

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WILLIAM STORM BLEECKER

A Member of the State Bar

[No. 84-O-18464]

Filed July 17, 1990

SUMMARY

Respondent was found culpable of commingling personal funds with client trust funds, misappropriating funds advanced by a client for costs, failing to pay payroll taxes, and using his trust account to hold personal funds so as to avoid a tax levy. The hearing department recommended a two-year stayed suspension, two years probation, and a sixty-day actual suspension. (Jared Dreyfus, Edward D. Morgan, Arthur H. Bernstein, Hearing Referees.)

The examiner sought review, arguing that the recommended discipline was inadequate. On review, respondent asserted that he was not culpable of misappropriation. Respondent's arguments that he was not culpable of misappropriation or of moral turpitude were rejected. The evidence supported the finding that the funds misappropriated had been advanced for corporation filing fees and not, as respondent claimed, for advanced attorney's fees subsequently earned. On the issue of moral turpitude, the review department found that, at the very least, respondent's handling of his client's funds involved gross carelessness which amounted to moral turpitude under Supreme Court precedent. The review department also found respondent's deliberate use of his trust account to avoid a tax levy to be a basis for a separate finding of moral turpitude.

However, the review department dismissed the charge relating to respondent's failure to pay payroll taxes, because although the facts showed that respondent might have violated penal or civil statutes pertaining to payment of payroll taxes, the notice to show cause alleged only that the respondent had violated sections of the Business and Professions Code, and thus was insufficient to put the attorney on notice that he should prepare to defend against allegations of violating other statutes.

The review department adopted the hearing department's disciplinary recommendation. After considering the misconduct, weighing the factors in mitigation, and reviewing Supreme Court case law, the review department concluded that a deviation from the Standards for Attorney Sanctions for Professional Misconduct was justified.

COUNSEL FOR PARTIES

For Office of Trials: Donald R. Steedman

For Respondent: Tom Low

HEADNOTES

- [1] **106.20 Procedure—Pleadings—Notice of Charges**
130 Procedure—Procedure on Review
192 Due Process/Procedural Rights
420.00 Misappropriation
Review department will not consider misappropriation implied by evidence but not charged in notice to show cause, and not mentioned at trial, in hearing department decision, or in briefs on review.
- [2 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**
420.00 Misappropriation
Attorney's responsibility for maintaining entrusted funds on deposit in trust account does not end when checks purporting to distribute entrusted funds are issued; responsibility continues until the checks have cleared the account. Where attorney's trust account balance fell below amount of entrusted funds after checks were written but before they cleared, attorney thereby misappropriated funds and violated trust account rules.
- [3] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Rule 453 of the Transitional Rules of Procedure of the State Bar requires the review department to independently review the record as to all matters brought before it. The review department accords great weight to findings of fact by the hearing department resolving testimonial issues. However, the review department has the authority to adopt findings, conclusions and recommendations that differ from those of the hearing department. Moreover, the scope of review is not limited to the issues raised by the parties.
- [4] **802.30 Standards—Purposes of Sanctions**
The overriding concern of the review department is the preservation of public confidence in the legal profession and the maintenance of high professional standards.
- [5] **159 Evidence—Miscellaneous**
161 Duty to Present Evidence
162.20 Proof—Respondent's Burden
165 Adequacy of Hearing Decision
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
Respondent's failure to substantiate with documentary evidence his claim that he had earned funds which he claimed were advanced legal fees was properly considered by hearing panel in determining that respondent was not credible on this issue, even though burden of proof was not respondent's. Giving great weight to hearing panel's credibility determination and resolution of conflicting facts against respondent, review department found no basis to reject panel's finding that funds were advanced costs which respondent misappropriated.
- [6] **204.20 Culpability—Intent Requirement**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
The mere fact that the balance in an attorney's trust account falls below the amounts deposited and purportedly held in trust therein supports a conclusion of misappropriation. The rule regarding safekeeping of entrusted funds leaves no room for inquiry into the attorney's intent.

- [7] **280.00 Rule 4-100(A) [former 8-101(A)]**
Respondent's admission that he used his trust account as an operating account and deposited his personal funds into his trust account when client funds were in the account supported finding of commingling in violation of rules governing use of trust accounts. Commingling is committed when a client's money is intermingled with that of the attorney and its separate identity lost so that it may be used for the attorney's personal expenses. Use of the trust account for personal purposes is absolutely prohibited, even if client funds are not on deposit.
- [8] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
430.00 Breach of Fiduciary Duty
Although respondent's misappropriation of client funds was not intentional, and resulted from poor management and misuse of trust account, respondent's gross carelessness, at best, in management of client's entrusted funds constituted moral turpitude, as such conduct breached his fiduciary duty to his client.
- [9] **169 Standard of Proof or Review—Miscellaneous**
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
Whether an attorney's misconduct involved moral turpitude is a question of law ultimately decided by the Supreme Court. The test is the same whether or not the act was a criminal offense. Where respondent failed to pay payroll taxes due to financial difficulty, such conduct did not constitute moral turpitude, because Supreme Court did not find moral turpitude in case involving similar but more egregious misconduct.
- [10] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
194 Statutes Outside State Bar Act
213.10 State Bar Act—Section 6068(a)

Contention by State Bar that respondent violated attorney's duty to obey state and federal laws by failing to pay payroll taxes as required by penal and civil statutes was rejected by review department, despite respondent's admission that taxes were not paid, because notice to show cause did not charge violation of employer withholding statutes, and no evidence was introduced to prove they were violated, thus depriving respondent of opportunity to defend.
- [11] **221.00 State Bar Act—Section 6106**
Respondent's admitted improper use of trust account as an operating account into which he deposited personal funds in order to avoid tax levy which he anticipated, involved concealment and dishonesty, and thus constituted moral turpitude.
- [12] **745.10 Mitigation—Remorse/Restitution—Found**
791 Mitigation—Other—Found
Fact that respondent readily admitted misuse of client trust account and had taken steps to change business practices to alleviate pressures that led to the misuse constituted a mitigating circumstance.

- [13] **750.10 Mitigation—Rehabilitation—Found**
Where respondent's misconduct occurred four years prior to disciplinary hearing, and five years prior to proceedings on review, and respondent had not committed misconduct since then, this constituted a mitigating circumstance.
- [14] **801.30 Standards—Effect as Guidelines**
1091 Substantive Issues re Discipline—Proportionality
In assessing appropriate discipline, review department starts with Standards for Attorney Sanctions for Professional Misconduct, which serve as guidelines, and also considers whether recommended discipline is consistent with or disproportionate to prior decisions of the Supreme Court based upon similar facts.
- [15] **801.20 Standards—Purpose**
802.30 Standards—Purposes of Sanctions
The Standards for Attorney Sanctions for Professional Misconduct must be viewed as a whole with the objective of achieving the primary purposes of disciplinary proceedings, namely, protection of the public, courts and legal profession; maintenance of high professional standards and preservation of public confidence in the legal profession.
- [16 a, b] **745.10 Mitigation—Remorse/Restitution—Found**
750.10 Mitigation—Rehabilitation—Found
801.41 Standards—Deviation From—Justified
822.52 Standards—Misappropriation—Declined to Apply
822.53 Standards—Misappropriation—Declined to Apply
822.55 Standards—Misappropriation—Declined to Apply
822.59 Standards—Misappropriation—Declined to Apply
824.53 Standards—Commingling/Trust Account—Declined to Apply
824.54 Standards—Commingling/Trust Account—Declined to Apply
824.59 Standards—Commingling/Trust Account—Declined to Apply
Where respondent had no prior or subsequent discipline; respondent was not venal; respondent's misconduct was an aberration occurring over a short period of time and contributed to by respondent's poor business judgment at a time when he was under financial pressures; respondent accepted responsibility for his misconduct, taking objective steps to avoid further misconduct; and other mitigating factors existed, it was appropriate to recommend lesser sanction than minimum actual suspension indicated by applicable standards.
- [17] **760.32 Mitigation—Personal/Financial Problems—Found but Discounted**
760.33 Mitigation—Personal/Financial Problems—Found but Discounted
Where respondent did not demonstrate that he suffered from such extreme personal pressures related to his financial difficulties that his misconduct could have been reasonably understandable as a desperate response to such pressures, respondent's financial difficulties were not considered a significant factor in mitigation.
- [18] **801.41 Standards—Deviation From—Justified**
822.53 Standards—Misappropriation—Declined to Apply
1091 Substantive Issues re Discipline—Proportionality
Supreme Court has usually not dealt severely with misappropriations involving a relatively small amount for a relatively brief time when no intentional dishonesty was involved and the offense involved attorney's use of trust account as an operating account.

- [19] **523 Aggravation—Multiple Acts—Found but Discounted**
 802.61 Standards—Appropriate Sanction—Most Severe Applicable
 833.20 Standards—Moral Turpitude—Suspension
 1091 Substantive Issues re Discipline—Proportionality
 1093 Substantive Issues re Discipline—Inadequacy
Fact that, in addition to unintentionally misappropriating client's funds, attorney had committed act of moral turpitude by concealing personal assets in trust account to avoid tax levy might, but would not necessarily, indicate greater discipline to be in order, based on Supreme Court precedent.
- [20] **165 Adequacy of Hearing Decision**
 179 Discipline Conditions—Miscellaneous
Probation conditions which were not set forth in language of standard conditions of probation utilized in disciplinary proceedings were inadequate.
- [21] **172.19 Discipline—Probation—Other Issues**
 179 Discipline Conditions—Miscellaneous
 1099 Substantive Issues re Discipline—Miscellaneous
Where delay in commencement of disciplinary probation until end of actual suspension would not further rehabilitation objective of probation, review department recommended that probation commence on finality of Supreme Court's discipline order.
- [22] **175 Discipline—Rule 955**
Where review department rejected examiner's contention that one-year actual suspension should be recommended, and instead recommended sixty-day actual suspension, requirement that respondent comply with rule 955, Cal. Rules of Ct., was rejected as unnecessary.

ADDITIONAL ANALYSIS

Culpability

Found

- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 221.12 Section 6106—Gross Negligence
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 420.12 Misappropriation—Gross Negligence

Not Found

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

Mitigation

Found

- 720.10 Lack of Harm

Standards

- 802.62 Appropriate Sanction
- 802.63 Appropriate Sanction
- 833.90 Moral Turpitude—Suspension

Discipline

- 1013.08 Stayed Suspension—2 Years
- 1015.02 Actual Suspension—2 Months
- 1017.08 Probation—2 Years

Probation Conditions

- 1022.10 Probation Monitor Appointed
- 1024 Ethics Exam/School
- 1026 Trust Account Auditing

OPINION

NORIAN, J.:

A hearing panel of the State Bar Court¹ has recommended that William S. Bleecker ("respondent") be suspended from the practice of law in the State of California for two years, stayed, with conditions including sixty days actual suspension and probation for the balance of the two-year stayed suspension.

We review this matter at the request of the State Bar examiner ("examiner"). (Trans. Rules Proc. of State Bar, rule 450(a).)² The examiner contends that the recommended level of discipline is insufficient in view of the facts found in the hearing panel's decision, the panel's recommended conditions of probation are incomplete, and respondent should be ordered to comply with rule 955, California Rules of Court. We have concluded, based on our independent review of the record, that the hearing panel's decision should be modified to expand the findings of fact, to modify the conclusions of law, and to set forth the probation conditions in language customary in suspension matters. With these modifications we shall adopt the hearing panel's decision as our recommendation to the Supreme Court.

I. PROCEDURAL HISTORY

This proceeding was initiated by a notice to show cause filed February 18, 1988. Count one of the four-count notice alleged that respondent failed to perform the services for which he was hired in a client matter and failed to communicate with that client in violation of Business and Professions Code

sections 6068 (a) and 6103,³ and former Rules of Professional Conduct, rules 2-111(A)(2), 6-101(A)(2) and 6-101(B)(1).⁴ Count two alleged that respondent commingled his personal funds with client funds, used his client trust account as a personal or business account and misappropriated client funds from the trust account in violation of sections 6068 (a), 6103 and 6106 and rule 8-101(A). Count three alleged that respondent wilfully failed to withhold and pay over payroll taxes on behalf of his employees in violation of sections 6068 (a), 6103 and 6106. Count four alleged that respondent's failure to withhold and pay over the payroll taxes was an attempt to evade a lawful levy of the taxing authorities in violation of sections 6068 (a), 6103 and 6106. Respondent's answer to the notice to show cause was filed February 29, 1988.

The parties entered into a stipulation as to facts and disposition which was approved by order of a former referee of the State Bar Court. The order approving the stipulation and the stipulation were both filed August 24, 1988. Our predecessor review department rejected the order approving the stipulation and the stipulation at its April 6, 1989, meeting on the ground that the discipline recommended appeared insufficient. Under rule 408(b) of the former Rules of Procedure of the State Bar, the parties were relieved of all effects of the stipulation upon its rejection by the review department and the matter was put back on the hearing department calendar for further proceedings. Accordingly, that stipulation is not part of the record of this proceeding and hence not the subject of our review.

The trial was held on July 13, 1989. Respondent appeared personally and was represented by counsel.

1. The Rules of Procedure of the State Bar, in effect prior to September 1, 1989, govern the proceedings held before the hearing panel because the taking of evidence had commenced before that date. (Trans. Rules Proc. of State Bar, rule 109.) Under rule 558 of those Rules of Procedure, upon timely election by a party, a hearing panel consisting of three referees was assigned by the Presiding Referee to adjudicate the disciplinary matter. Such an election apparently occurred in this case, although the record before us does not so indicate.

2. The Transitional Rules of Procedure of the State Bar, effective September 1, 1989, apply to this review department,

created by Business and Professions Code section 6086.65 and appointed by the Supreme Court, and to proceedings conducted by the hearing judges and judges pro tem after September 1, 1989.

3. All statutory references herein are to the Business and Professions Code unless otherwise stated.

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

At trial, count one was dismissed on motion of the examiner on the ground of insufficiency of evidence. The hearing panel, without elaboration, found culpability on counts two, three and four, and each Business and Professions Code section and Rule of Professional Conduct charged in each count.⁵

II. FACTS

Respondent was admitted to the practice of law in the State of California in January of 1979 and has no prior record of discipline.

Except for the misappropriation charge, the facts underlying count two are not disputed and were the subject of a stipulation as to facts entered by the parties at trial.⁶ The stipulated facts demonstrate that:

As of October of 1985 respondent was engaged in the practice of law and maintained a client trust account. Prior to October 1985 respondent had deposited client funds into that account. On or about September 16, 1985, respondent began writing trust checks for personal and operating purposes. Respondent issued numerous trust account checks for the purpose of paying his office staff, personal and office bills, and advancing costs for clients. During the same period of time respondent made numerous deposits into the trust account of money belonging solely to him, including earned fees.

On October 2, 1985, respondent deposited a \$1,000 check into his trust account from William Frye. The money was a retainer for services to

dissolve a joint venture.⁷ By October 17, 1985, the Frye funds were depleted. In January of 1986 respondent issued a trust check in the amount of \$166.50 to Frye, which was a refund of fees.

The refund of the \$166.50 came out of a retainer paid by a client named Gianotti. The trust account had a negative balance for much of the time between respondent's receipt of the \$1,000 (October 2, 1985) and his return of the \$166.50 (January 4, 1986).

In December of 1985⁸ the respondent deposited \$750 in cash into the trust account. Prior to that deposit the account had a negative balance of \$209.38. After the deposit there was a positive balance of \$528.15. The \$750 was the retainer from the client named Gianotti.⁹ [1 - see fn. 9]

On January 13, 1986, respondent deposited \$172.78 into the trust account which were funds belonging to his client, Mary Maletti. On the same day respondent wrote a trust check to Maletti in the same amount. That check did not clear the account until January 17, 1986. During the period that the money was in the respondent's trust account (January 13-17, 1986), respondent had his own personal funds in the account.

The facts regarding the misappropriation charge in count two were disputed at trial. The hearing panel found that in May of 1985, respondent was hired by Dr. Harris Young ("Young") to incorporate Young's practice. Young gave respondent \$270 which was deposited into respondent's trust account.¹⁰ The par-

5. The hearing panel found culpability for each statute and rule charged on the record at trial. (R.T. p. 71.) However, it did not include those legal conclusions in the decision.

6. The stipulation as to facts was based on the allegations that were contained in the examiner's trial brief on culpability, filed July 13, 1989. The hearing panel's decision does not contain findings of fact based on the stipulated facts. However, the panel made conclusions based on the stipulated facts and we deem the panel intended to include the stipulated facts within the decision and we modify the decision to include our recitation of those stipulated facts contained in this opinion.

7. The stipulated facts indicate that the money "may have been a fee retainer." (Examiner's trial brief, filed July 13, 1989, p. 5.) However, respondent testified at trial that the money was a fee retainer to dissolve a joint venture (R.T. p. 28), and we so find.

8. The stipulated facts have December of 1986 as the date. (Examiner's trial brief, p. 7.) The bank records introduced in evidence indicate December of 1985 is the correct date (State Bar exh. 1, p. 138), and we so find.

9. [1] No mention is made in the notice to show cause, trial, decision or review briefs of possible misappropriation with regard to the Frye and Gianotti matters. As misappropriation allegations with regard to these matters were not charged in the notice to show cause, we have not considered them. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928.)

10. The decision is silent on the date the money was deposited. However, the documentary evidence submitted at trial indicates the deposit was on May 13, 1985 (State Bar exh. 1, p. 4) and we so find.

ties stipulated that \$270 was the total fee charged by California for incorporation in May of 1985.¹¹

In September of 1985 respondent wrote two checks in the Young matter,¹² one to the Secretary of State for \$70 and the other to the Franchise Tax Board for \$200. Between the deposit of the client's check into the account in May of 1985 and September of 1985, the balance in the account fell below \$270.¹³ [2a - see fn. 13]

The hearing panel's decision made very limited findings of fact on counts three and four. (See decision, p. 2.) Because of that we find it necessary to make the following findings of fact on these counts. Our findings are derived primarily from respondent's admissions made during his testimony at trial herein. (See R.T. pp. 16-20.)

In count three, respondent employed a secretary and at times a paralegal in his law practice. The employees were paid on an hourly basis less deductions for state and federal withholding taxes. As of September of 1985 respondent owed the federal government approximately \$5,000 in employee withholding taxes. (R.T. pp. 17-18.)

Prior to September of 1985 respondent had been unable to pay the withholding taxes when due many times. On some of these occasions, respondent contacted the taxing authorities and made arrangements to pay the amounts due in installments. On other occasions the Internal Revenue Service levied on his operating account. (R.T. p. 37.)

In count four, respondent began using his trust account as an operating account in September of 1985. (R.T. pp. 7-8.) He did so in order to avoid levy by the Internal Revenue Service for a short period of time so he could arrange to obtain the funds necessary to pay the tax obligations. Although there was no evidence that respondent was aware that a levy was imminent, he expected the federal government would levy on the operating account (R.T. pp. 19-20), and sought to conceal assets from such a levy by use of his client trust account as an operating account.¹⁴

III. CONTENTIONS ON REVIEW

The examiner sought review of this matter on three grounds: the discipline was insufficient (arguing that it should be five years stayed suspension, five years probation, one year actual); the probation conditions recommended were insufficient; and a rule 955, California Rules of Court, requirement should be imposed. The essence of the examiner's argument is that standard 2.2(a), Standards for Attorney Sanctions for Professional Misconduct ("standards"), provides for a minimum of one year actual suspension irrespective of mitigating circumstances.

The respondent's reply brief contends that there was no misappropriation proven in this case, that in any event the discipline recommended is sufficient to protect the public, and because sixty days actual suspension is sufficient, compliance with rule 955, California Rules of Court, should not be required.

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11. We modify the decision to make this stipulation a finding of fact.
 12. Both checks bear the notation "Young Incorporation." (State Bar exh. 1, p. 76.) Both checks cleared respondent's trust account on October 17, 1985. (State Bar exh. 1, p. 69.) We modify the decision to add the date the checks cleared the account as a finding of fact.
 13. [2a] The account balance fell to \$32.58 on September 17, 1985, and remained at about that level until October 2, 1985. (State Bar exh. 1, pp. 60, 69.) We modify the decision to add this as a finding of fact. In addition, the hearing panel consid-

ered the date the checks were written as the operative date in terms of the misappropriation. As we explained in the previous footnote, the checks did not clear the trust account until October 17, 1985. Respondent was to have held Young's funds in trust until the checks cleared the account, not just until the date they were written.

14. The record is unclear as to the duration of the misconduct in this count. However, as the stipulated facts and evidence at trial do not cover a time period beyond January of 1986, we conclude respondent used his trust account as an operating account to avoid levy during September of 1985 through January of 1986.

Other than the misappropriation charge, which respondent disputes, the parties have not made a direct request that any of the findings of fact be modified.¹⁵

IV. STANDARD OF REVIEW

[3] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it, this review department, like the Supreme Court, must independently review the record. (See *Sands v. State Bar* (1989) 49 Cal.3d 919, 928.) We accord great weight to findings of fact made by the hearing department which resolve testimonial issues. (*In re Bloom* (1987) 44 Cal.3d 128, 134; rule 453(a), Trans. Rules Proc. of State Bar.) However, the review department has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar.) Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (*Id.*) [4] Our overriding concern is the same as that of the Supreme Court; the preservation of public confidence in the profession and the maintenance of high professional standards. (See std. 1.3; *Walker v. State Bar* (1989) 49 Cal.3d 1107, 1117.)

V. DISCUSSION

A. Misappropriation

Count two alleges that respondent (1) commingled personal funds with client funds, (2) used his trust account as an operating account, and (3) misappropriated client funds. As indicated above, except for the misappropriation allegation, respondent admits the charges of count two.

With respect to the misappropriation, respondent contends that since Young did not testify, the only evidence presented was respondent's testimony

in which he claimed the \$270 that was deposited into his account in May of 1985 was for past services rendered and therefore had been earned when paid, and the \$270 paid in September to the Secretary of State and Franchise Tax Board was an advance of costs he made for Young. Respondent claims his testimony was uncontradicted and unimpeached and should not be disregarded.

This contention misstates the evidence in this matter. While it is true that Young did not testify, it is not true that respondent's testimony was uncontradicted. Respondent admitted he was hired by Young to form a corporation (R.T. p. 23); that \$270 was the fee required to incorporate a business in California (R.T. p. 42); and that he placed the \$270 in his client trust account (R.T. p. 23). These circumstantial facts contradict respondent's testimony.

In addition, respondent was not able to substantiate, with documentary evidence, his claim that he performed three hours of work for Young. No billings, statements, or work product were presented. [5] As respondent contends, he did not have the burden of proof on this issue, nevertheless the panel could appropriately consider the respondent's failure to produce documentary evidence as an indication that his testimony on this issue was not credible. The panel was also in a position to observe respondent's demeanor and determine credibility. The hearing panel resolved conflicting facts against respondent on this issue and we accord that resolution great weight. (Rule 453(a), Trans. Rules Proc. of State Bar.) Respondent has not directed our attention to anything in the record to overcome that great weight and our independent review has revealed no basis for rejecting the panel's finding.

[6] As the Supreme Court noted in *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474, "[t]he mere fact that the balance in an attorney's trust account has fallen below the total amounts deposited in and purportedly held in trust, supports the conclusion of misappropriation." Moreover, "rule 8-101 leaves no

15. The examiner has noted the limited findings of fact, but has not requested they be modified.

room for inquiry into attorney intent. [Citation.]” (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 976.) Accordingly, we, like the hearing panel, conclude that respondent misappropriated Young’s funds.

B. Modifications to Decision

Before we turn to the issue of the appropriate degree of discipline in this case, we find it necessary to modify the conclusions of law reached by the hearing panel on the record at trial. (R.T. p. 71.)

1. Count Two

The hearing panel found respondent culpable in this count of violating sections 6068 (a), 6103 and 6106 and rule 8-101(A). The essence of this count is respondent’s misuse of his client trust account and misappropriation of Young’s money.

We conclude the evidence clearly and convincingly supports the hearing panel’s conclusions that respondent commingled his own funds with those of his clients and misappropriated client funds in the Young matter¹⁶ and therefore violated rule 8-101(A).

[7] Respondent stipulated that he used his client trust account as an operating account and deposited his own funds into the trust account at a time when client funds were in the account. “[C]ommingling is committed when a client’s money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney’s personal expenses [Citations.]” (*Clark v. State Bar* (1952) 39 Cal.2d 161, 167-168.) Rule 8-101(A) “absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit.” (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23.)

[2b] As we indicated above, the record also supports the hearing panel’s conclusion that respondent misappropriated \$240 from Young. Respon-

dent was paid \$270 by Young for costs to form a corporation. He placed that money in his trust account. The trust checks written for that money did not clear the trust account until approximately five months later. During that five-month period the balance in respondent’s trust account fell well below \$270. Respondent violated rule 8-101 by allowing his trust account balance to fall below the amount he was to have held in trust for Young. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1365, citing *Giovanazzi v. State Bar, supra*, 28 Cal.3d at p. 474.)

[8] We deem the record before us supports the conclusion that respondent’s misappropriation of Young’s money was not intentional and resulted from his poor management and misuse of his trust account. At best, respondent’s handling of Young’s money involved gross carelessness. “Gross carelessness and negligence constitute violations of the oath of an attorney to faithfully discharge his duties to the best of his knowledge and ability, and involve moral turpitude as they breach the fiduciary relationship owed to clients. [Citation.]” (*Giovanazzi v. State Bar, supra*, 28 Cal.3d at p. 475.) We therefore conclude that respondent violated section 6106.

The remaining conclusions of law in count two were that respondent violated sections 6068 (a) and 6103. The recent Supreme Court cases of *Baker v. State Bar* (1989) 49 Cal.3d 804, and *Sands v. State Bar, supra*, 49 Cal.3d 919, are dispositive of these conclusions.

Both *Baker* and *Sands* involved attorneys who had been found culpable by the State Bar Court of misappropriation of clients’ funds in violation of rule 8-101 and of committing acts of moral turpitude in violation of section 6106, as well as violations of sections 6068 (a) and 6103. The Supreme Court in both cases specifically found no violations of sections 6068 (a) and 6103. (*Baker, supra*, 49 Cal.3d at pp. 814-815; *Sands, supra*, 49 Cal.3d at p. 931.)¹⁷ We

16. The hearing panel found without explanation that respondent misappropriated \$240.00 instead of the \$270.00 paid by Young. As the balance in the trust account fell to approximately \$30, we conclude the record supports that finding.

17. The Supreme Court in *Sands* essentially found Sands culpable in one of the four client matters of violating his oath and duty as an attorney to support the law (Bus. & Prof. Code, § 6068 (a)) based on conduct which amounted to bribery. No such conduct occurred here.

likewise find no violation of either section 6068(a) or 6103 under the facts adduced in count two.¹⁸

2. Count Three

In count three, respondent was found culpable of failing to withhold and pay over payroll taxes on behalf of his employees in violation of sections 6068 (a), 6103 and 6106. The examiner contends that the facts underlying this count support these findings. We disagree.

The examiner relies on *In re Morales* (1983) 35 Cal.3d 1, to support his contention that respondent's conduct involved moral turpitude and therefore violated section 6106. The examiner argues that the misconduct herein is similar to *Morales* and the Supreme Court found moral turpitude there.

The examiner's reliance on *Morales* is misplaced. *Morales* had been convicted of 27 misdemeanor counts of failing to withhold and pay payroll taxes. (*Id.* at p. 3.) The State Bar Court hearing panel in *Morales* found the conduct involved moral turpitude. (*Id.* at p. 4.) Our predecessor review department modified that finding after determining the conduct involved other misconduct warranting discipline, rather than moral turpitude. (*Id.*) Based thereon, the review department recommended 18 months stayed suspension, 18 months probation, with no actual suspension. (*Id.*) Contrary to the examiner's assertion, the Supreme Court agreed with the review department that the misconduct did not involve moral turpitude but other misconduct warranting discipline

and imposed the review department's recommended discipline. (*Id.* at p. 8.)

The present case is similar to *Morales*. In both cases, the respondents encountered financial difficulties and as a result failed to pay the payroll taxes. Instead, they paid their employees the "net" salary and used the money that should have been paid for taxes to meet other obligations. However, *Morales* differs from the present case in that the respondent there had been convicted of 27 misdemeanor offenses as a result of his failure to withhold and pay payroll taxes and unemployment insurance contributions. Here, respondent has not been the subject of a criminal prosecution. Thus, there has been no finding that respondent possessed any criminal intent required to violate any penal statute.

[9] We recognize that the question of whether respondent's misconduct involved moral turpitude is one of law to be determined ultimately by the Supreme Court (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 109) and that the "test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all." (*Id.* at p. 110.) Nevertheless, we are bound to find no moral turpitude based on the Supreme Court's holding in *Morales* on more egregious facts. Accordingly, we conclude that respondent's misconduct in count three did not involve moral turpitude and therefore did not violate section 6106.

[10] The remaining legal conclusions in this count were that respondent violated sections 6068 (a)

18. We recognize that since the issuance of the *Baker* and *Sands* decisions, *supra*, the Supreme Court has issued other decisions finding attorneys culpable of violations of sections 6068 (a) and/or 6103. (See *Layton v. State Bar* (1990) 50 Cal.3d 889, 893, 898 [editor's note: mod. on den. rhg. July 18, 1990]; *Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1144, 1154.) However, it has done so without citing *Baker* or *Sands*, and without expressly overruling either decision.

Moreover, prior to *Layton* and *Hartford*, the Court reaffirmed in another case the holding in *Baker* that section 6103 does not define any duties of members of the State Bar. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245.) Also, the Court presently has under reconsideration a petition for re-

hearing in *Layton* which may resolve the apparent conflict between *Layton* and *Baker*.

We are reluctant to assume the Court intended, in *Layton* or *Hartford*, to overrule, without comment, decisions which it had reached only a few months earlier. We therefore intend to follow *Baker* and *Sands*, as applied in text *ante*, pending further clarification from the Supreme Court.

In any event, the validity or invalidity of the findings of violations of sections 6068 (a) and 6103 in this matter does not affect our recommendation as to discipline. For that reason, we are reluctant to delay the resolution of this matter any further by awaiting further clarification of the issue from the Supreme Court.

and 6103. The examiner contends that respondent violated his duty to obey the laws of the United States and of the State of California (§ 6068 (a)). Although not clearly stated by the examiner, this contention appears to be that respondent failed to pay over the tax money as required by various penal and civil statutes and thereby failed to obey both state and federal laws. However, the employer withholding statutes were not charged in the notice to show cause (rule 550, Trans. Rules Proc. of State Bar; *Van Sloten v. State Bar, supra*, 48 Cal.3d at p. 928) and no evidence was introduced to prove they were violated. Thus, the record before us fails to support the conclusion that any penal or civil statute has been violated and therefore does not support the conclusion that respondent failed to obey the laws of this state or the United States. Even though respondent admits he failed to pay the taxes, without evidence that a specific statute was violated, not only was respondent deprived of an opportunity to defend, but we are without a record to support any statutory violations.

The conclusion of law that respondent violated section 6103 is likewise improper. This section "does not define a duty or obligation of an attorney." (*Baker v. State Bar, supra*, 49 Cal.3d at p. 815.)¹⁹

In sum, we conclude, based on the charges in the notice to show cause and the record before us, that respondent is not culpable of violating any of the Business and Professions Code sections charged in count three.

3. Count Four

Respondent was found culpable in count four of using his trust account as an operating account in order to avoid levy by the Internal Revenue Service²⁰ in violation of sections 6068 (a), 6103 and 6106.

[11] Respondent testified that the Internal Revenue Service had levied on his operating account in the past (documentary evidence introduced by examiner supported this testimony [exh. 3]) and he started using the trust account as an operating account in order to avoid another levy and buy time to work out a payment arrangement with the Internal Revenue Service. (R.T. p. 20.) Thus, by respondent's own admission, the use of the trust account in that fashion was designed to conceal his assets from levy. Concealment is an act of dishonesty and supports a finding that respondent violated section 6106 in this count. (*Crane v. State Bar* (1981) 30 Cal.3d 117, 124.)

As in counts two and three, we conclude based on the record before us, that respondent is not culpable of violating sections 6068 (a) and 6103. (*Baker v. State Bar, supra*, 49 Cal.3d at p. 815; *Sands v. State Bar, supra* 49 Cal.3d at p. 931.)²¹

In conclusion, based on our independent review of the record before us, we conclude that respondent is culpable in count two of mishandling his client trust account, which resulted in commingling and misappropriation of client funds, in violation of section 6106 and rule 8-101(A). In count four we conclude respondent is culpable of misusing his client trust account in order to conceal his assets from levy by the Internal Revenue Service in violation of section 6106. Finally we conclude that respondent is not culpable in count three of violating any of the charged Business and Professions Code sections.

4. Mitigation

The hearing panel's decision briefly discussed that various mitigating factors were considered without clearly specifying findings of fact. Those miti-

19. See footnote 18, *ante*. We recognize that following *Baker* and *Sands* with regard to section 6103 has resulted in our conclusion that respondent is not culpable in this count. We note, however, that even if we were to conclude that respondent is culpable of violating the section, our recommended discipline would not change.

20. The notice to show cause alleged that respondent was attempting to evade levy by the United States and/or California

taxing authorities. The hearing panel found that respondent was attempting to evade levy by the Internal Revenue Service. As the evidence presented was regarding levy by the Internal Revenue Service, the record supports the hearing panel's finding.

21. See footnotes 18 and 19, *ante*.

gating factors were that respondent was under financial pressures arising from his wife's unemployment and the burden of remodeling their home which, along with his deficient business practices, led to a cash shortage and forced respondent to choose between creditors; that respondent hired a business consultant to remedy his business practices; and that no clients were harmed. Our review of the records compels us to conclude that the mitigating circumstances the panel considered were established clearly and convincingly and we modify the decision to make them findings of fact.

In addition, the record reveals mitigating factors not found by the panel and we modify the decision to include the following additional findings of fact with regard to mitigation. (1) [12] Respondent readily admitted his misuse of his client trust account and had taken steps to change his business practices to alleviate the financial pressures that led to the misuse. We consider this a mitigating circumstance under standard 1.2(e)(vii) (objective steps promptly taken by the member spontaneously demonstrating remorse and recognition of the wrongdoing). (2) [13] The misconduct occurred in 1985 and the record reveals that respondent has not committed misconduct since then. We consider this a mitigating circumstance under standard 1.2(e)(viii) (passage of time since misconduct followed by proof of subsequent rehabilitation).

C. Discipline

We next turn to the issue of the degree of discipline we are to recommend to the Supreme Court based on our conclusions as to respondent's misconduct in this case. [14] In determining the appropriate degree of discipline to recommend, we start with the standards which serve as our guidelines. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We must also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts. (See, e.g., *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) In the present case we have concluded that respondent is culpable of misappropriation and commingling of funds in violation of rule 8-101 and of concealment of his assets in violation of section 6106.

Standard 2.2(a) provides for disbarment for misappropriation of entrusted funds unless the amount of funds misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case a minimum of one year actual suspension should be imposed. Standard 2.2(b) provides for a minimum actual suspension of 90 days for commingling of entrusted funds or any other violation of rule 8-101, not amounting to wilful misappropriation. Standard 2.3 provides for actual suspension or disbarment for offenses involving moral turpitude, depending on the degree to which the victim was harmed, the magnitude of the misconduct, and the degree to which it relates to the practice of law.

Pursuant to standard 1.6(a), if two or more acts of professional misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards, the sanction imposed should be the most severe of the different applicable sanctions. Thus in the present case, standard 2.2(a) is the most severe applicable sanction. However, our inquiry does not end with standard 2.2(a).

[15] The standards must be viewed as a whole with the objective of achieving the primary purposes of the disciplinary proceedings as set forth in standard 1.3: namely, the protection of the public, courts and legal profession; the maintenance of high professional standards; and the preservation of public confidence in the legal profession. We are further guided by standard 1.6(b) which provides that the sanction specified by the standards shall be imposed unless: (1) aggravating circumstances are found to surround the particular act of misconduct and the net effect of the aggravating circumstances, by themselves and in balance with any mitigating circumstances, demonstrates that a greater degree of sanction is required to fulfill the purpose of imposing sanctions as set forth in standard 1.3 or (2) mitigating circumstances are found to surround the particular act of misconduct and the net effect of the mitigating circumstances, by themselves and in balance with any aggravating circumstances, demonstrates that a lesser sanction should be imposed to fulfill the purposes set forth in standard 1.3.

[16a] In the present case the nature of respondent's misconduct combined with the mitigat-

ing factors indicates that imposing the sanction set forth in standard 2.2 would not further the purposes of standard 1.3. The record before us supports the conclusion that respondent is not a venal person and his misconduct was aberrational. Respondent does not have a prior or subsequent record of discipline. He made a very poor business decision brought on by financial pressures.²² [17 - see fn. 22] The misconduct occurred over a relatively short period of time (late 1985 and early 1986), and respondent has taken steps to reform his conduct as evidenced by the business consultant he hired and by the lack of subsequent discipline since the misconduct herein. Respondent's "engagement of a management firm is not only a recognition of the seriousness of the misconduct and an acceptance of responsibility therefor, it is . . . an objective step taken to avoid misconduct in the future." (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 3.) These factors together with the other mitigating circumstances present in this case establish that a lesser sanction than that called for in standard 2.2(a) should be imposed to fulfill the purposes of attorney discipline.

[18] As indicated above, the misappropriation was of a relatively small amount for a relatively brief time, arising out of respondent's misuse of his trust account as an operating account. Moreover, the offense did not involve intentional dishonesty. A review of Supreme Court cases reveals that the Court has usually not dealt severely with a misappropriation of this character.

In *Giovanazzi v. State Bar*, *supra*, 28 Cal.3d 465, the respondent was found culpable of misappropriating client funds, misleading a court by filing a false pleading and conflict of interest by obtaining a \$100,000 loan from his client without complying with rule 5-101. The misappropriation charge arose from the attorney's retention of approximately \$2,450 from a settlement to pay an investigator's fee. The money was placed in the attorney's trust account, but not paid to the investigator or the client. During the three-year period following the deposit of the money, the trust account balance dropped to approximately

\$2,100. The Supreme Court held that the misappropriation resulted from respondent's poor management of his client trust account and careless supervision of his staff and was not intentional. (*Id.* at p. 475.) The Court imposed three years stayed suspension, and thirty days actual suspension.

In *Heavey v. State Bar* (1976) 17 Cal.3d 553, the respondent was found culpable of misappropriating client funds and commingling them with his own and of writing to a judge on the merits of a case without furnishing a copy of the letters to opposing counsel. The misappropriation charge arose out of the attorney's retention of approximately \$350 from a settlement to satisfy a claim of a doctor for treatment of the client. The attorney deposited the money in his trust account and sent the doctor a check for that amount which was misplaced in the mail. As a result, the doctor did not receive the check for almost a year. During that one-year period of time the balance in the trust account fell below \$350 several times. The Supreme Court found that none of the offenses involved intentional dishonesty. (*Id.* at p. 560.) Based on this misconduct and the significant mitigation (30 years of practice with no prior discipline), the Court imposed a two-year stayed suspension, two years probation and thirty days actual suspension.

In *Waysman v. State Bar* (1986) 41 Cal.3d 452, the respondent was found culpable of commingling and misappropriating \$24,000 in client funds. The funds were received by the attorney's office when he was out of town, as a settlement. He had his secretary place them in his general account because the draft would clear the account sooner than if placed in his trust account. When he returned from out of town he discovered that his secretary had quit after having used several presigned checks written on the general account to pay various expenses. The entire \$24,000 was spent. The Supreme Court found that one year probation with no actual suspension was appropriate in light of the facts that strongly suggested that respondent was simply negligent and had no specific intent to defraud his clients. (*Id.* at p. 458.)

22. [17] Because respondent has not demonstrated that he "suffered from such extreme personal pressures related to his financial difficulties that his misconduct can reasonably be

understood as a desperate response to such pressures" (*Amante v. State Bar* (1990) 50 Cal.3d 247, 255), we do not consider his financial difficulties a significant factor in mitigation. (*Id.*)

[19] The present misconduct also involved respondent's concealment of his assets from levy in violation of section 6106. This additional violation might suggest that greater discipline than imposed in the above cases is warranted herein. We note however that in addition to the misappropriation, Giovanazzi had been found culpable of misleading a court by filing a false pleading and Heavey had written to a judge on the merits of a case without furnishing a copy to opposing counsel. Further, as we noted earlier, the Supreme Court in *Morales, supra*, 35 Cal.3d 1, imposed no actual suspension on more egregious facts than are present herein.

[16b] In conclusion, our analysis of respondent's misconduct and the Supreme Court cases we deem comparable, coupled with the short duration of the misconduct, the passage of time since the misconduct and the steps taken by respondent to reform his conduct show that even the minimum discipline of 90 days actual suspension called for by standard 2.2(b) is unnecessary here. We conclude that the recommended discipline of 60 days actual suspension in this case is both consistent with prior decisions of the Supreme Court on similar facts and will adequately address the purposes of attorney discipline as set forth in standard 1.3. Accordingly, we shall adopt that recommendation as our recommendation to the Supreme Court.

D. Probation Conditions

[20] The examiner contends that the probation conditions recommended by the hearing panel are inadequate because they are not set forth in the language of our standard conditions of probation. We agree and set forth our recommended probation conditions at the end of this opinion.

[21] In addition, the hearing panel recommended 60 days actual suspension and probation for the balance of the stayed suspension. The result of this provision is to delay beginning the probation term for the period of the actual suspension and thereby delay respondent's compliance with the terms and conditions of his probation. Such a delay will not further the rehabilitation objective of probation in this case. Accordingly, we shall recommend a two-year probation term to com-

mence on the finality of the Supreme Court's order, with actual suspension for the first 60 days.

E. Rule 955

[22] As a result of requesting one year actual suspension, the examiner contends that the respondent should also be required to comply with rule 955, California Rules of Court. As noted above, since we adopt the hearing panel's recommendation of 60 days actual suspension, a rule 955 requirement is not necessary.

VI. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law in this state for two (2) years; that execution of such order be stayed; and that respondent be placed on probation for two (2) years on the following conditions:

(1) That during the first sixty (60) days of said period of probation he shall be suspended from the practice of law in the State of California;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(7) That, except to the extent prohibited by the attorney client privilege and the privileges against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, or designee, or to any probation monitor referee assigned under these conditions of probation, at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed

to him personally or in writing by said Presiding Judge, designee, or probation monitor referee, relating to whether respondent is complying, or has complied, with these terms of probation;

(8) That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective; and

(9) That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of two (2) years shall be satisfied and the suspension shall be terminated.

Finally, we recommend that respondent be required to take and pass the Professional Responsibility Examination within one (1) year of the effective date of the Supreme Court order and furnish satisfactory proof of such to the Probation Department of the State Bar Court.

We concur:

PEARLMAN, P.J.
STOVITZ, J.