

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ERNEST LEE BRAZIL

No. 89-C-12837

Filed February 7, 1994; reconsideration denied, March 9, 1994

SUMMARY

While serving as the principal officer of a mortgage banking company, respondent misapplied over \$1 million loaned to the company by an investor by using the money to reduce the company's debt rather than to fund specific transactions. He also forged the signature and seal of a notary public on six documents, and gave the investor documents which falsely indicated that the company had an interest in certain property. As a result of this conduct, respondent was convicted of forgery and grand theft.

In the ensuing State Bar disciplinary proceeding, the hearing judge concluded that respondent's offenses were very serious but that his misconduct was the aberrational result of a confluence of personal and financial pressures. Based on this conclusion, the hearing judge recommended that respondent receive a five-year stayed suspension, with five years probation on conditions including actual suspension for three and one-half years, retroactive to the date of his interim suspension, and continuing until respondent demonstrated his fitness to practice. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar requested review, arguing that the hearing judge erred in excluding rebuttal evidence regarding the revocation of respondent's real estate license, and contending that respondent should be disbarred. The review department agreed that the real estate license revocation constituted proper rebuttal, but declined to reach questions regarding its admissibility and preclusive effect which had not been addressed by the parties at trial or by the hearing judge. Even without this evidence, the review department concluded that respondent's showing of mitigating circumstances was not sufficient to outweigh the seriousness of his crimes of moral turpitude. Accordingly, the review department recommended respondent's disbarment.

COUNSEL FOR PARTIES

For Office of Trials: Richard Harker, Julie W. Stainfield

For Respondent: Gary L. Fontana, John S. Banas, III

HEADNOTES

- [1] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
159 Evidence—Miscellaneous
Where respondent's brief on review referred to facts and newspaper articles regarding victim of respondent's misconduct which were not part of the record, review department declined to strike brief or admonish respondent or his counsel, but emphasized that its review is limited to the evidence properly made a part of the record. (Prov. Rules of Practice, rules 1303-1304.)
- [2] **130 Procedure—Procedure on Review**
141 Evidence—Relevance
146 Evidence—Judicial Notice
171 Discipline—Restitution
191 Effect/Relationship of Other Proceedings
745.31 Mitigation—Remorse/Restitution—Found but Discounted
Where bankruptcy court order which was not already part of record showed that restitution payments had been made to victim of respondent's misconduct, review department granted request to take judicial notice of such order. Undisputed evidence bearing on issue of restitution is important, if for no other purpose than to create an accurate record on the status of restitution.
- [3] **169 Standard of Proof or Review—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1519 Conviction Matters—Nature of Conviction—Other
1691 Conviction Cases—Record in Criminal Proceeding
Respondent's conviction of grand theft and forgery was conclusive evidence of his guilt of all elements of those crimes. The grand theft conviction necessarily carried with it the specific intent to deprive the victim permanently of his funds. The forgery conviction necessarily showed that respondent acted without authority and with an intent to defraud.
- [4 a, b] **1512 Conviction Matters—Nature of Conviction—Theft Crimes**
1519 Conviction Matters—Nature of Conviction—Other
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
Convictions of grand theft and forgery would have resulted in recommendation of summary disbarment if crimes had occurred in practice of law or a client was a victim. Where respondent's crimes did not occur in practice of law or victimize a client, case was not eligible for summary disbarment, and respondent was entitled to hearing on appropriate degree of discipline. Nevertheless, opportunity for hearing was not designed to lower professional standards. Respondent's crimes constituted heinous misconduct for an attorney. Where such crimes were of great magnitude, and were related to the very types of matters in which attorneys frequently act, such as ensuring validity of documents requiring notarial services, respondent's crimes were of such a serious nature that by themselves, they would warrant disbarment.

- [5] **725.39 Mitigation—Disability/Illness—Found but Discounted**
 760.39 Mitigation—Personal/Financial Problems—Found but Discounted
 1512 Conviction Matters—Nature of Conviction—Theft Crimes
 1519 Conviction Matters—Nature of Conviction—Other
 1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment
Disbarment was warranted for convictions of grand theft and forgery unless most compelling mitigating circumstances clearly predominated. Despite hearing judge’s conclusion that respondent’s crimes were aberrant and brought on by incredible psychological stress due to marital and business problems, review department did not agree that mitigation was compelling.
- [6] **710.35 Mitigation—No Prior Record—Found but Discounted**
 1512 Conviction Matters—Nature of Conviction—Theft Crimes
 1519 Conviction Matters—Nature of Conviction—Other
 1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment
Respondent’s lack of a prior record of discipline in 14 years of practice was entitled to mitigating weight but did not of itself prove that disbarment was excessive for convictions of grand theft and forgery.
- [7 a, b] **162.20 Proof—Respondent’s Burden**
 740.32 Mitigation—Good Character—Found but Discounted
 740.39 Mitigation—Good Character—Found but Discounted
 1512 Conviction Matters—Nature of Conviction—Theft Crimes
 1519 Conviction Matters—Nature of Conviction—Other
 1691 Conviction Cases—Record in Criminal Proceeding
Respondent’s favorable character showing, while attested to by many references, did not amount to a showing of extraordinary demonstration of good character, where not all witnesses were familiar with the magnitude and nature of respondent’s crimes, and where respondent’s repeated contention that he did not act to defraud his victim served to undercut his favorable character showing in light of the conclusive effect of his convictions for grand theft and forgery.
- [8 a, b] **725.32 Mitigation—Disability/Illness—Found but Discounted**
 725.33 Mitigation—Disability/Illness—Found but Discounted
Problems such as disabling psychological disorders or substance abuse proven to have led to misconduct may mitigate discipline when accompanied by adequate rehabilitative evidence. However, evidence of psychological difficulty will not always warrant reduced discipline. Where respondent suffered from an adjustment disorder and not any chronic psychological condition, and where prior to his crimes respondent had done excellent work despite being under great stress, review department concluded that respondent’s proof fell short of entitling him to significant mitigation.
- [9 a, b] **120 Procedure—Conduct of Trial**
 141 Evidence—Relevance
 159 Evidence—Miscellaneous
 162.90 Quantum of Proof—Miscellaneous
 191 Effect/Relationship of Other Proceedings
 1699 Conviction Cases—Miscellaneous Issues
The question of the proper degree of discipline in a conviction referral matter may rest on a wide scope of evidence not directly connected with the crimes themselves. Evidence that respondent’s real estate license had been revoked over a year before his crimes was improperly excluded from

rebuttal evidence. Such evidence was not an essential element of the State Bar's case in chief, and could properly be reserved to rebut respondent's contention that his crimes were aberrational.

- [10 a, b] **142 Evidence—Hearsay**
159 Evidence—Miscellaneous
165 Adequacy of Hearing Decision
191 Effect/Relationship of Other Proceedings
199 General Issues—Miscellaneous

Where administrative proceeding in which respondent had not appeared had resulted in revocation of respondent's real estate license, and record of such administrative proceeding was relevant in State Bar disciplinary proceeding, hearing judge and parties should have addressed issues regarding whether administrative decision had preclusive weight; if not, whether it was admissible under any hearsay exception, and whether respondent should be permitted to introduce evidence concerning culpability or mitigation with respect to the license revocation.

- [11 a-c] **725.39 Mitigation—Disability/Illness—Found but Discounted**
801.45 Standards—Deviation From—Not Justified
1512 Conviction Matters—Nature of Conviction—Theft Crimes
1519 Conviction Matters—Nature of Conviction—Other
1552.10 Conviction Matters—Standards—Moral Turpitude—Disbarment

Not all instances of serious professional misconduct warrant disbarment, depending on mitigating circumstances. Theft crimes unrelated to the practice of law have resulted in less than disbarment. However, where respondent's offenses of grand theft and forgery were extremely grave and multiple examples of felonious and fraudulent misconduct, likely to impugn public confidence in the legal profession, and respondent's experience in sophisticated law practice, public office and private business should have dissuaded him from committing felonies, review department recommended disbarment notwithstanding respondent's evidence of stress caused by personal and financial problems.

ADDITIONAL ANALYSIS

Aggravation

Found

584.10 Harm to Public

Discipline

1610 Disbarment

Other

175 Discipline—Rule 955

178.90 Costs—Miscellaneous

1521 Conviction Matters—Moral Turpitude—Per Se

1541.10 Conviction Matters—Interim Suspension—Ordered

1541.20 Conviction Matters—Interim Suspension—Ordered

2502 Reinstatement—Waiting Period

OPINION

STOVITZ, Acting P.J.*:

Respondent, Ernest L. Brazil, was admitted to practice law in California in 1974 and has no prior record of discipline. In 1990, he pled no contest to forgery and grand theft charges. Without dispute, the record shows that in September 1988, while serving as the principal officer of a mortgage banking company, he misapplied over \$1 million which had been given to his company by an investor for loans for specific transactions. Instead, he used the money to reduce the debt of his business. He also forged the signature and notary seal of a notary public on six documents and gave the investor five documents purporting to show that he or his company had an interest in property when no such interest then existed.

After a lengthy trial, the hearing judge concluded that respondent's offenses were indeed very serious but due to a confluence of personal and financial pressures, his misconduct was aberrant. She recommended that respondent be suspended for five years, stayed, and that he be placed on probation for that period on conditions including actual suspension for three and one-half years from the start of his April 1990 interim suspension and until he demonstrates his fitness to practice under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V).

The Office of the Chief Trial Counsel (OCTC) seeks review, urging that the hearing judge erred by excluding proper rebuttal evidence and that disbarment should be the appropriate discipline. Respondent supports the hearing judge's suspension recommendation and urges us to consider additional evidence and to grant relief from any costs which might be imposed.

Upon our independent review of the record, we have given great weight to the hearing judge's recommendation on essentially undisputed findings. However, because we have concluded that the seriousness of respondent's crimes of moral turpitude is not outweighed by any mitigation we can consider compelling, we shall recommend disbarment rather than the lengthy suspension chosen by the hearing judge.

I. ESSENTIAL FACTS AND CIRCUMSTANCES IN THE RECORD.

A. Respondent's background.

As we noted, *ante*, the detailed findings of fact made by the hearing judge are not disputed by either party in any material aspect. Following is a summary of those findings, augmented by evidence in the record.

After completing undergraduate studies at Ohio State University in 1965, respondent became a Navy pilot and served two duty tours in Vietnam. After release from the Navy in 1971, respondent graduated from Harvard Law School. He became a member of the State Bar in 1974. For about three years, he was an associate attorney for a large San Francisco law firm. He then joined a large leasing company, becoming its divisional general counsel. After serving as general counsel for another leasing company, he was hired as vice president and general counsel of the financial subsidiary of a large real estate company. In 1981, Governor Edmund G. Brown, Jr., appointed respondent Real Estate Commissioner of California. He served in that office until early 1983, when Governor Deukmejian appointed a successor.

After leaving state office, respondent became president and chief executive officer of a mortgage banking company. After it was sold to a bank, he became president of another such company, Interbank Mortgage Corporation ("Interbank").¹

* Pursuant to rule 453(c), Trans. Rules of Proc. of State Bar.

1. Respondent was approached by three investors to start Interbank and he invested \$50,000 as his capital contribution, receiving 10 percent of the company's stock.

B. Facts and circumstances leading to respondent's criminal conviction.

In 1987, while Interbank president, respondent became a director of a savings and loan association. In 1988 Interbank spent almost \$400,000 in its attempt to buy this savings and loan institution and then another such institution respondent wished Interbank to acquire. Both purchase attempts were unsuccessful. Also in 1988, led by respondent, Interbank engaged in several municipal bond "defeasance" transactions, which had never been undertaken before. In these bond defeasance transactions, low-interest home mortgages, funded by a city through municipal bonds that it had sold earlier to investors, would then be sold to a buyer. The proceeds from the sale of the mortgages would be used to pay off the municipal bond holders and enable the city to retire the bonds. This process was expected to yield a profit for the city, free up the city's bond capacity, and enable it to issue other bonds for other purposes. The buyer could re-sell the mortgages to other entities for a profit.

Respondent committed his crimes during the period of about mid-September to early October 1988. Respondent first met the victim, Benjamin Hom, in mid-1988.² Hom had been chair and president of a bank and was active in investments through his Acorn Corporation.³ [1 - see fn. 3]

Hom approached respondent in July or August to see if respondent would be interested in Hom investing in one of the two savings and loan institutions that respondent was trying to have Interbank purchase. Respondent told Hom that no funds were then needed. By September, Interbank had spent between \$700,000 and \$750,000 both for unsuccessful

ful bond defeasance projects and failed attempts to buy savings and loan institutions. Interbank had two lines of credit, one with Meridian Bank in Concord for \$2 million and one with Commercial Bank of San Jose for \$1½ million. In early September 1988, the credit line at Commercial Bank had been used up, and the line with Meridian Bank was being renegotiated and not available. Completion of a City of San Pablo mortgage bond defeasance was expected to place Interbank on a sound financial footing.

In September, respondent approached Hom to see if Hom would make a short-term loan to Interbank to fund a mortgage loan transaction involving homes in Merced, California. On September 9, Hom agreed orally to make a \$516,000, 2-week loan at 12 percent interest plus a 2¼ percent loan fee. This resulted in an annual percentage rate charge of nearly 60 percent, usurious under California law.

Respondent gave Hom Interbank's promissory note as well as a personal note. Hom wanted as much collateral and security as he could get to support the loan. On about September 15, respondent gave Hom six deeds which purported to grant Hom respondent's or Interbank's interests in the subject properties. Neither respondent nor Interbank had any such interest in five of the six subject properties and respondent knew that neither he nor Interbank had any such interest in the five properties. Also, on about September 15, respondent forged the name of a notary employed by Interbank and affixed her seal without her consent to each of the deeds he gave Hom. As to the parcel in which Interbank or respondent had an interest, on September 24 respondent re-conveyed his interest in that property to another without telling Hom. Upon delivering these documents to Hom, respondent received from him on September 15,

2. Unless noted otherwise, all references hereafter to dates are to the year 1988.

3. [1] In his review brief, respondent referred to events surrounding Hom's service as a city commissioner. Respondent also proffered certain related newspaper articles about Hom. About two weeks after respondent filed his brief, OCTC filed a motion to strike respondent's brief in whole or part and admonish respondent and respondent's counsel not to refer to matters outside the record. We deferred ruling on the matter

prior to oral argument. We take judicial notice that Hom is the same person who served as a city commissioner but we attach no importance whatever to Hom's status or conduct as a city commissioner. We deny OCTC's motion to strike and decline to admonish respondent or his counsel but we emphasize that our review is limited to the evidence properly made a part of the record. (See Provisional Rules of Practice, rules 1303-1304; *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, 418, fn. 6.)

1988, a check for \$516,000 for the purpose of completing the Merced transaction. At the same time, respondent delivered a commission check from Interbank to Hom for the loan.

Interbank's pay-down on its credit line was due at Meridian Bank on September 15. Respondent deposited Hom's \$516,000 check into Interbank's Meridian Bank account on September 15. That same day, respondent wrote a check on the same account at Meridian Bank, payable to that bank, to pay-down Interbank's credit line. Hom's \$516,000 in funds were not used to fund the Merced mortgages. Respondent did not tell Hom how he used the \$516,000 and did not tell Hom that the Merced transactions never came through. Respondent did not discuss the \$516,000 loan with anyone else at Interbank. He did not present his negotiations with Hom about the \$516,000 loan or its terms to the Interbank board of directors despite the usurious rate being charged.

On about September 22, respondent asked Hom to loan Interbank more money to fund a municipal bond transaction. Hom agreed to loan \$1.2 million, for which Hom was to get fees of \$500,000, representing an annual percentage rate of 323 percent. Respondent signed a second loan and security agreement and received from Hom, in return, a check for \$500,000. Respondent deposited Hom's \$500,000 check into Interbank's account at California Commerce Bank. A few days later, respondent transferred these funds as an additional pay-down on Interbank's credit line at Meridian Bank, and not for the proposed bond defeasance transaction. On September 22, Hom gave respondent \$500,000 of the \$1.2 million loan and respondent used it to reduce Interbank's debt and not for the bond transaction.

Respondent did not present the second loan agreement with Hom to Interbank's board of directors despite respondent's belief that the fees charged by Hom were usurious.

On October 3, respondent gave Hom an Interbank check for \$500,694 but it bounced.⁴ Hom ultimately pressed for the bringing of criminal charges against respondent.

C. Respondent's nolo contendere plea to crimes involving moral turpitude.

In an amended criminal complaint filed in July 1989 respondent was charged with two counts of grand theft and one count of forgery. In February 1990 he pled nolo contendere to those charges. In his testimony below, respondent stated that the forgery charges presented almost an "open-and-shut case" although, contrary to the legal elements of his admitted crime, he denied his intent to defraud anyone. The sentencing judge suspended execution of a four-year, four-month state prison sentence and granted probation, ordering respondent to perform 2,000 hours of community service. Respondent complied with this condition by performing extensive work for a veteran's center in San Mateo County, even participating in some center activities without claiming credit for them.

The record of respondent's criminal conviction was transmitted to the Supreme Court and effective April 13, 1990, it placed him on interim suspension. (See Bus. & Prof. Code, § 6102 (a).)

D. Evidence in aggravation and mitigation.

In aggravation, the hearing judge considered that Hom was harmed by respondent's crimes. Hom suffered more than a \$1 million loss. Respondent attempted to put together other bond defeasance transactions to get funds to repay Hom, but he was unsuccessful. As of the time of the hearing below, respondent had repaid Hom only \$50,000. Respondent had entered into an agreement with Hom that his debt to Hom would not be discharged by Interbank's bankruptcy. Only recently, due to bankruptcy court distribution of Interbank assets, did Hom recover

4. The findings draw no conclusion as to whether respondent's uttering of the October 3 Interbank check was a dishonest act and the record affords no basis for so concluding.

most of his loss, nearly \$900,000. Respondent still owes Hom slightly over \$50,000.⁵ [2 - see fn. 5]

The hearing judge also considered that respondent's crimes were very serious offenses for an attorney. By themselves, the hearing judge opined, they would warrant disbarment.

In mitigation, the hearing judge considered several factors: respondent's lack of prior discipline in 14 years of practice; the extensive, favorable character evidence he submitted; and evidence offered by him to show that his crime was aberrational and arguably the result, at least in part, of severe stress brought on by his wife's psychological crisis and the stress of Interbank's severe financial problems. We summarize respondent's expert and character evidence, as it comprised the bulk of his mitigative showing.

Respondent's psychiatric evidence was presented through Dr. Robert Kaye, who had treated respondent regularly for marital and family problems from 1984 until August 1988, one month prior to his crimes. It is undisputed that respondent's former wife had suffered serious emotional problems during late 1987 and early 1988 and was hospitalized in early 1988. The emotional illness of respondent's wife caused considerable stress to respondent at this time. Kaye testified that respondent stopped treating with him in August 1988 because he was then in a more positive interpersonal relationship. Kaye saw respondent only twice thereafter, once in February 1990 and once in 1991. Kaye opined that respondent was under severe stress during the summer of 1988 and that it could have affected respondent's judgment causing his crimes. Kaye's diagnosis was that respondent had a "severe adjustment reaction" which fell short of any chronic psychiatric disorder or even of a personality disorder.

Kaye testified that respondent told him that because of his upbringing, it was "extremely difficult" for respondent to accept failure of any kind, whether in marriage or business. Later in his testimony Kaye opined that, from all that he knew of respondent, Kaye would not predict that the severe stress he was under would lead to acts of theft. Respondent's counsel, Gary Fontana, testified that he observed respondent's work in the spring of 1988 on bond defeasance matters and it was excellent. This period of time would correlate to a period of high stress for respondent.

Five witnesses testified favorably about respondent's character. Two were attorneys, one of whom was his counsel in this proceeding, another was his former wife, another a business owner and the last was the director of the veteran's center at which respondent performed his community service. Several witnesses did not appear aware of the specific crimes of which respondent was convicted or their magnitude and little evidence was presented as to the time surrounding and immediately preceding his crimes. The hearing judge also received in evidence nearly 20 character reference letters which were also presented to the sentencing judge in his criminal proceeding. The hearing judge found that these references attested to respondent's good character, honesty and concern for others.

OCTC offered four witnesses and several exhibits in rebuttal of respondent's good character and of his position that his 1988 crimes were aberrational. Collectively these witnesses had unfavorable opinions of respondent's performance during periods of time from 1981 to 1988. The testimony of these witnesses was either stricken by the hearing judge as beyond the scope of appropriate rebuttal or was deemed not to weigh against respondent's favorable showing of good character.

5. [2] Respondent asks us to take judicial notice of orders of the bankruptcy court showing payments made as restitution to Hom's corporation and to augment the record with that evidence. OCTC does not oppose respondent's request as to one of the bankruptcy court orders but correctly points out that the other is already part of the record. We grant respondent's

request to take judicial notice of the later order of the bankruptcy court, noting the importance of undisputed evidence bearing on the issue of restitution, if for no other purpose than to create an accurate record on the status of restitution. (See *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 496.)

The most significant exhibit offered by OCTC in rebuttal was exhibit 57, a 1989 default decision of an administrative law judge, adopted by the California Real Estate Commissioner, revoking the real estate licenses of respondent and Interbank for dishonest acts in 1987 involving deceit and conversion of funds in a real estate transaction unrelated to the matters which led to respondent's criminal conviction. After hearing argument on the admissibility of this exhibit, the hearing judge excluded it on the ground that it did not specifically rebut evidence offered by respondent and due to procedural concerns expressed by the judge such as regarding the default nature of the real estate licensing proceeding. We shall deal *post* with OCTC's claims that the hearing judge erred in excluding evidence such as exhibit 57 or in not according weight to OCTC's rebuttal testimony.

II. DISCUSSION OF THE APPROPRIATE DEGREE OF DISCIPLINE.

[3] Respondent's conviction of two counts of grand theft and one count of forgery is conclusive evidence of his guilt of all of the elements of those crimes. (Bus. & Prof. Code, § 6101 (a); *In re Basinger* (1988) 45 Cal.3d 1348, 1358 [grand theft]; *In re Bogart* (1973) 9 Cal.3d 743, 748 [grand theft and forgery].) Respondent's grand theft conviction necessarily carries with it his specific intent to permanently deprive Hom of his funds. (E.g., *People v. Jaso* (1970) 4 Cal.App.3d 767, 771.) His conviction of forgery necessarily shows that respondent signed the notary's name and affixed her seal without authority and with an intent to defraud. (Pen. Code, § 470; 2 Witkin & Epstein, Cal. Crim. Law (2d ed. 1988) § 714, p. 807.) By respondent's own testimony, his plea to the forgery charges resulted from his awareness or his counsel's advice that the prosecutor had essentially an "open-and-shut" case against him.

[4a] If respondent's crimes had occurred in the practice of law or in any way such that a client was the victim, upon motion to us by OCTC upon the finality of respondent's convictions, we surely would have recommended to the Supreme Court his *summary* disbarment. (Bus. & Prof. Code, § 6102 (c); see *In the Matter of Lilly* (Review Dept. 1993) 2 Cal.

State Bar Ct. Rptr. 473; *In the Matter of Segall* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 71.) Since this case is not eligible for summary disbarment, solely because respondent's crimes did not occur in the practice of law or victimize a client, respondent was entitled to a hearing on the appropriate degree of discipline. Nevertheless, the opportunity for hearing is not designed to lower professional standards. (Cf. *In re Smith* (1967) 67 Cal.2d 460, 462.) In *In re Bogart, supra*, the Supreme Court described Bogart's crimes of grand theft and forgery as "heinous misconduct for an attorney." (9 Cal.3d at p. 748, quoting *In re Smith, supra*, 67 Cal.2d at p. 462.) Bogart's conviction also arose outside the practice of law and involved a fraction of the loss suffered by the victim of respondent's crimes.

[4b] Although respondent's crimes occurred over about one month in 1988, their magnitude was enormous. He committed two thefts, totaling over \$1 million, and six forgeries of the signature and seal of a notary public. Knowing that Hom wanted as much security and formality as possible for the two loans, respondent defrauded Hom by giving him five security interests purporting to be those of Interbank or respondent when respondent knew that neither had any security interest in the subject properties. Only by the relatively recent distribution of the bankruptcy court was Hom made nearly whole, yet respondent still owes Hom over \$50,000 in restitution. By themselves, respondent's crimes were of such a serious nature that they would warrant disbarment. Although respondent acted outside the practice of law, the crimes he committed were related to the very types of matters in which attorneys frequently act, such as overseeing the proper handling of documents requiring notarial services to ensure their validity. (Cf. *In re Morales* (1983) 35 Cal.3d 1, 4-6.)

[5] Looking to the Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("stds.") as guidelines (e.g., *Kennedy v. State Bar* (1989) 48 Cal.3d 610, 617, fn. 3), disbarment is warranted for respondent's crimes unless "the most compelling mitigating circumstances clearly predominate." (Std. 3.2.) The hearing judge concluded that compelling mitigation existed on two grounds: (1) that respondent's crimes were an instance of aberrant behavior and (2) his acts were

desperate, brought on by incredible psychological stress due to his marital problems and the feared imminent collapse of Interbank. Discharging our required function of independent review of this record (Trans. Rules Proc. of State Bar, rule 453(a); *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 30), we cannot agree with the hearing judge's conclusion that the mitigation here is compelling.

[6] Respondent's lack of a prior record in 14 years of practice is entitled to mitigating weight (e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452, 457), but does not, of itself, prove that disbarment is excessive. (See *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594, and cases cited.) [7a] Respondent's favorable character showing, while attested to by many references, was also not determinative. (*In the Matter of Rodriguez, supra*, 2 Cal. State Bar Ct. Rptr. at p. 500.) In our independent review of the record, we conclude that respondent did not make a showing of extraordinary demonstration of good character.⁶

[7b] In the first place, not all witnesses appeared familiar with the magnitude of his crimes, nor with all of the specific crimes themselves. (See *In re Ford* (1988) 44 Cal.3d 810, 818.) Second, respondent's repeated position that he did not act to defraud Hom served to undercut his favorable character showing, in view of the conclusivity accorded by law to his criminal convictions.

We have concluded that the most important sub-issue bearing on respondent's mitigative showing concerns the effect to be given the stress he suffered in 1988. [8a] While problems such as disabling psychological disorders or substance abuse proven to have led to misconduct may mitigate discipline when accompanied by adequate rehabilitative evidence (see *In re Billings* (1990) 50 Cal.3d 358, 367; *Rose v. State Bar* (1989) 49 Cal.3d 646, 667), here the proof falls far short of entitling respondent to significant mitigation.

[8b] Dr. Kaye's opportunity to observe respondent closely ended a month before his misconduct and respondent told Kaye he had stopped counseling sessions at that time because he was in a more productive personal relationship. Kaye's diagnosis was that respondent suffered from an adjustment disorder and not any chronic psychological condition. Although Kaye opined that respondent had suffered from severe stress earlier in 1988, questions put to him were phrased in the form of whether such stress "could" affect respondent's judgment adversely. Kaye opined that it could but elsewhere testified that from what he knew of respondent, Kaye would not predict that the severe stress he was under would lead to acts of theft. Respondent's counsel and also one of his witnesses, Fontana, testified to the excellence of respondent's bond defeasance work in spring of 1988. From the record, it appears that respondent would have been under great stress in spring 1988 because of his former wife's hospitalization. We do not conclude that stress was completely absent from respondent's September 1988 crimes. Since the hearing judge observed the demeanor of the witnesses, we have given great weight to her findings. We accept all of her credibility determinations on this issue. However, we conclude that this is a case more akin to *In re Ford, supra*, 44 Cal.3d at p. 817, where the Supreme Court concluded that, notwithstanding evidence of serious domestic difficulties caused by the uncommonly difficult behavior of a spouse, that did not justify reduced discipline. That evidence of psychological difficulty will not always warrant reduced discipline, is evidenced by many Supreme Court decisions. (See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029; *In re Vaughn* (1985) 38 Cal.3d 614, 619.)

[9a] We conclude that the hearing judge improperly excluded from evidence exhibit 57 (the decision of the Department of Real Estate revoking the real estate licenses of respondent and Interbank for conduct over a year before his crimes), by applying too strict a test of the proper scope of rebuttal evidence. First, the question of the proper degree of discipline in a conviction referral matter has rested in

6. However, we agree with the hearing judge's assessment that OCTC's rebuttal witnesses did not sufficiently call into question respondent's morality. The detailed discussion of the hearing judge in her decision as to the testimony of OCTC rebuttal witness William Stark is somewhat confusing in view

of the judge's striking of Stark's testimony at trial. However, whether the judge struck Stark's testimony or instead considered it but gave it no weight has no effect on our ultimate recommendation.

the past on a wide scope of evidence not directly connected with the crimes themselves. (See *In re Possino* (1984) 37 Cal.3d 163, 170 [Supreme Court considered attorney's conduct in approaching and conversing with a juror in his criminal trial two years after committing the drug offense for which he was ultimately convicted]; *In re Arnoff* (1978) 22 Cal.3d 740, 745 [attorney's use of fraudulent medical reports was properly considered on referral of conviction of conspiracy to commit capping]; *In re Langford* (1966) 64 Cal.2d 489, 496 [attorney's involvement in gold importation properly considered on referral of conviction for selling fraudulent securities].) Moreover, even if we look to the civil or criminal case authorities on rebuttal, we do not read them as creating a strict standard for excluding as rebuttal any evidence which conceivably could have been presented in the party's case in chief.⁷ [9b - see fn. 7] An important theory of respondent's mitigation case at trial was that his crimes were aberrational. Whether or not OCTC was clearly put on notice of this theory from the pretrial statements, evidence of other uncharged misconduct by respondent was not an essential element of the State Bar's case in chief and could properly be reserved for rebuttal.

After respondent presented his evidence that his conduct was aberrational, it became entirely appropriate to attempt to impeach such evidence to demonstrate that respondent had, prior to the commission of the crimes which gave rise to these proceedings, committed analogous dishonest conduct. Acknowledging the wide latitude of evidence we have cited which can be considered in conviction referral matters, competent evidence rebutting that should have been admitted.

[10a] There are other important legal issues surrounding the admissibility of exhibit 57 not addressed by the parties: (1) Does the "default" decision of the Department of Real Estate, which recites that it rests on the clear and convincing evidentiary standard—the same standard as in State Bar Court original disciplinary proceedings—have preclusive weight in the State Bar Court proceeding to establish the basis of the revocation of respondent's real estate license? (2) Should respondent be entitled to an opportunity in this State Bar Court proceeding to offer evidence concerning the real estate accusation as he did request below in the event that the hearing judge admitted the exhibit? (3) Even if the Department of Real Estate adjudication was not preclusive, are the facts set forth in the decision admissible evidence under any exception to the hearsay rule? and (4) Should respondent have been allowed to present other mitigating evidence surrounding the revocation of his real estate license? Some of these issues appeared to support the hearing judge's decision to exclude exhibit 57 and two related documents of the Department of Real Estate, exhibits 55 and 56.

[10b] We hold that, upon a hearing judge finding that records of such an administrative proceeding are relevant to a State Bar proceeding, the above issues should be addressed by the parties and the hearing judge. This is important because, although the hearing judge could take judicial notice of license revocation and of the laws or rules under which the license was revoked, such notice does not carry with it facts found by the administrative agency absent judicial or statutory authority for collateral estoppel or a hearsay exception, issues which were not addressed below or on review.

7. The statutory authority for rebuttal evidence seems essentially identical whether the case is a civil or criminal one. (See Code Civ. Proc., § 607, subd. 6; Pen. Code, § 1093, subd. (d).) [9b] In *People v. Daniels* (1991) 52 Cal.3d 815, 859, the Court quoted from the leading case of *People v. Carter* (1957) 48 Cal.2d 737, 753-754, to observe that the purpose of the restriction on rebuttal evidence is to achieve an orderly presentation of evidence to avoid confusing the trier of fact; "to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise" resulting when a party who assumedly met the opponent's case is "suddenly confronted at end of trial with an additional piece of crucial evidence. . . . [P]roper

rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." Rebuttal of respondent's contention that his conduct was aberrational would seem to meet these criteria fully. Moreover, the restriction on rebuttal evidence may not even apply in the aggravation/mitigation phase of the trial. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1251, fn. 46 [*Carter* restriction on rebuttal evidence has only been applied to guilt issues, not to the penalty phase of a capital trial].)

Although we could remand this matter for further proceedings concerning exhibits 55-57, for reasons of judicial economy, because we have concluded that disbarment is warranted in the absence of exhibits 55-57, we do not. Because neither the hearing judge nor the parties addressed these issues, we have not relied upon or considered the substance of exhibits 55-57 in determining that disbarment is warranted.⁸

[11a] The Supreme Court has recognized that not all instances of serious professional misconduct warrant disbarment, depending on mitigating circumstances (e.g., *Friedman v. State Bar* (1990) 50 Cal.3d 235, 244-245) and we have followed that principle in our own decisions as well. (*In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, 192-193.) In support of her recommendation, the hearing judge cited *In re Duchow* (1988) 44 Cal.3d 268, for the point that theft crimes unrelated to the practice of law have resulted in less than disbarment. We do not disagree but the *Duchow* case is of little precedential value since the facts and circumstances are not set forth or discussed in the opinion.⁹

Ultimately, however, the recommendation of the appropriate degree of discipline rests on a balanced consideration of all relevant factors with due regard to the purposes of imposing discipline: protection of the public, preserving integrity of and public confidence in the legal profession and the maintenance of high professional standards. (*In re Scott* (1991) 52 Cal.3d 968, 980; *In re Billings*, *supra*, 50 Cal.3d at p. 365; *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 107.) **[11b]** Respondent's offenses were extremely

grave and multiple examples of felonious and fraudulent misconduct, likely to impugn notoriously the confidence of the public in the legal profession. Moreover, respondent's experience in sophisticated law practice, public office and private business should have served him better to dissuade him from committing the felonies to which he pled no contest.

[11c] Although the attorney's misconduct in *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, lasted for a longer time, there are guiding similarities expressed in the Supreme Court's opinion. Kaplan had 12 years of experience with a large law firm prior to being confronted by the firm's managing partner and admitting what turned out to be the misappropriation of \$29,000 of law firm revenues, a fraction of the loss suffered by Hom. Kaplan presented psychiatric testimony to establish pressures acting on him at the time of the misappropriation and offered many character references to establish that his misconduct was aberrational. In ordering disbarment, the Supreme Court stated "While marital stresses and the imminent demise of loved ones are always personal tragedies, we fully expect that members of the bar will be able to cope with them without engaging in dishonest or fraudulent activities, especially on the scale that Kaplan engaged in such activities. In light of both the amount of money and the sustained period over which Kaplan misappropriated [his law firm's] funds, we are unpersuaded that the State Bar's recommendation was in error." (*Id.* at p. 1073.) For similar reasons, we recommend that respondent be disbarred. Since he has been under interim suspension continuously since April 1990, if the Supreme Court follows our recommendation, he will be able to petition for reinstatement as of right in April 1995. (Trans. Rules Proc. of State Bar, rule 662.)

8. Since exhibits 55, 56 and 57 were excluded by the hearing judge, they were not part of the record initially forwarded to this court during the review process. In view of the move of our court clerk's offices in late December 1993, in which the exhibits were maintained, coupled with the need to undertake unanticipated further research, we have extended the submission period of this review an additional 10 days. We have also extended that time period a further 10 days due to delays caused by the recent Los Angeles area earthquake in circulation of this court's draft opinion among the panel which

consists of two Los Angeles judges and one San Francisco judge. We therefore vacate our submission of this matter on October 20, 1993, and order it resubmitted nunc pro tunc as of November 9, 1993.

9. In cases such as *In re Chira* (1986) 42 Cal.3d 904 and *In re Chernik* (1989) 49 Cal.3d 467, the Supreme Court has imposed suspension. But those cases involved an attorney committing or counselling a single fraudulent income tax deduction and did not involve any theft.

III. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, Ernest Lee Brazil, be disbarred from the practice of law in the State of California. Since he has been suspended continuously since April 1990, we do not recommend that he again be required to comply with the provisions of rule 955, California Rules of Court. We follow the recommendation of the hearing judge to recommend that costs incurred by the State Bar in the investigation and hearing of this matter be awarded the State Bar pursuant to Business and Professions Code section 6086.10. We deny as premature respondent's request in this review proceeding to be relieved from the requirement to pay costs, noting that if the Supreme Court orders the payment of costs, the applicable rules afford him a formal opportunity to seek relief. (Trans. Rules Proc. of State Bar, rule 462.)

We concur:

NORIAN, J.
PECK, J.*

* By appointment of the Acting Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.