

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

RICHARD C. STAMPER

A Member of the State Bar

[No. 85-C-19022]

Filed July 9, 1990

SUMMARY

Respondent was referred for State Bar disciplinary proceedings following his criminal conviction for forgery and embezzlement based on his theft of funds belonging to his law partnership. The State Bar contended that respondent should be disbarred, and the referee concurred. (Guenter S. Cohn, Hearing Referee.)

The review department held that the summary disbarment provisions of section 6102(c) of the Business and Professions Code did not apply to respondent's crimes, because they were not committed in the course of respondent's law practice and did not involve any clients as victims. Accordingly, the review department considered respondent's mitigating evidence. It concluded that due to the persuasiveness of respondent's character evidence and the aberrational nature of his misconduct, respondent should not be disbarred. The review department recommended that respondent receive five years stayed suspension, five years probation, and four years actual suspension, with full credit against the actual suspension for the time respondent was on interim suspension following his initial conviction.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: Lily Barry

HEADNOTES

- [1] **146 Evidence—Judicial Notice**
 159 Evidence—Miscellaneous
 191 Effect/Relationship of Other Proceedings
 1691 Conviction Cases—Record in Criminal Proceeding

Court of appeal opinion regarding respondent's criminal appeal could be cited in related disciplinary proceeding, notwithstanding Supreme Court's depublication order, under Cal. Rules of Court, rule 977(b)(2).

- [2] **166 Independent Review of Record**
In reviewing hearing department's findings, conclusions, and recommendation, review department undertakes an independent examination of the record, but gives great deference to the referee's findings of fact and substantial weight to the referee's recommendation as to discipline.
- [3] **162.11 Proof—State Bar's Burden—Clear and Convincing**
166 Independent Review of Record
On review, the burden remains on the State Bar to prove its case by clear and convincing evidence.
- [4] **801.30 Standards—Effect as Guidelines**
802.69 Standards—Appropriate Sanction—Generally
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
An attorney's commission of a crime involving moral turpitude is always a matter of serious consequence but does not always result in disbarment; the sanction imposed is determined in each case depending on the nature of the crime and the circumstances presented by the record.
- [5] **193 Constitutional Issues**
1553.59 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
The issue of retroactive application of the summary disbarment statute (Bus. & Prof. Code § 6102(c)) to conduct occurring prior to its enactment has not been decided by the Supreme Court.
- [6] **1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment**
Attorney's embezzlement from law partnership was not a crime committed in the course of the practice of law and did not involve a client as victim, and therefore did not come within the scope of the summary disbarment statute (Bus. & Prof. Code § 6102(c)).
- [7] **169 Standard of Proof or Review—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
In determining whether nature of attorney's crimes warranted summary disbarment, review department gave great weight to decision of court of appeal issued on direct appeal from respondent's criminal conviction.
- [8] **146 Evidence—Judicial Notice**
166 Independent Review of Record
169 Standard of Proof or Review—Miscellaneous
191 Effect/Relationship of Other Proceedings
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
Court of appeal opinion on direct appeal from attorney's criminal conviction is conclusive with respect to attorney's guilt of underlying crime, but for discipline purposes, State Bar Court must independently determine, through careful review of criminal record, whether clients were victims of misconduct or misconduct was committed in attorney's capacity as attorney.

- [9 a, b] **1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment**
 Where respondent embezzled from his law partnership through forgeries and other acts internal to the law firm and intended only to deceive his law partner, respondent breached the fiduciary duty of a partner to the partnership, but did not commit a crime related to respondent's status as an attorney.
- [10] **1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment**
 Phrase "offense committed in the course of the practice of law", as used in standard 3.3 and in summary disbarment statute (Bus. & Prof. Code § 6102(c)), addresses the conduct of attorneys as such in dealing with clients and the public, and does not encompass crimes where attorney does not act as such in the commission of the offenses directly, but only in the surrounding circumstances.
- [11] **695 Aggravation—Other—Declined to Find**
1691 Conviction Cases—Record in Criminal Proceeding
 Fact that in a disciplinary proceeding arising from an attorney's criminal conviction, the conviction is conclusive evidence of the attorney's guilt, is not an aggravating factor, but the basis of the attorney's culpability.
- [12] **695 Aggravation—Other—Declined to Find**
 Failure to present expert psychological testimony regarding purportedly aberrant nature of attorney's misconduct was not an aggravating factor.
- [13] **695 Aggravation—Other—Declined to Find**
 Failure to explain motive for misconduct is not an aggravating factor.
- [14] **523 Aggravation—Multiple Acts—Found but Discounted**
 Existence of multiple acts of theft added to overall gravity of respondent's misconduct, but did not preclude consideration of mitigation to reach a result short of disbarment.
- [15] **595.90 Aggravation—Indifference—Declined to Find**
625.20 Aggravation—Lack of Remorse—Declined to Find
 Where evidence established that victim of attorney's misconduct had received in compensation from attorney an amount greater than the amount originally embezzled by attorney, attorney's belief that victim was not economically harmed, and failure to make additional restitution, did not demonstrate attorney's failure to appreciate wrongfulness of acts, or lack of remorse.
- [16] **801.20 Standards—Purpose**
801.30 Standards—Effect as Guidelines
802.30 Standards—Purposes of Sanctions
802.69 Standards—Appropriate Sanction—Generally
 In assessing appropriate discipline, State Bar Court looks to provisions of applicable standard, in light of goals of disciplinary system set forth in standard 1.3 and guidance from Supreme Court; standards are guidelines, not mandatory sentencing provisions.

- [17] **1552.31 Conviction Matters—Standards—Moral Turpitude—Suspension**
 1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Standard 3.2 contemplates opportunity to introduce mitigating evidence which, if compelling, would justify sanction short of disbarment.
- [18] **710.10 Mitigation—No Prior Record—Found**
Record of practicing without complaint subsequent to misconduct is as valid a mitigating circumstance as lack of a prior record.
- [19] **710.10 Mitigation—No Prior Record—Found**
 710.35 Mitigation—No Prior Record—Found but Discounted
Contrary to express terms of standard 1.2(e)(i), case law permits long record of practice without prior discipline to be treated as mitigation notwithstanding seriousness of present misconduct.
- [20] **172.50 Discipline—Psychological Treatment**
Where attorney's expert witness testified that attorney still had personality traits that needed working on, protection of public required imposition of psychological treatment requirement as condition of probation.
- [21] **148 Evidence—Witnesses**
 162.19 Proof—State Bar's Burden—Other/General
 169 Standard of Proof or Review—Miscellaneous
 740.10 Mitigation—Good Character—Found
Where examiner stipulated to admissibility of character reference letters at hearing, and thus chose not to require the declarants to be cross-examined, examiner's attempt to discount letters before review department was without foundation.
- [22] **1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply**
Where length of attorney's prolonged interim suspension was largely due to meritorious appeal from criminal conviction, it would have been inequitable not to give credit for interim suspension against period of actual suspension recommended after disciplinary hearing.
- [23] **1552.59 Conviction Matters—Standards—Moral Turpitude—Declined to Apply**
Supreme Court has rejected rigid application of the requirement of prospective suspension in standard 3.2.

ADDITIONAL ANALYSIS

Aggravation

Found

541 Bad Faith, Dishonesty

Declined to Find

575.90 Refusal/Inability to Account

588.50 Harm—Generally

615 Lack of Candor—Bar

Mitigation

Found

720.10 Lack of Harm

725.11 Disability/Illness

745.10 Remorse/Restitution

750.10 Rehabilitation

Discipline

1613.11 Stayed Suspension—5 Years

1615.10 Actual Suspension—4 Years

1616.50 Relationship of Actual to Interim Suspension—Full Credit

1617.11 Probation—5 Years

Probation Conditions

1022.10 Probation Monitor Appointed

1023.40 Testing/Treatment—Psychological

1024 Ethics Exam/School

1026 Trust Account Auditing

Other

1512 Conviction Matters—Nature of Conviction—Theft Crimes

1525 Conviction Matters—Moral Turpitude—Found

1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

PEARLMAN, P. J.:

This case arose as a conviction referral from the California Supreme Court following the finality, after appeal, of respondent Richard C. Stamper's conviction by a jury of two counts each of forgery and grand theft by embezzlement.¹ On appeal, the crimes were ruled not to involve the practice of law or a client as a victim. By an earlier order dated September 17, 1986, issued following the entry of the original jury verdict, the Supreme Court had placed respondent on interim suspension due to his conviction of numerous felonies involving moral turpitude. Respondent was an active member of the State Bar with no disciplinary record from his admission in 1971 until his interim suspension went into effect on October 17, 1986. He has remained on interim suspension ever since.

We conclude that the summary disbarment provisions of Business and Professions Code section 6102 (c) are inapplicable to these facts and that respondent was entitled to put on evidence of compelling mitigation justifying a sanction less than disbarment under standard 3.2 of the Standards for Attorney Sanctions for Professional Misconduct ("standard(s)" or "std."). In accordance with the standards, respondent put on persuasive evidence in mitigation as to the lack of harm to clients or the

person who was the object of the misconduct, the aberrational nature of his conduct, an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities, and his remorse, restitution and rehabilitation in the seven years since the acts occurred. Following Supreme Court precedent in *In re Young* (1989) 49 Cal.3d 257, we recommend five years' stayed and four years' actual suspension from the practice of law coupled with five years of probation, and that respondent receive credit against the actual suspension for the time he has been on interim suspension.

BACKGROUND

The hearing in this matter was conducted pursuant to the Supreme Court's referral order of November 10, 1988, before a compensated referee of the State Bar Court.² The State Bar introduced the record of respondent's criminal trial into evidence at the hearing. (Exhs. 1-8.)³ It detailed respondent's elaborate scheme to embezzle a total of approximately \$30,000 from his law partnership, Dotson & Stamper, at three different times over a five-year period from 1978 through 1983.

The Fourth District Court of Appeal, in an unpublished opinion,⁴ [1 - see fn. 4] concluded that only four of the charged offenses were not time-barred; that no client funds were involved and that respondent's only victim was his law partner David

1. Respondent originally was charged by information with 30 counts of theft by embezzlement from his law partnership and forgery, plus an allegation that the total amount taken was over \$25,000. Two of the counts were stricken for lack of evidence. (Exh. 5, at p. 796.) Of the remaining 28 counts, respondent was acquitted of 4; in addition, the jury found the allegation that respondent had taken over \$25,000 not to be true. On appeal, 20 of respondent's 24 convictions were reversed on the ground that they were time-barred. The convictions were affirmed as to two forgery counts and two counts of grand theft by embezzlement.

2. This proceeding was heard by a compensated referee appointed under Business and Professions Code section 6079, acting as a hearing panel of the State Bar Court as constituted prior to the implementation of the full-time State Bar Court system created by Business and Professions Code sections 6079.1 and 6086.65. Pursuant to Business and Professions Code section 6086.65 (b) and rule 109 of the Transitional

Rules of Procedure of the State Bar, respondent's request for review, filed on November 9, 1989, was assigned to this full-time review department created by Business and Professions Code section 6086.65 (a).

3. The criminal trial record consisted of six volumes of reporter's transcript, and two volumes of clerk's transcript, as well as two volumes of preliminary hearing transcript introduced into evidence by respondent. (Exhs. J, K.)

4. [1] The opinion is included in the State Bar Court's file in this matter, as part of the record of respondent's conviction. It was certified for publication, and was printed in the advance sheets (*People v. Stamper* (1987) 195 Cal.App.3d 1608), but was deleted from the bound volume on the direction of the Supreme Court. (See 195 Cal.App.3d 1660, fn. 16.) We may nevertheless cite it in this related disciplinary proceeding. (Cal. Rules of Court, rule 977(b)(2).)

Dotson who was entitled to half of the embezzled funds. It further held that the jury was erroneously instructed that respondent's conduct was in breach of his fiduciary duty as a lawyer, because the crimes were unrelated to respondent's status as an attorney. The court held that this error was not prejudicial, however, because the jury was properly instructed that respondent had breached his fiduciary duty as a partner of the victim of the crimes. On remand, as part of his sentence, respondent was ordered to pay restitution to Dotson in the amount of \$3,000. (I.R.T. p. 7.)⁵ Respondent paid Dotson the \$3,000 as ordered. (*Id.*) He was by then under interim suspension from his law practice, had resigned from the firm he had joined in 1983 after leaving his partnership with Dotson and had complied with the notice requirements of rule 955 of the California Rules of Court, as ordered by the Supreme Court.

At the hearing, the State Bar of California, through its examiner, sought respondent's disbarment pursuant to Business and Professions Code section 6102 (c) and standard 3.2. The State Bar rested its case after introducing into evidence the record of respondent's criminal trial. (I.R.T. pp. 7-8; exh. 1-8.) Respondent admitted the commission of the crimes of which he was charged (including those counts that were stricken and those on which he was acquitted), and his counsel conceded that the State Bar proceeding properly involved not only the convictions that were sustained, but also those that were reversed on appeal on statute of limitations grounds. (I.R.T. p. 3; II R.T. pp. 16-20.) Respondent and two other witnesses (his wife and a former associate at Dotson & Stamper) testified on issues in mitigation

and respondent introduced without objection over thirty letters and declarations under penalty of perjury from a broad spectrum of well-respected members of his community attesting to his good character, his high standing as a lawyer in the community and the aberrational nature of his misconduct.

The referee "reluctantly" recommended disbarment despite finding that respondent "enjoyed a reputation and was held in high regard for honesty, hard work, competence and community involvement" (decision, finding of fact 11) and despite concluding that respondent's actions "appear to be an aberration and totally contrary to the type of person he and all persons providing evidence on his behalf seem to indicate." (Decision at p. 8.) The referee adhered to the disbarment recommendation on reconsideration after taking additional evidence in the form of a forensic psychologist's report and testimony evaluating respondent as having an excellent prognosis for refraining from future illegal activity.⁶

DISCUSSION

[2] Like the Supreme Court and the former volunteer review department, this review department, in reviewing the findings, conclusions, and recommendation of a referee's decision in an attorney disciplinary matter, undertakes an independent examination of the record, but gives great deference to the referee's findings of fact and substantial weight to the referee's recommendation as to discipline. (See, e.g., *In re Ewaniszyk* (1990) 50 Cal.3d 543, 549; *In re Larkin* (1989) 48 Cal.3d 236, 244.)

5. The record does not contain any formal record of the sentence respondent received on remand. Respondent introduced a presentence report prepared for his resentencing, which included a sentencing recommendation (exh. A), but there is no evidence as to whether it was accepted by the court. The recommendation was for six months in work furlough, \$6,254.23 in restitution divided equally between Dotson and an insurance company (which had not yet decided whether it was entitled to restitution), and three years probation. (Exh. A.) Respondent testified that he was not required to, and did not, pay any restitution to an insurance company. (II R.T. pp. 7-8.)

6. The witness, Dr. Friedman, was the same psychologist who had evaluated respondent in 1985 in connection with his criminal conviction. As indicated in the record (III R.T. p. 108) she is a forensic expert who has done evaluations for the superior and juvenile courts in San Diego for 12 years. She concluded her evaluation (exh. L) by stating: "It was this examiner's opinion in 1985 that Mr. Stamper's prognosis not to again engage in illegal behavior was very good. Today, it seems that not only is his prognosis excellent in terms of refraining from illegal activity, but that if Mr. Stamper's license to practice law is reinstated he will bring to his profession a sensitivity, compassion and concern for others that would be hard to equal."

[3] Nonetheless, the burden remains on the State Bar to prove its case by clear and convincing evidence.

A. Summary Disbarment Is Inapplicable.

[4] An attorney's commission of a crime involving moral turpitude is always a matter of serious consequence but does not always result in disbarment. (See, e.g., *In re Chernik* (1989) 49 Cal.3d 467, 473-474; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111-112; *In re Mostman* (1989) 47 Cal.3d 725, 740-743; *In re Duchow* (1988) 44 Cal.3d 268, 269-270; *In re Chira* (1986) 42 Cal.3d 904, 909.) In the past and since 1955, the sanction imposed is determined by the Supreme Court in each case depending on the nature of the crime and the circumstances presented by the record before it. (See, e.g., *In re Mostman, supra*, 47 Cal.3d at p. 740; *In re Smith* (1967) 67 Cal.2d 460, 463-464.)

In 1985, the Legislature amended Business and Professions Code section 6102 (c) to provide for summary disbarment of an attorney convicted of certain felonies involving clients as victims or the practice of law.⁷ The State Bar examiner argues on review that respondent must be disbarred under this statute, but respondent challenges its application to conduct occurring prior to its enactment. [5] The issue of retroactive application of section 6102 (c) has not been decided by the Supreme Court. (*In re Ewaniszyk* (1990) 50 Cal.3d 543, 550; *In re Ford* (1988) 44 Cal.3d 810, 816.) [6] We need not reach it here, because we agree with respondent's alternative argument that his misconduct did not meet the threshold for invoking section 6102 (c) since no client was a victim of the offenses and the crimes were not committed in the course of the practice of law. [7] In determining that the threshold was not met, we give great weight to the decision of the Court of Appeal which reviewed a voluminous record and considered the same issues very thoughtfully in its opinion.

[8] The Court of Appeal decision was issued for the purpose of deciding the propriety of respondent's criminal conviction. We have a different purpose here—to determine what disciplinary sanction is appropriate. In reaching that determination we must treat the decision of the Court of Appeal as conclusive with respect to respondent's guilt of the underlying crime. (See, e.g., *In re Young* (1989) 49 Cal.3d 257, 268.) However, for discipline purposes we must independently determine whether clients were victims of respondent's misconduct or whether the misconduct was committed by respondent in his capacity as an attorney.

We thus must carefully review the criminal record for this purpose. On appeal from his criminal conviction, Stamper contended a partner cannot commit embezzlement from his own partnership and that even if the crime was properly charged, the jury was improperly instructed that he breached his fiduciary duty as an attorney by embezzling funds from his law partnership.

[9a] As the Court of Appeal stated, "As to the issue whether any general partner can be convicted of embezzling wholly-owned funds of a partnership in which he has a partnership interest, the fact the partners are engaged in a law partnership or a co-ownership appears to be of no significance, and the culpability of a partner who converts partnership monies fraudulently is unrelated to the fact the defrauding partner may be an attorney." (*People v. Stamper* (Nov. 5, 1987) D004871, typed opn. p. 6.) The Court of Appeal concluded that a partner may indeed be convicted of embezzlement under such circumstances. It agreed, however, with Stamper's contention that the jury instructions referring to Stamper's having breached his fiduciary duty *as an attorney* were given in error. "This theft was not of funds over which Stamper exercised a fiduciary relationship by virtue of his *attorney* status, but

7. The statute as amended effective January 1, 1986, provides as follows: "After the judgment of conviction of an offense [that involves moral turpitude or is a California or federal felony] has become final or ... an order granting probation has been made suspending the imposition of sentence, the Supreme Court shall summarily disbar the attorney if the

conviction is a felony under the laws of California or of the United States which meets both of the following criteria: [¶] (1) An element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement. [¶] (2) The offense was committed in the course of the practice of law or in any manner such that a client of the attorney was a victim."

merely because under California law they were intrusted to him as a member of the partnership.” (*Id.*, typed opn. p. 14 (emphasis original).)⁸

We agree with that analysis, which is consistent with the Supreme Court’s analysis of the same issue in the context of attorney discipline. (*In re Utz* (1989) 48 Cal.3d 468, 482-483.) In *Utz*, the attorney had been convicted of mail fraud for participating (as a “silent partner,” and not as counsel) in a real estate fraud scheme. [10] The Court was asked to interpret the meaning of the language in section 6102 (c) “offense committed in the course of the practice of law” which had been incorporated verbatim into standard 3.3. The Court held that when the attorney in that case “used his position as deputy attorney general to lend credibility to [his business partner’s] financial status, he was essentially only acting as a credit reference.” (*Id.* at 483.) The Court held that because the attorney in *Utz* acted as an attorney only in the circumstances related to his offenses, and not in the commission of the offenses directly, section 6102 (c) did not apply.⁹

[9b] The acts committed by Stamper in this case (issuing checks drawn on partnership funds in the client trust account; drafting and signing (undelivered) “letters” addressed to clients regarding non-existent “refunds” of purportedly unearned fees) were all internal to the law firm and for the purpose of deceiving a business partner. None of the forged documents were intended for dissemination outside the law firm nor were they so disseminated. They were discovered and brought to light by respondent’s law partner.

It would appear that the purpose of section 6102 (c) was to address the conduct of attorneys acting as such in dealing with clients and the public and not to encompass crimes of the nature involved here. No authorities have been cited to this court by the examiner to support her position that 6102 (c) is

applicable and we decline to find it applicable to these facts.

B. Findings and Conclusions.

1. Findings of Fact

The referee’s findings of fact concerning the nature and circumstances of respondent’s crimes (decision, findings of fact 1-9) are not in dispute, and we adopt them as our own without change.¹⁰ They may be summarized briefly as follows.

On 17 occasions from 1978 to 1983, respondent took for himself money belonging to his law partnership. Typically, respondent did this by writing checks on his law partnership’s trust account which were made out to clients, and which purportedly were for refunds of advanced attorneys’ fees. The clients were not actually entitled to any refunds, and the money represented by the checks actually belonged to the partnership. Respondent forged the clients’ endorsements on the checks and deposited them in his personal account. To conceal the diversion of funds, he placed in the clients’ files copies of letters forwarding the refunds to them. (The originals of these letters apparently were destroyed rather than mailed.) The total amount which respondent thereby diverted from the partnership was \$32,138.36 (of which half actually belonged to respondent, as an equal partner in the firm).

2. Aggravating Factors

The referee’s decision contains several findings regarding aggravating factors which either are not properly considered in aggravation, or are not supported by clear and convincing evidence. (Decision, findings of fact 22, 24-26.) [11] First, finding of fact 22 (“Respondent’s criminal conviction of forgery and grand theft are conclusive evidence of his guilt”) is not a finding in aggravation, it is the basis of culpability.

8. The court concluded, however, that the error was harmless beyond a reasonable doubt, and thus upheld the embezzlement convictions that were not time-barred. (*Id.*, typed opn. pp. 14-15.)

9. However, the Court found it appropriate to disbar the attorney

under the general provisions regarding crimes involving moral turpitude.

10. We note, however, that findings of fact 10 and 11 are more properly characterized as findings in mitigation than as findings regarding respondent’s culpability.

Second, finding of fact 24 states that “No testimony was presented from any professional providing counselling [sic] to Respondent which would explain [the] purported aberration of Respondent’s behavior” involved in this case. This finding was reaffirmed after respondent moved for reconsideration, despite the fact that, in the proceedings on respondent’s motion for reconsideration, respondent presented the testimony on this precise subject by a forensic psychologist who had provided counseling to respondent. (Exh. L; III R.T. pp. 107-135.) Although the referee apparently did not find this testimony persuasive as to mitigation, even he admitted that it “help[ed] to shed light on Respondent’s character.” (Decision after reconsideration, ¶ 1.) [12] Thus, the finding that respondent presented no testimony of the sort described in finding of fact 24 is not supported by the record. It would not in any event constitute an aggravating factor.

Third, finding of fact 25 states that “Respondent has not explained his motive for his actions.” This is not a statement that the referee did not *believe* respondent’s explanation, but a finding that none was *offered*. This finding is not supported by the record. A good deal of the testimony presented by respondent (and, on reconsideration, by his psychologist) was devoted to explaining the motive for respondent’s misconduct, namely, his belief that he was not getting a fair share of the partnership’s income, and his desire to avoid confrontation with Dotson. (I R.T. pp. 63, 67; II R.T. pp. 2-3, 13-14, 38-43; III R.T. pp. 114-115, 125, 133.) [13] Again, even if respondent had failed to explain his motive, such failure would not properly constitute an aggravating factor.

Finally, finding of fact 26 states that “Respondent’s claim that he intended to utilize the money he diverted for the eventual settlement with his partner is contradicted by his admission that none of the money was so used.” This statement does not resolve the conflict and is thus not a true finding. It also does not accurately characterize the testimony. Respondent never testified that he intended to re-

place the money he misappropriated from his partnership. Rather, he stated that the last part of the money he misappropriated was taken as an advance offset against an anticipated unequal division of the partnership assets in Dotson’s favor. Respondent testified without contradiction that such an unequal division occurred. Accordingly, this “finding” also is not supported by the record.

On review, the State Bar contends that there are additional aggravating factors shown by the record which were not set forth in the referee’s decision. [14] First, the examiner argues that respondent’s repeated thefts over a five-year period constitute a pattern of misconduct and/or multiple acts. Clearly, there were multiple acts. Such factor adds to the overall gravity of respondent’s misconduct, but it does not preclude consideration of mitigation to reach a result short of disbarment. (See, e.g., *Rose v. State Bar* (1989) 49 Cal.3d 646.)

Second, the examiner argues that respondent gave “circuitous and dubious testimony” at the hearing. This contention is best addressed to the hearing referee who observed respondent’s demeanor. No finding of lack of candor was made here, nor does our own review of the record permit such a finding. Respondent’s explanation for his misconduct was coherent and internally logical, albeit misguided, and did not reflect evasion or deliberate untruth such as might appropriately be viewed as an aggravating factor.

[15] Third, the examiner argues that respondent has demonstrated indifference to the consequences of his act, and lack of remorse. This is based on respondent’s testimony that he held the belief that his former partner was not harmed by his misconduct. The record does in fact show that Dotson received back more than the amount respondent took. While respondent officially made restitution only of the relatively small amount (\$3,000) ordered by the court as part of respondent’s criminal sentence, respondent also left Dotson with a far greater than half share of the partnership’s accumulated assets, in-

cluding fees later collected in cases that respondent took with him when he left the partnership.¹¹ As a consequence, respondent's adherence to his contention that Dotson was not harmed economically is supported by the record and his failure to make additional restitution does not demonstrate a failure to appreciate the wrongfulness of his acts.

In short, the only aggravating factors found by the referee or offered by the examiner which we conclude are supported by clear and convincing evidence, and appropriately relied on in aggravation, are (1) that respondent's scheme was repeated on numerous occasions over a period of time, and thus consisted of multiple acts of misconduct (std. 1.2(b)(ii)), and (2) that respondent's misconduct was surrounded by concealment (decision, finding of fact 23; std. 1.2(b)(iii)).

3. Mitigating Factors

[16] In assessing the appropriate discipline we begin by looking to the provisions of standard 3.2, in light of the goals of the disciplinary system as set forth in standard 1.3, and in light of the guidance we have received from the Supreme Court. (*In re Young* (1989) 49 Cal.3d 257, 266-268.) The standards are guidelines, not mandatory sentencing provisions. (*Id.* at pp. 267-268 & fn. 11.) [17] Standard 3.2 contemplates the opportunity for the respondent to introduce evidence in mitigation which, if compelling, would justify a sanction short of disbarment.

Respondent introduced evidence to support findings of mitigation under standards 1.2(e)(i) (absence of prior discipline), 1.2(e)(iii) (lack of harm to victim), 1.2(e)(iv) (emotional difficulties), 1.2(e)(vi) (good character), 1.2(e)(vii) (remorse and restitution) and 1.2(e)(viii) (subsequent rehabilitation). The referee recited much of this evidence in his decision. (Decision, ¶¶ 10-21.) However, he introduced most of it (decision, ¶¶ 12-21) with the phrase "Respondent offers" (decision at p. 4), thus making it difficult to determine whether or not respondent's evidence was accepted as fact. There was no serious dispute, however, as to the truth of the factual evidence offered by respondent in this regard; the real dispute was as to its adequacy as mitigation. We therefore adopt the relevant portion of the referee's decision (findings of fact 12-21) as findings of fact.

The referee's findings, together with other undisputed evidence in the record, establish the existence of the following mitigating factors. First, respondent has no prior (or subsequent¹² [18 - see fn. 12]) disciplinary record, and had been in practice for over seven years prior to the commencement of his misconduct, and for nearly sixteen years by the date of his interim suspension. (Decision, findings of fact 2, 13; std. 1.2(e)(i).)¹³ [19 - see fn. 13]

Second, as already noted, Dotson was more than compensated for his share of the money taken by respondent, due to respondent's voluntary restitution in the form of an uneven division of the

11. As respondent's brief on review points out, respondent, as a 50 percent partner, would have been entitled to receive half of the \$30,000 as legitimate distributions if he had not embezzled it. Thus, the net loss to respondent's partner Dotson (as opposed to the partnership) was about \$15,000, of which Dotson was repaid \$3,000 as a result of the criminal proceeding. The uncontradicted evidence adduced by the respondent at the hearing shows that respondent gave Dotson a library valued at \$25,000 and almost all of the office furniture and equipment (I.R.T. p. 66) as well as 50 percent of the gross fees to be earned on five contingencies which were being litigated by respondent. (I.R.T. pp. 63-71, 76-88; exhs. H, I.) Respondent donated his services and paid all costs incurred out of his own pocket resulting in approximately \$19,000 more fees paid to Dotson than to respondent. (Exh. H.) Thus, in compensation for his \$15,000 loss, Dotson received at least \$9,500 in cash plus an in-kind distribution in excess of \$12,500 representing the value of respondent's share of the library, equipment and furnishings.

12. [18] Although not mentioned expressly in the standards, under the case law respondent's record of practicing without complaint *subsequent* to his misconduct is as valid a mitigating circumstance as his lack of a *prior* record. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316-317.)

13. [19] Under the express terms of standard 1.2(e)(i), a long record of practice without prior discipline is mitigating only if "coupled with present misconduct which is not deemed serious." Respondent's misconduct in this matter must be considered serious. However, standard 1.2(e)(ii) has been applied repeatedly by the Supreme Court to cases involving serious misconduct, and the limitation in the standard's language appears essentially to have been read out of it by case law. (See, e.g., *Rodgers v. State Bar, supra*, 48 Cal.3d at p. 317; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [absence of prior record will militate against disbarment of attorney who is culpable of pattern of serious misconduct, but only if attorney can show that misconduct is not likely to recur].)

partnership assets. Thus, Dotson, who was the only victim of respondent's crime, was not permanently harmed by respondent's conduct. (Decision, findings of fact 17, 19; stds. 1.2(e)(iii), 1.2(e)(vii).)

Third, respondent presented uncontroverted expert testimony, as well as his own testimony, establishing that his misconduct was related to emotional problems. (Std. 1.2(e)(iv).) These included respondent's traumatic separation from his first wife (decision, finding of fact 14), as well as psychological shortcomings that precluded respondent from confronting Dotson about the inequity respondent perceived in their partnership arrangement, and that led respondent to desire to create an appearance of financial advantage to Dotson upon the dissolution of their partnership. (Decision, findings of fact 15-16; I R.T. p. 63; II R.T. pp. 38-41; III R.T. pp. 111-115.)¹⁴ [20 - see fn. 14]

With respect to respondent's general good character and reputation (standard 1.2(e)(vi)), the referee found that respondent was president of his county bar association in 1977, and that he "enjoyed a reputation and was held in high regard for honesty, hard work, competence and community involvement." (Decision, findings of fact 10, 11.) In addition, respondent introduced into evidence numerous letters (admitted collectively as exhibit C) attesting to his character, originating from a wide spectrum of very credible sources, which are very persuasive in this regard.¹⁵ They constitute the "extraordinary demonstration of good character . . . attested to by a wide range of references in the legal and general communities . . . who are aware of the full extent of the member's misconduct" that is required by standard 1.2(e)(vi).

For example, a former client who had nothing but high praise for respondent (stating that "he put meaning in my life" through free legal assistance) and whose name was forged by respondent stated: "I know about the criminal charges against Mr. Stamper. I was required to testify for the prosecution at the preliminary hearing. They called me a victim. Nothing could be further from the truth." (Exh. C [letter signed under penalty of perjury by Chris McLaughlin].)

John Ryerson, a successful businessman in Imperial County for over thirty years, testified to his observation of respondent in a professional context as well as church and social settings. He characterized respondent's conduct as a lapse of judgment that had not recurred and attested to respondent's honesty and integrity despite Ryerson's familiarity with the facts of respondent's conviction and suspension. "In fact, I was interviewed by the Attorney General's Office and I understand that my case was one of those that resulted in a conviction. In spite of that, I feel that Richard Stamper has learned his lesson, is completely rehabilitated, and would present no threat to the community if he resumes practice. Actually, I believe the community would benefit from the services of such a lawyer." (Exh. C [letter signed under penalty of perjury by John Ryerson].)

Dwayne Peek was a client who went to respondent *after* criminal charges had been filed and substantial publicity had been generated thereby. This was before respondent was suspended. Peek stated that respondent was completely candid and completely trustworthy. (Exh. C [letter signed under penalty of perjury by Dwayne Peek].)

14. Respondent's testimony demonstrated his remorse for his misconduct, and his growing insight into its sources. (II R.T. pp. 38-41.) Respondent's expert testified that he had made progress in ameliorating his psychological difficulties, and that his misconduct was not likely to recur. (III R.T. pp. 115-117.) Thus, some rehabilitation, during the considerable time that has passed since the misconduct, is established as required by standards 1.2(e)(iv) and (viii). [20] However, the expert also acknowledged that respondent still possesses personality traits that "need working on." (III R.T. p. 123; see also *id.* at pp. 123-124.) This testimony leads us to believe that the protection of the public requires that respondent remain on probation for a significant period of time following his return

to active practice, with a condition requiring further psychological treatment, if needed. We have recommended the imposition of such a condition.

15. The sources included not only former clients whose names respondent had forged, but also his law partners after Dotson (at the firm he resigned from upon his conviction), the former dean of the University of San Francisco law school, a prosecutor and former sheriff, the county counsel, the most senior deputy probation officer in the county, respondent's current wife's ex-husband, his ex-wife's subsequent boyfriend, fellow attorneys, neighbors and a member of the school board.

One letter which we find most persuasive came from a source who should have been most leery about respondent's past misdeeds—Richard Hecht, the attorney who took over respondent's practice in 1986 when respondent was suspended and hired respondent as his paralegal. Hecht characterized respondent as being among the top 10 to 20 percent of the thousands of attorneys he had worked with or opposed in 28 years of practice. He explained that he had discussed respondent's conviction and character with a number of attorneys as well as respondent and that he considered respondent totally honest and candid as well as an involved and tenacious attorney of superior workmanship showing extraordinary dedication and compassion for his clients.¹⁶ Hecht concluded by noting: "I can state my position no more forcefully than to say that I would not hesitate to enter into a partnership with [respondent]. . . . I feel the same about very few others." (Exh. C [letter from Richard Hecht].)

[21] On review, the examiner attempts to discount the letters, but this effort is not based on solid ground. The examiner stipulated to the admissibility of the letters at the hearing and thus chose not to require the declarants to be subjected to cross-examination. While not all of the more than 30 letters state the extent of the author's knowledge of respondent's misconduct, most of them convincingly recite their familiarity with the criminal conviction (see discussion *ante*) and some note that it enjoyed widespread publicity in the community. Thus, in light of the examiner's waiver of cross-examination, we have no basis for determining that the authors of the letters were not adequately familiar with respondent's misconduct. In any event, those few letters that do not expressly indicate such knowledge are far outweighed by the many that do.

C. Appropriate Discipline.

In seeking a recommendation of disbarment, the examiner relies in part upon *In re Rivas* (1989) 49

Cal.3d 794. *In re Rivas* is clearly distinguishable. It involved fraud upon the public by a candidate for election to a judgeship. Disbarment was required because of the extremely serious nature of the misconduct which was aggravated by Rivas's conduct during the hearing.¹⁷ Moreover, the character evidence offered in mitigation was not based on any detailed personal knowledge, but largely upon Rivas's reputation. (*Id.* at pp. 801-802.)

In re Bloom (1977) 19 Cal.3d 175, 179 is likewise distinguishable. Bloom solicited a \$150,000 bribe for purposes of personal gain. Respondent's motivation (albeit misguided) was not personal gain. It was to avoid confrontation over what he considered to be his fair share of the partnership, and respondent undisputedly gave up a portion of his half of the partnership assets to compensate his partner for the embezzled funds *before* any misconduct was discovered.

The principal recent case relied upon by the examiner is *In re Basinger* (1988) 45 Cal.3d 1348. Basinger gave his secretary authority to invest money on his behalf and write checks on his law partnership's accounts. To cover losses on the investments, the secretary improperly transferred money into respondent's operating account, including both partnership funds and client trust funds. Basinger first found out about the secretary's activity and failed to report it to his partners or investigate further. Instead, he became romantically involved with her. When thefts in excess of \$240,500 were finally discovered, Basinger paid back part of the money, but refused to borrow additional funds in order to restore the rest of what had been taken. Basinger contended, with the support of expert testimony, that his misconduct was the aberrational product of situational stress, and was not likely to recur.

The Supreme Court held that these arguments were not sufficient when balanced against other factors: "We must still consider the enormity of the

16. This characterization was echoed by all of the other character references who were familiar with respondent's law practice.

17. The Court did note that, with credit for interim suspension, Rivas could apply for reinstatement two months after

disbarment! (*Id.* at p. 802 fn. 8.) A similar result would occur here. If disbarment were ordered by the Supreme Court, it would not be effective for several months to a year following our decision, by which time respondent will have been on interim suspension for four to four and one-half years.

crime and its effect on the integrity, high professional standards, and public confidence in the legal profession.” (*In re Basinger, supra*, 45 Cal.3d at p. 1360.) In so doing, the Supreme Court noted that the scheme only ended when the defalcations were discovered, that an unusually large amount of money was involved and the forged signatures in settled cases possibly compromised his clients’ rights. (*Id.* at p. 1361.) The court also noted that petitioner “repaid” victims from funds converted from new victims and only made restitution after discovery of the crime and threatened police intervention. (*Id.* at p. 1364.)

We, too, must consider the effect of respondent’s conduct on the integrity, high professional standards and public confidence in the profession. But we must also take into consideration that his crime is not of the enormity of Basinger’s crime, that restitution was made *before* discovery, and that no clients were involved.

The examiner contends that a partner as victim should receive the same solicitude as a client as victim. Assuming that to be the case, respondent is nonetheless entitled to consideration of mitigating evidence. In *Weller v. State Bar* (1989) 49 Cal.3d 670, 677-678, for example, disbarment was rejected and three years actual suspension was ordered even though the respondent had a prior record of discipline and had misappropriated \$14,000 from his clients which he repaid only after the client’s wages were garnished by the creditor. There, as here, the respondent had numerous letters of recommendation which the court treated as a mitigating factor. (*Id.* at p. 677.)¹⁸

We find the evidence in mitigation introduced by respondent to establish the existence of “the most compelling mitigating circumstances” which “clearly predominate” over respondent’s commission of crimes involving moral turpitude, and over the aggravating factors discussed *ante*. Under standard 3.2, therefore, a degree of discipline short of disbarment is appropriate.

In light of all the facts and circumstances, as noted at the outset of this opinion, we recommend to the Supreme Court that respondent be given five years’ stayed suspension and four years’ actual suspension, placed on probation for five years on conditions specified in our formal recommendation (*post*), and required to take and pass the Professional Responsibility Examination within one year. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891 fn. 8.) In applying this recommendation, however, it is necessary to take into account the fact that respondent has already been suspended on an interim basis for over three and a half years.

D. Effect of Interim Suspension.

[22] If we had recommended disbarment, respondent would be entitled, in determining when he could apply for reinstatement, to receive full credit for all time served on interim suspension. (Rules Proc. of State Bar, rule 622; see *In re Young* (1989) 49 Cal.3d 257, 268 fn. 13.) If we follow the minimum actual suspension set forth in standard 3.2, we would have to make two years of the recommended suspension prospective. This could deprive respondent of his right to practice for more years than he might be removed for disbarment, even though he has made a showing of compelling mitigation. Such an inequitable result would stem from the length of respondent’s interim suspension. The time spent on interim suspension was largely due to respondent’s having taken an appeal from his conviction. Not only was this something respondent had every right to do, but in fact, his appeal proved to be meritorious in large part. Nearly all of his convictions were reversed and his contentions on the remaining convictions regarding erroneous jury instructions were accepted by the Court of Appeal (though the error was found to have been harmless). Respondent should not be penalized for his entirely proper exercise of his right to appeal by forfeiting his right to practice law for longer than would have been the case had he allowed his conviction to become final earlier. (*In re Young, supra*, 49 Cal.3d at p. 267.)

18. In *Weller*, the attorney’s character evidence was treated as mitigation, but was held to be “less persuasive than [it] otherwise might be” (49 Cal.3d at p. 677) because of lack of evidence that the character references knew the full extent of

the attorney’s misconduct. In the present case, as discussed *ante*, respondent’s letters are entitled to more weight than those presented in *Weller*, because the authors generally were aware of respondent’s criminal conviction.

[23] The Supreme Court in *In re Young* rejected the rigid application of the prospective provision of standard 3.2. The Court held that each case must be resolved on its own facts to avoid unfair and inconsistent results, taking into account all relevant evidence including whether the conduct was aberrational, testimony from character witnesses, cooperation, remorse and length of interim suspension. (*Id.* at pp. 267-268.) The Supreme Court determined upon mitigating circumstances similar to those found here that the public would be adequately protected by five years stayed suspension, with an actual suspension of four years, with credit for time spent on interim suspension, plus five years probation. Under the mandate of *In re Young*, therefore, we recommend that respondent be given credit, against the lengthy period of actual suspension which we have recommended, for all of the time he will have spent on interim suspension as of the date the Supreme Court's order in this matter becomes effective.

As in *In re Young*, to protect the public, we also recommend a five-year period of probation which will continue after respondent's return to the practice of law. To guard against any remaining uncertainty regarding respondent's rehabilitation from the psychological shortcomings that led to the commission of his crimes, we also recommend that respondent be required to obtain further psychiatric or psychological counseling and certification of his recovery. We also require that he have any client trust account monitored by a certified public accountant or public accountant for the duration of probation.

FORMAL RECOMMENDATION

It is therefore recommended to the Supreme Court that respondent RICHARD C. STAMPER be suspended from the practice of law for a period of five years, and that said suspension be stayed on the following conditions:

1. That respondent be placed on actual suspension for four years with credit for the time spent on interim suspension between October 17, 1986 and the effective date of the Supreme Court's order herein.

2. That respondent be placed on probation for five years, commencing on the effective date of the Supreme Court's order herein, on the following conditions:

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

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

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

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

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

(c) That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish

such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

(d) That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

(e) That respondent shall promptly report, and in no event in more than ten days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

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

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

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

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

(C) The amount of money held in trust for each client;

(ii) That respondent has maintained a bank account in a bank authorized to do business in the

State of California at a branch within the State of California and that such account is designated as a "trust account" or "clients' funds account";

(iii) That respondent has maintained a permanent record showing:

(A) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

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

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

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

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

(g) That he shall obtain psychiatric or psychological help from a duly licensed psychiatrist or a clinical psychologist at his own expense and shall furnish evidence to the Office of the Clerk, State Bar Court, Los Angeles, that he is so complying with each report that he is required to render under these conditions of probation; provided, however, that should it be determined by said psychiatrist or psychologist that respondent has recovered from the mental infirmities concerning which he presented testimony at his criminal trial, he may furnish to the State Bar a written statement from said psychiatrist or psychologist so certifying by affidavit or under penalty of perjury, in which event, and subject to the approval of the court, no reports or further reports under this paragraph shall be required and he shall not be required to obtain such psychiatric or psychological help.

3. We further recommend that respondent be required to take and pass the Professional Responsibility Examination within one year from the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.
STOVITZ, J.