an ongoing relationship with respondent and would periodically visit respondent's office for legal assistance. It was during an office visit that Hwa first learned of the project and during subsequent visits that further discussions regarding the project occurred culminating in the loan/investment.

Respondent also stipulated that he learned Hwa had funds available to invest in Cajon during the course of his representation of Hwa. [6] "One of the purposes of the rule is to protect clients from their attorneys' personal use of financial information gained from confidences disclosed during the attorney-client relationship. [Citation.]" (*Hunnicut v. State Bar*, *supra*, 44 Cal.3d at p. 370.) Thus, the facts of the Hwa transaction fall squarely within the parameters of the rule.

Failure to Communicate

Respondent's argument that there was no failure to communicate and therefore no violation of rule 6-101 in count five is well taken. The hearing judge found that respondent failed to act competently in violation of rule 6-101(A)(2) by failing to communicate with Perry between the end of August 1984 and November 1984 concerning why the settlement was not proceeding and why respondent could not disburse the \$6,000. [7] The failure to communicate with and inattention to the needs of a client are proper grounds for discipline. (*Spindell v. State Bar* (1975) 13 Cal.3d 253, 260.)

The record indicates that from early September 1983 until early November 1983,⁷ Perry tried on numerous occasions to contact respondent to find out the status of the litigation and had only limited success. Perry made numerous, and at one point

daily, telephone calls to respondent's office and spoke with him on one occasion and respondent had "nothing to report at that time." In addition, Perry went to respondent's office a couple of times and was able to speak to respondent on only one of those occasions. Perry prepared a letter to respondent, dated October 5, 1983, which requested a response to several specific questions regarding the litigation. He hand delivered the letter to respondent's office on October 5, 1983, and he received a call from respondent shortly thereafter. Perry also testified that after mid-November 1983, he received some correspondence from respondent.

[8] It does appear from the record that for a relatively short period of time in the fall of 1983 Perry had difficulty communicating with respondent, but that respondent did reply in some limited fashion to Perry's status inquiries. It is not clear from the record whether any significant developments occurred with regard to the litigation during this period of time. We conclude that the evidence presented on this issue falls short of clear and convincing evidence of a failure to communicate.

Trust Fund Violations

Respondent argues that his trust fund violations resulted from gross negligence and warrant discipline, but that the violations do not constitute wilful misappropriations and therefore do not warrant the "harsh" discipline recommended by the hearing judge. Specifically, respondent asserts that his application of trust funds to satisfy the outstanding fees he was owed by the clients in counts one and six were not wilful misappropriations because he was owed the money and he had a good faith belief that the clients authorized his actions. With regard to counts two through five, respondent argues that his failure to promptly transfer sufficient funds from one trust account to another to cover the trust checks he wrote in those counts was the result of gross negligence and

7. We correct what appears to be a typographical error in the hearing judge's decision with regard to the dates of the alleged failure to communicate. The judge cites to findings of fact numbers 119-122 in support of her conclusion. Those findings involve facts that occurred between when respondent received the \$6,000 (August 1983) and when Perry hired new

counsel (February 1984). Only finding number 120 relates to a failure to communicate and there, the judge found that between September 1983 and October 1983, Perry tried to determine the status from respondent of the lawsuit and respondent "repeatedly indicated it had not changed."

therefore does not constitute wilful misappropriation or moral turpitude.

As noted above, the hearing judge found in counts one and six that respondent wilfully misappropriated funds in violation of section 6106 and failed to pay the clients their funds promptly after demand in wilful violation of rule 8-101(B)(4). Also in count six, the hearing judge found that respondent failed to maintain the disputed portion of trust funds in his trust account until the dispute was resolved in wilful violation of rule 8-101(A)(2). In counts two through five, the hearing judge found that respondent was grossly negligent in issuing insufficiently funded checks to his clients in violation of section 6106. Also in counts two and five, the hearing judge found that respondent failed to pay the clients their funds promptly after demand in wilful violation of rule 8-101(B)(4) because he presented the clients with insufficiently funded checks.

Respondent cites several cases in support of his argument that his conduct in counts one and six did not amount to wilful misappropriation, of which *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, and *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, are instructive.⁸ *Sternlieb* had represented the wife in a divorce action and pursuant to the agreement of the parties, she placed income from the marital property in her trust account. Without approval from her client, the husband or his attorney, she withdrew money from the account for her own personal use. (*Sternlieb v. State Bar, supra*, 52 Cal.3d at pp. 324-328.) The State Bar Court referee found that the misappropriation was due to negligent inadvertence, and the former review department modified that finding after concluding that the misappropriation involved dishonesty. (*Id.* at p. 332.) The Supreme Court concluded that although *Sternlieb's* belief that she was entitled to the money was unreasonable, the evidence did not support the review department's

finding that she acted dishonestly and therefore the Court concluded that she violated rule 8-101(A), but not section 6106. (*Id.* at p. 321.)

In *Dudugjian*, the attorneys deposited their clients' settlement check into their general account under an honest, but mistaken belief that the clients had given them permission to retain those funds. (*Dudugjian v. State Bar, supra*, 52 Cal.3d at p. 1095.) The hearing panel found the attorneys violated rule 8-101(A), but not section 6106. The former review department increased the recommended discipline based on its conclusion that the violation of rule 8-101 was wilful. (*Id.* at pp. 1096-1098.) The Supreme Court found that the attorneys had an honest belief that they had permission to retain the money but that an honest belief is not a defense to a rule 8-101 charge. The Court adopted the hearing panel's recommended discipline after rejecting the review department's determination that the misconduct was wilful. "In context, the [review department's] statement is most reasonably read to mean that his behavior was not as mitigated as the hearing panel believed. The record is otherwise." (*Id.* at p. 1100.)

The present case, though factually similar to the above cases, comes to us in a slightly different posture. In both *Sternlieb* and *Dudugjian*, the hearing referees concluded that no violation of section 6106 occurred. The hearing judge herein found respondent culpable of the improper conversion of the clients' money which constituted wilful misappropriation and therefore an act of moral turpitude in violation of section 6106. However, it does not appear that the hearing judge based her conclusion on a finding of dishonesty as she specifically stated later in the decision that respondent's acts in these two counts were not dishonest. Thus, it appears she concluded that the mere fact of a conversion constituted moral turpitude. [9] *Sternlieb* and *Dudugjian* indicate that a moral turpitude conclusion does not

8. Respondent also cites *Schultz v. State Bar* (1975) 15 Cal.3d 799 (misappropriation due to negligent loss of control over trust account); *Palomo v. State Bar* (1984) 36 Cal.3d 785 (misappropriation due to failure to supervise employees); *Grossman v. State Bar* (1983) 34 Cal.3d 73 (misappropriation due to unauthorized retention of a fee in excess of the fee agreed upon in the retainer agreement); *In the Matter of*

Bouyer (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404 (misappropriation due to failure to supervise staff coupled with shortfalls in trust account balances); and *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113 (misappropriation due to misuse of trust account to pay personal expenses).

necessarily follow from a finding of conversion of funds.

[10a] In the present case, as in *Sternlieb* and *Dudugjian*, there is no evidence respondent acted dishonestly in count one. In this count, respondent performed legal services for the various entities associated with Rutten and Kranser. Apparently, the established billing practices permitted respondent to use funds from one entity to pay legal fees incurred by another entity. There is no evidence that the amount of the fees charged by respondent was disputed by Rutten or Kranser or any of the various entities. A malpractice action was filed against respondent which alleged, among others, a cause of action for conversion of the money in count one, but that action was long after respondent took the money. Thus, it does appear that at the time respondent took the money he had an honest belief that he was entitled to it.

[10b] Nevertheless, as in *Sternlieb*, respondent's belief was not reasonable. Respondent's agreement with Rutten was that respondent could apply the money to past due fees if the opposing party did not sign a release settling the dispute. In his accounting to Miller Dial in December 1985, respondent indicated that he applied the funds to his fees because Miller Dial did not sign the release. There was no evidence to suggest that respondent ever discussed this latter condition with his client or was authorized to take the money if Miller Dial did not sign the release.

In count six, the examiner proved that respondent met with Slater on August 1, 1984, and discussed the use of the client's money he held in trust to satisfy his outstanding fees.⁹ At respondent's request and direction, his associate confirmed those discussions in a letter to the client on August 6, 1984. That letter requested the client approve the application of her

trust funds to fees by signing the letter. The client did not sign the letter and her father wrote respondent on August 21, 1984, objecting to the amount of the fee charged and the quality of the work performed. Respondent testified without contradiction that he took the money immediately after the August 1 meeting, without waiting for the client's signature on the August 6 letter and before he became aware that the client was disputing the fee, because he believed an agreement was reached at the August 1 meeting.¹⁰ [10c] Thus, it appears that at the time respondent took most of Slater's money, he honestly believed he had the client's permission. However, that belief was not reasonable considering the specific request for client authorization contained in the August 6 letter and his failure to obtain that consent prior to taking the money.

Respondent's accounting to Slater in the August 6 letter indicated that the balance of Slater's money in his trust account after deducting his outstanding fees was \$929; that the accounting was for services rendered through July 3, 1984; that there would be additional charges for the preparation for and appearance at a hearing on July 19, 1984, and the preparation of a post-hearing order; and that he would send her the \$929 upon receipt of a copy of the letter signed by Slater. The August 6 letter also indicated that as of August 1984 there was approximately \$1,800 owing for fees pursuant to a January 1984 agreement with Slater. The January 1984 agreement provided that Slater was to pay \$300 per month beginning January 15, 1984, for unpaid fees in the amount of approximately \$3,900. Of the amount respondent deducted from Slater's trust funds pursuant to his August 6 letter, \$2,100 represented the seven monthly payments of \$300 from January 1984 through July 15, 1984, that Slater had not paid.

In respondent's billing statement of December 1984, he indicated that he applied the \$929 to the

9. The hearing judge found that respondent's associate met with the client on August 1. However, the associate testified that he did not specifically recall attending this meeting. Respondent testified that he was at the August 1 meeting and he did not believe the associate attended.

10. Respondent's associate sent Slater's father a letter dated September 4, 1984, which referred to the August 1 agreement as a "proposal" for distribution of the trust funds. However, respondent disclaimed any prior knowledge of the specific language contained in this letter, and his testimony was confirmed by the associate. The hearing judge did not make findings of fact on this issue.

\$1,800 for the months of September 1984 through December 1984. [10d] Thus, at the time respondent took the \$929 in early August 1984 respondent had not earned the money.¹¹ Accordingly, we conclude that respondent did not have an honest belief he was authorized to apply this money.

[10e] In *Sternlieb*, the attorney began withdrawing her client's money prior to the time when she could have believed that her client authorized the withdrawals. (*Sternlieb v. State Bar*, *supra*, 52 Cal.3d at p. 325.) The hearing referee and Supreme Court concluded that no dishonesty was involved. Nevertheless, *Sternlieb*, unlike the present respondent, had applied trust funds to arguably earned fees. Respondent's action of applying the \$929 to legal fees for which he did not have a claim of right distinguishes this case from *Sternlieb* and amounts to an act of moral turpitude in violation of section 6106. (*In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 662.) [11] In addition, respondent's withdrawal of the \$929 after the client disputed respondent's right to receive that money was also a wilful violation of rule 8-101(A)(2).

The hearing judge's conclusions that respondent wilfully violated rule 8-101(B)(4) in counts one and six are supported by the record. In count one, Miller Dial's new attorney demanded respondent return the settlement money entrusted to him. Respondent did not have a lien on that money nor did he have client authorization to apply more than \$1,200 to outstanding fees. In count six, Slater's father demanded payment of the money to which Slater was entitled in his letter to respondent in late August 1984 and respondent failed to do so. Respondent did not have authority from the client to apply the funds to outstanding fees. In short, the clients were entitled to that money and respondent failed to return it after demand.

In counts two through five, respondent does not dispute that he was grossly negligent "in the manner in which he deposited, transferred and distributed

funds from trust," as indicated in his brief on review. Nevertheless, he asserts that this conduct does not support a finding of dishonesty or moral turpitude. The hearing judge found that respondent was grossly negligent in failing to ensure that sufficient funds were transferred from other accounts to cover the checks respondent wrote in these counts. [12] "Gross carelessness and negligence constitute violations of the oath of an attorney to faithfully discharge his duties to the best of his knowledge and ability, and involve moral turpitude as they breach the fiduciary relationship owed to clients." (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 475 [gross negligence in handling client funds that resulted in shortfall in trust account]; see also *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729 [gross negligence that resulted in abandonment of clients' interests].)

[13] There is no evidence to suggest that at the time he wrote the checks respondent knew he was not going to transfer sufficient funds into the appropriate account, or that he intentionally failed to transfer sufficient funds, or that he had any other dishonest motive for issuing insufficiently funded checks to these clients. On the other hand, ensuring sufficient funds were on deposit to cover the checks he wrote was a problem more pervasive than the several checks involved in this proceeding. Respondent testified that he had these shortfalls from the time he began using the multiple trust account system and that in the beginning, his banks would simply call him to tell him of the shortfall but as time went on, his banks began assessing charges against his accounts and that was when he "started getting some NSF-stamped checks." In addition, respondent testified that his problems with his trust account system stemmed from his busy schedule and that he "didn't give it the care that it should have received." Thus, while we agree with respondent that his conduct in these counts does not support a finding of dishonesty, his gross negligence in handling his clients' funds, which resulted in the issuance of trust account checks that were not honored due to insufficient funds, does support a moral turpitude conclusion.

11. The record is silent as to the work performed regarding the July 19 hearing and order. The December 1984 billing statement belies any claim that the \$929 was applied to this work.

[14a] The hearing judge found respondent wilfully violated rule 8-101(B)(4) in counts two and five because he did not provide the clients with a sufficiently funded check. Although not raised by the parties on appeal, we conclude respondent wilfully violated the rule in count two but not in count five.

In count two, respondent sent a letter to Miller Dial dated February 13, 1986, enclosing the mutual release for its signature and informing Miller Dial that he would send the settlement money to Miller Dial and file the dismissal of the action upon receipt of the executed release. Although the record is not clear as to when respondent received the executed release, on February 24, 1986, he sent the request for dismissal to the court for filing and sent copies of the executed releases to Miller Dial. On March 25, 1986, respondent sent a conformed copy of the dismissal to Atari, and issued a check to Miller Dial for its share of the Atari settlement proceeds. On April 22, 1986, Miller Dial's bank account was charged for the amount of that check because it was returned unpaid. On April 24, 1986, the check was redeposited and was honored. Respondent testified that his bank called him and told him his account was short and he brought over funds to cover the check. However, due to a miscommunication between his bank branches, the branch that processed the check was not informed of his deposit and the check was not honored initially.

[14b] Although a month passed after the presentation of the check to Miller Dial, it appears that respondent took relatively prompt steps to cover the check when notified. Nevertheless, respondent was to have sent the settlement money to Miller Dial upon his receipt of the executed release, which he received at least by February 24. Thus, the delay in payment was over two months. Under these circumstances, we find clear and convincing evidence of a failure to pay the client its money promptly.

[14c] In count five, respondent gave Perry a check for \$3,500 in October 1985, pursuant to a court

order in Perry's lawsuit against respondent for conversion of the settlement money. That same day Perry went to respondent's bank and was not able to cash the check because of insufficient funds in the account. Perry went to the police immediately and a day or two later, after police intervention, Perry was advised that the police had a cashier's check for the money. There is no evidence that respondent provided the insufficiently funded check intentionally to delay payment and payment was received within days of when the check was given. Under these facts, we do not find clear and convincing evidence of a wilful violation of rule 8-101(B)(4).

In summary, with respect to the trust fund violations, we conclude that respondent is culpable in counts one and six of wilfully violating: rule 8-101(A)¹² [15 - see fn. 12] for his misappropriation of client funds; rule 8-101(B)(4) for his failure to pay the clients their funds promptly after demand; and additionally in count six, rule 8-101(A)(2) for failing to retain the disputed portion of his fee in the trust account and section 6106 for his wilful misappropriation of \$929. In counts two through five, we conclude that respondent is culpable of violating section 6106 based on his gross negligence in handling his clients' funds, which resulted in the issuance of trust account checks that were not honored due to insufficient funds; and additionally in count two, of wilfully violating rule 8-101(B)(4) for his failure to pay the client its settlement money promptly.

Discipline

As noted above, respondent asserts the hearing judge's recommended discipline is unreasonably harsh and the actual suspension should be reduced to not more than 90 days because the misconduct occurred under strong mitigating circumstances and was the result of gross negligence as opposed to intentional wrongdoing. The hearing judge recommended a four-year stayed suspension with four years probation and eighteen months actual suspension.

12. [15] Even though rule 8-101(A) was not expressly charged in the notice to show cause, misappropriation of client funds was clearly encompassed within the allegations in support of

the section 6106 charge. (Cf. *Sternlieb v. State Bar*, *supra*, 52 Cal.3d at p. 321.)

[16] Three character witnesses, one judge, one attorney and one client, testified for respondent, which the hearing judge found to be a factor in mitigation under standard 1.2(e)(vi), Standards for Attorney Sanctions for Professional Misconduct, Transitional Rules of Procedure of the State Bar, division V (standard[s]). We do not find this evidence to be “an extraordinary demonstration of good character . . . attested to by a wide range of references” (*id.*) and therefore do not give it significant weight in mitigation. The hearing judge also found that respondent now “can handle responsibly funds entrusted to him.” Respondent testified that he still uses two trust accounts, one for short term transactions and one for keeping funds for longer periods of time. However, he has check writing ability on both accounts and does not have to transfer funds from one account to the other to cover checks. Finally, the hearing judge found that although respondent made restitution to all his clients except Slater, he did so only under the pressure of the pending State Bar proceeding, civil proceedings or the potential criminal liability and therefore the mitigating weight of the restitution was significantly reduced. While this is generally accurate, we note that respondent did make good on the various insufficiently funded checks shortly after they were dishonored.

[17] Respondent argues that his misconduct is mitigated because the State Bar delayed prosecuting this matter for an unusually long period of time which prejudiced his defense in that his trust account bank records were destroyed and he was therefore not able to introduce evidence at trial “in corroboration of his testimony.” We note that the hearing judge essentially accepted respondent’s testimony regarding his trust account practices, as her findings of fact make clear, and respondent admits that he was grossly negligent in handling his clients’ funds. Thus, respondent’s inability to corroborate his testimony, even if it resulted from unreasonable delay, was not prejudicial.

[18] The hearing judge did not find respondent’s many years of practice as a mitigating factor, presumably because of his prior discipline. However, the prior misconduct occurred during the same time period as the present misconduct and both the prior and current misconduct occurred within a narrow

time frame. Therefore, it is appropriate to consider respondent’s approximately 28 years of blemish-free practice prior to the first act of misconduct as a mitigating circumstance. (*Shapiro v. State Bar* (1990) 51 Cal.3d 251, 259; *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 350-351.)

[19] Nevertheless, we consider the prior discipline as a factor in aggravation. (*Lewis v. State Bar* (1973) 9 Cal.3d 704, 715; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646.) “Whenever discipline is imposed, consideration is properly given to the presence or absence of a prior disciplinary record. [Citations.]” (*Lewis v. State Bar, supra*, 9 Cal.3d at p. 715 [prior discipline is appropriately considered even when the facts giving rise to that prior discipline occurred after the misconduct in the proceeding then under consideration].) Had the full facts of respondent’s contemporaneous misconduct been presented in the earlier proceeding more severe discipline would have been warranted. (*Ibid.*) However, the aggravating force of the prior discipline is diminished because it occurred during the same time period as the present misconduct and thus did not provide respondent with an opportunity to “heed the import of that discipline.” (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

The hearing judge also found in aggravation that the present misconduct involved multiple acts; the misconduct in counts four and six was surrounded by bad faith because respondent failed to adequately document the Hwa transaction and failed to repay Hwa forcing the heirs to incur legal costs, and because of the manner in which he converted Slater’s money and his failure to repay her; the clients in counts one, four, five and six suffered harm by having to incur legal costs to recoup their money and by the delay in disbursement to them of their money; and the misconduct in count six demonstrated indifference toward rectification or atonement.

We do not believe the bad faith findings in counts four and six are appropriate. There is no evidence that respondent acted in bad faith in the Hwa transaction. He did not adequately document the transaction, but that is part of the basis for finding

him culpable of violating rule 5-101 and there is no indication that this failure was in bad faith. In addition, respondent testified he could not repay the \$25,000 because of his own financial difficulties brought on by his divorce. There is no evidence that he intentionally did not repay the money or delayed payment because of an improper motive. Respondent's taking of the \$929 was an act of moral turpitude. However, except for the \$929, respondent "converted" Slater's money because he thought he had an agreement. Although this was improper, there is no evidence that there was bad faith involved. Respondent had not paid Slater any money at the time of trial. While his failure to repay the money or put the money in trust was improper, we do not view this fact as an act of bad faith in light of the work he performed for the client which tends to support his claim that he honestly believed he was owed the money for legal services rendered.

In summary, respondent is culpable in counts one and six of wilfully violating: rule 8-101(A) for his misappropriation of clients' funds; rule 8-101(B)(4) for his failure to return client funds after demand; and in count six, rule 8-101(A)(2) for his withdrawal of the disputed portion of his fee from his trust account and section 6106 for his wilful misappropriation of \$929. In counts three and four, respondent wilfully violated rule 5-101 for his failure to advise the clients to seek independent counsel, and in count four, also because the transaction was not fair and reasonable to Hwa. In counts two, three, four and five he violated section 6106 for his gross negligence in handling his clients' funds which resulted in the issuance of insufficiently funded trust account checks, and additionally in count two, respondent wilfully violated rule 8-101(B)(4) for his failure to promptly pay the client its settlement money. Respondent's misconduct is mitigated by his 28 years of practice prior to his earliest misconduct, his change in trust account practices, his repayment of the insufficiently funded checks, and to a lesser extent his restitution of the other monies he owed his clients; and is aggravated by the multiple acts of

misconduct, and to a lesser extent, his prior discipline, and the harm suffered by the clients.

In arriving at the recommended 18 months actual suspension, the hearing judge applied, among others, standards 2.2(a) (wilful misappropriations shall result in disbarment unless compelling mitigating circumstances predominate in which case the discipline shall be not less than one year actual suspension), and 2.3 (moral turpitude misconduct shall result in actual suspension or disbarment depending on the surrounding circumstances). [20a] The hearing judge concluded that an actual suspension of eighteen months was appropriate by concluding that at least one year was warranted for the misappropriations in counts one and six, and an actual suspension of at least six months was warranted for knowingly writing insufficiently funded checks in counts two through five.¹³ [20b - see fn. 13] As indicated above, the record supports a finding of wilful misappropriation for the \$929 involved in count six, and respondent's issuance of the checks in counts two through five was the result of gross negligence that amounted to moral turpitude.

[21a] The appropriate discipline for wilful misappropriation is disbarment in the absence of extenuating circumstances. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.) Extenuating circumstances sufficient to warrant less than disbarment have been found both in the attorney's background, which demonstrate that the misconduct was aberrational and hence unlikely to recur, and in the facts relating to the misappropriation, which recognizes that more severe discipline is warranted for intentional theft as opposed to negligent acts unaccompanied by evil intent. (*Id.* at pp. 37-38.)

[21b] Respondent has practiced law for 35 years without misconduct except for the approximately three-year period involved in the present and prior matters and had practiced 28 years without misconduct prior to the earliest incidents. In addition, the three-year period of misconduct is attributable, at

13. [20b] We are not aware of any authority that supports this approach to determining an appropriate discipline recommendation. Indeed, the standards provide that where two or more

acts of professional misconduct are found, the discipline should be the most severe of the several applicable sanctions, not the sum of the applicable standards. (Std. 1.6.)

least in part, to respondent's marital problems. We find these factors tend to prove that the misconduct was aberrational and the threat of future misconduct is therefore somewhat discounted. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245.)

In *Sugarman v. State Bar* (1990) 51 Cal.3d 609, the misconduct consisted of misappropriation of client funds caused by grossly negligent office procedures in one matter and an improper business transaction with another client which had caused financial loss to the client in another matter. Sugarman did not have a prior record of discipline but had only been in practice approximately three years prior to the misconduct. The Supreme Court imposed three years stayed suspension, three years probation, and a one-year actual suspension.

In *Edwards v. State Bar, supra*, 52 Cal.3d 28, the attorney's misconduct consisted of willful misappropriation of client funds coupled with habitual negligence in handling his client trust accounts in a single matter. Mitigating factors included prompt, full restitution, an 18-year clean record of practice, and voluntary steps by the attorney to improve his management of trust funds. The Supreme Court imposed one year actual suspension, with three years stayed suspension and probation.

In *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, the attorney, who had no prior record of discipline, was culpable of six counts of grossly negligent misappropriation of trust funds totaling over \$20,000 in medical liens due to his failure to adequately supervise his staff and one count each of failing to perform legal services competently and failing to return a file to a client. We adopted the hearing judge's recommendation of two years stayed suspension with three years probation on conditions including one year actual suspension. The Supreme Court adopted our recommendation and imposed the above discipline. (Order filed April 15, 1992 (S025013).)

[21c] The misconduct in the present case is more extensive than the misconduct in *Sugarman* and *Edwards*. However, Sugarman did not have many years of blemish-free practice, Edwards misappropriated funds that he knew were not his to prevent the

foreclosure of his residence, and respondent's improper business transactions are to some degree mitigated because they were not violations of a more well established rule. Respondent's misconduct is similar to *Robins* in that it involved multiple acts of grossly negligent handling of trust funds but, unlike *Robins*, respondent also wilfully misappropriated funds and entered into improper business transactions with clients. However, *Robins* engaged in misconduct over a seven-year period whereas respondent's misconduct occurred over a three-year period, and *Robins* had practiced for 12 years without discipline prior to his misdeeds whereas respondent had practiced for 28 years.

[21d] Thus, although the misconduct is extensive in the present case, the circumstances surrounding respondent's background and the misconduct indicate that discipline similar to that imposed in *Sugarman*, *Edwards*, and *Robins* will achieve the purposes of attorney discipline. Accordingly, we conclude that respondent should be suspended for three years, stayed, and placed on probation for three years on conditions, including one year of actual suspension.

The hearing judge recommended as a condition of probation that respondent be ordered to make restitution to Slater in the amount of \$7,823 plus interest from September 1984 prior to being relieved of his actual suspension. [22] We believe it is appropriate for respondent to make restitution to Slater even though he performed substantial legal services for her (*Brockway v. State Bar, supra*, 53 Cal.3d at p. 67) because it will effectuate respondent's rehabilitation and protect the public from similar future misconduct (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044). (See also *McKnight v State Bar* (1991) 53 Cal.3d 1025, 1039 [restitution ordered where attorney did not have the client's authority to apply client funds to fees despite attorney's claim that he was owed more for services rendered than he took].) However, the sum recommended is the entire amount respondent held in trust for Slater. Slater's father, in his August 21, 1984 letter to respondent, authorized respondent to apply \$1,361 of the trust funds to his fees. Thus, even the client was not claiming a right to the entire amount of the trust funds. Therefore, we limit the amount of restitution to \$6,462 plus interest,

which represents the amount recommended by the hearing judge less \$1,361.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent be suspended from the practice of law in California for a period of three (3) years, that said suspension be stayed, and that he be placed on probation for a period of three (3) years on the conditions recommended by the hearing judge except that respondent be actually suspended from the practice of law in California for the first one (1) year of said period of probation and until he makes restitution to Shirley Slater (or to the Client Security Fund, if appropriate) in the amount of \$6,462 plus interest from September 21, 1984, until paid at ten (10) percent per annum, and furnish satisfactory evidence of restitution to the Probation Department of the State Bar Court in Los Angeles. Further, we recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and take and pass the California Professional Responsibility Examination within one (1) year of the effective date of the Supreme Court's order in this matter, as recommended by the hearing judge.

We concur:

PEARLMAN, P.J.
STOVITZ, J.