

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

JOHN ROBERT TINDALL

A Member of the State Bar

[No. 88-O-12063]

Filed September 11, 1991

SUMMARY

Respondent was found culpable of misappropriating nearly \$25,000 in client funds held in trust as part of a dispute involving a dissolved partnership. Respondent made 19 unauthorized withdrawals over an eight-month period, failed to perform legal services competently for the client, did not return client calls and, upon discharge, did not return promptly the client's funds, papers and property or execute a substitution of counsel form as requested. The hearing judge recommended a five-year stayed suspension, five years probation, and actual suspension for two years and until respondent completed restitution and demonstrated his rehabilitation, fitness to practice and learning in the law. (Ronald Dean, Judge Pro Tempore.)

Respondent requested review, asserting factual and procedural errors and contending that the recommended discipline was excessive. The review department determined that the material facts as found by the hearing judge were supported by the record; sustained the hearing judge's conclusions as to culpability; and rejected respondent's claim that the hearing judge improperly denied him a continuance of the hearing on mitigation. Reviewing Supreme Court precedent, the review department concurred with the hearing judge that although respondent's misappropriation was very serious, it did not stem from venality and was not surrounded by deceit, and thus did not warrant disbarment. However, the review department concluded that a lengthier actual suspension than recommended by the hearing judge was necessary in light of the nature of respondent's misconduct and his failure to recognize and acknowledge his ethical breaches. The review department therefore increased the recommended actual suspension to three years. (Pearlman, P.J., filed a concurring opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Karen Smith-Gorman

For Respondent: John R. Tindall, in pro. per.

HEADNOTES

- [1] **159 Evidence—Miscellaneous**
 162.20 Proof—Respondent’s Burden
 165 Adequacy of Hearing Decision
Where neither respondent nor respondent’s former client testified as to respondent’s hourly fee, but respondent had sent one bill to client reflecting an hourly rate of \$100, and respondent apparently acquiesced in hearing judge’s finding that respondent’s fee was \$100 per hour, review department adopted such finding.
- [2] **115 Procedure—Continuances**
 167 Abuse of Discretion
The length of pendency of matters before the State Bar Court is a matter of great concern and continuances have long been disfavored by the court. A judge’s denial of a motion for a continuance to prepare for the mitigation portion of a hearing was not an abuse of discretion where respondent had notice one month before trial of how the evidence would be presented, and respondent failed to take any steps to contact potential character witnesses.
- [3 a, b] **159 Evidence—Miscellaneous**
 165 Adequacy of Hearing Decision
 221.00 State Bar Act—Section 6106
 280.00 Rule 4-100(A) [former 8-101(A)]
 420.00 Misappropriation
A finding that the amount respondent withdrew from a client trust account was not an earned fee, even though the client did not dispute respondent’s testimony that it was an earned fee, was consistent with the evidence that respondent had not performed any legal services during the period of time for which he withdrew the funds; that what work was done by the attorney occurred after the trust funds had been withdrawn; that no value had been placed on the attorney’s services during that time, and that the attorney had otherwise been inattentive to the client’s case.
- [4] **221.00 State Bar Act—Section 6106**
 280.00 Rule 4-100(A) [former 8-101(A)]
 420.00 Misappropriation
An attorney’s withdrawal of client trust funds based on a reasonable or unreasonable but honest belief of entitlement to fees may constitute only a violation of the rule of professional conduct regarding client trust funds, and not an act of moral turpitude or dishonesty. However, where an attorney could not have held an honest belief that he was entitled to most of the money he withdrew from a client trust account, his misappropriation of the funds not only violated the rule governing client trust funds, but also involved moral turpitude and dishonesty.
- [5] **214.30 State Bar Act—Section 6068(m)**
 270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
 277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Where a client’s matter involved a large amount of money and the client was concerned that his reputation would be affected by the dispute, the client’s anxiousness to resolve the matter as quickly as was practical, and his periodic attempts to learn the status of the matter, were reasonable. His attorney’s failure to complete necessary legal services and to return the client’s calls thus violated the duty to respond to reasonable status inquiries and to provide competent legal services.

- [6] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
822.39 Standards—Misappropriation—One Year Minimum
 Misappropriation of client funds is a particularly serious ethical violation, which breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the legal profession. Misappropriation generally warrants disbarment of the attorney involved unless clearly extenuating circumstances are present. In assessing the appropriate discipline to recommend for a respondent who had misappropriated a large amount of client funds and also abandoned the client, the review department focused on the misappropriation, the most serious aspect of the misconduct.
- [7] **745.51 Mitigation—Remorse/Restitution—Declined to Find**
 Where respondent made partial restitution of misappropriated client funds only after the institution of a disciplinary investigation, this negated the otherwise mitigating effect of his amends.
- [8] **710.53 Mitigation—No Prior Record—Declined to Find**
 Where an attorney had been admitted to practice less than seven years at the time of his misconduct, his prior good record was not significant as mitigation.
- [9] **765.10 Mitigation—Pro Bono Work—Found**
 Respondent deserved mitigating credit for practice on behalf of poor and disadvantaged clients, which should have been weighed more heavily than did the hearing judge.
- [10] **795 Mitigation—Other—Declined to Find**
 Respondent's claim of inexperience did not mitigate misappropriation of client funds nor breach of related fiduciary duties to client.
- [11] **760.33 Mitigation—Personal/Financial Problems—Found but Discounted**
760.52 Mitigation—Personal/Financial Problems—Declined to Find
 Stress from pressure of other business was not sufficiently linked to misappropriation of client's funds to constitute mitigation; family health difficulties also were not mitigating when they arose after the misappropriation occurred; financial pressure from inability to pay office rent was entitled to little weight in mitigation.
- [12] **420.00 Misappropriation**
545 Aggravation—Bad Faith, Dishonesty—Declined to Find
801.41 Standards—Deviation From—Justified
822.39 Standards—Misappropriation—One Year Minimum
 Misappropriation can be committed in different degrees of culpability, deserving of different discipline. Even where the most compelling mitigating circumstances do not clearly predominate, extenuating circumstances relating to the facts of the misappropriation may render disbarment inappropriate. An attorney who acts deliberately and with deceit should receive more severe discipline than an attorney who acts negligently and without deception. Disbarment would rarely, if ever, be appropriate for an attorney whose only misconduct was a single act of misappropriation unaccompanied by deceit or other aggravating factors.

[13 a, b] **621 Aggravation—Lack of Remorse—Found**
801.41 Standards—Deviation From—Justified
822.39 Standards—Misappropriation—One Year Minimum

Disbarment was not appropriate in a misappropriation case where the misconduct resulted more from respondent's lack of understanding of an attorney's ethical duties rather than innate venality. However, because there was more serious misconduct and less mitigation than in other cases, and respondent had not recognized the seriousness of the misconduct, a three-year actual suspension, a showing of rehabilitation and fitness to practice before termination of the actual suspension, and strict probation conditions were required.

ADDITIONAL ANALYSIS

Culpability

Found

- 214.31 Section 6068(m)
- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
- 420.11 Misappropriation—Deliberate Theft/Dishonesty

Not Found

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

Aggravation

Found

- 521 Multiple Acts
- 571 Refusal/Inability to Account

Declined to Find

- 565 Uncharged Violations
- 582.50 Harm to Client

Discipline

- 1013.11 Stayed Suspension—5 Years
- 1015.09 Actual Suspension—3 Years
- 1017.11 Probation—5 Years

Probation Conditions

- 1021 Restitution
- 1024 Ethics Exam/School
- 1030 Standard 1.4(c)(ii)

Other

- 1091 Substantive Issues re Discipline—Proportionality

OPINION

STOVITZ J.:

In this original disciplinary proceeding, a State Bar Court hearing judge pro tempore ("judge") has recommended that respondent John Robert Tindall, a member of the State Bar since 1980 and with no prior record of discipline, be suspended from the practice of law for a period of five years, that the suspension be stayed and that he be placed on probation for five years on conditions including actual suspension for the first two years and until he completes restitution and has shown rehabilitation, fitness to practice and learning in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V).

The judge's recommendation is found in a thorough 26-page decision. It rests on findings of fact that respondent misappropriated nearly \$25,000 of his client's funds by means of 19 unauthorized withdrawals over an 8-month period. In addition, the judge found that respondent failed to perform legal services competently for his client; that he failed to return the trust funds promptly upon the client's demand; that he failed to communicate reasonably with his client; and that when discharged, he failed to turn over the client's papers and records either to the client or the client's new counsel and failed to execute a substitution of attorney.

Respondent's request for review takes issue with 10 of the judge's findings of fact, claims that he was not given sufficient time to present evidence in mitigation and disputes the degree of discipline, contending that at the very most, a 30-day actual suspension is the maximum discipline needed in this matter. In response, the State Bar examiner supports the judge's findings and conclusions, except that she contends that the judge also should have concluded that respondent violated his oath and duties to his client. As discipline, she urges that "disbarment

would not be inappropriate and a lengthy actual suspension is absolutely indicated."

Upon our independent review of the record, we adopt almost all of the judge's findings and conclusions. We conclude that respondent's misappropriation was willful and extremely serious; however for the reasons set forth by the hearing judge, we believe lengthy suspension on strict conditions of restitution and proof of rehabilitation will suffice to protect the public and is consistent with the discipline deemed appropriate by our Supreme Court in similar matters. Nevertheless, because respondent's offense was very serious, we believe that applicable Supreme Court decisions warrant a three-year rather than two-year actual suspension as a condition of probation.

I. THE RECORD

A. The Charges.

The February 5, 1990, notice to show cause charged respondent with misconduct in two counts relating to the same client matter. Count one charged him with misappropriating about \$25,500 of trust funds between about December 11, 1986, and September 23, 1987, belonging to the business of one Verne Miller. This count also charged respondent with failing to promptly disburse to Miller the funds to which he was entitled and with failing to perform services for which he hired respondent. Count one charged respondent with the following Business and Professions Code section¹ violations: 6068 (a), 6103 and 6106, and with the following (former) Rules² of Professional Conduct violations: 2-111(A)(2), 6-101(A)(2) and 8-101(B)(4).

Count two charged respondent with failing to provide an accounting of trust funds as Miller requested and failing to forward Miller's file to his new counsel. This count also charged respondent with failing to respond to several letters requesting execution of a substitution of attorney and return of Miller's

1. Unless noted otherwise, all references to sections are to those of the Business and Professions Code.

2. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

financial records and papers. Violations charged in this count were sections 6068 (a), 6068 (m), and 6103, and rules 2-111(A)(2) and 8-101(B)(3).

B. The Findings and Evidence.

Except for minor changes noted below, we adopt the findings of fact of the hearing judge, found on pages two through seven of his decision. We summarize those findings and the supporting evidence revealed by the record:

1. *Miller's Initial Hiring of Respondent.*

At the time of the State Bar Court hearing in August of 1990, Verne Miller of Hemet (Riverside County), California, was an insurance services agent. Between 1980 and 1985 he was a general partner and part owner of a small business partnership known as Fish 'n Ships. This business owned one or more commercial fishing boats operating in Alaskan waters. (R.T. pp. 26-27; exhs. 12, 16.) Fish 'n Ships stopped operating in 1985, its assets were sold and the partnership liquidated. Another partner, Halverson, had assigned his property and partnership interests to the Southeastern California Association of Seventh-Day Adventists ("Seventh-Day").³ Halverson died. Seventh-Day was trustee of Halverson's trust, and sued Miller for money it claimed Halverson owed Seventh-Day. Seventh-Day's lawsuit filed in the Riverside County Superior Court, on August 27, 1986, claimed it was due over \$59,000 plus interest and attorney fees. (Exh. 12.)

Miller knew respondent as a business acquaintance or friend-of-a-friend. (R.T. p. 30.) He therefore retained respondent in about September 1986 to represent him in the Seventh-Day dispute and respondent agreed to do so. Miller wanted the dispute resolved quickly. (Decision at p. 2 [findings of fact 2-4]; R.T. pp. 52, 155.)

It is undisputed that respondent never prepared a written fee agreement and we amend the findings of

fact of the hearing judge to so find. (R.T. p. 158.)⁴ Neither respondent nor Miller had any clear recollection as to what respondent's fee agreement was supposed to be. Miller did expect respondent to negotiate with Seventh-Day and, if needed, to appear in court opposing the litigation. (R.T. p. 31.) Miller's recollection of the fee agreement was that he was supposed to pay fees on an "ongoing" basis as needed, by the service and that there was no set hourly rate. (R.T. p. 32.) Respondent testified that he knew that Miller held the partnership assets in some \$52,000 worth of cashier's checks and that Miller had no other source of funds. Respondent told Miller he could not predict how much the fees would be—that if a quick settlement could be reached, the fees would not be very great at all, but a sizable retainer would be needed if respondent had to get into litigation. Respondent quoted Miller a fee of \$2,000 to start the case. (R.T. p. 156.) [1] Although neither respondent nor Miller testified to a fee of \$100 per hour, the hearing judge found that that was respondent's fee, based on the recital of that rate in the only bill respondent ever sent Miller. In view of the evidence of Miller's apparent acquiescence in that fee, we adopt the judge's finding in that regard.

2. *Respondent's Opening of a \$49,000 Trust Account and Performance of Some Services for Miller in Late 1986.*

To relieve the immediate pressure of Seventh-Day's lawsuit, with Miller's agreement, respondent obtained an open extension of time from Seventh-Day's counsel to answer the suit. (R.T. p. 156; exh. 12.) At about the same time, respondent and Miller were each aware that Seventh-Day's counsel was concerned about preserving the partnership funds in Miller's possession. Considering the size of the trust funds and that litigation could take some time, respondent (understandably) did not want to place Miller's funds in his regular trust account since that trust account remitted interest to the State Bar for distribution to qualified legal service providers under the Legal Services Trust Fund Act. (§§

3. Miller himself had previously been employed by Seventh-Day in the publications department and had been affiliated with the church for many years. (R.T. pp. 52-53.)

4. The law requiring attorney-client written fee agreements did not take effect until a few months later, January 1, 1987. (Bus. & Prof. Code, § 6148.)

6210-6228). Therefore, respondent opened a separate trust account for Miller's funds with the Riverside Thrift and Loan Association ("Riverside Thrift"). He chose Riverside Thrift because he knew a member of its board of directors.⁵ Respondent was the only signatory on the Riverside Thrift account. The signature cards for the account showed that the beneficiary was "Fish 'n Chips" [sic]. (Exh. 2.) The net opening deposit in the account was \$49,000. It is undisputed that Miller had paid respondent a \$2,000 retainer on October 7, 1986, a few weeks before respondent opened the trust account. (Exhs. 1, 18; finding of fact 5.)

With Miller's agreement, respondent reviewed the partnership records Miller had given him and correctly identified that a substantial amount of accounting work was needed to determine whether the funds in Miller's possession (now in the Riverside Thrift trust account) were partnership funds or Miller's personal funds and whether Seventh-Day could have a legal interest therein. At the same time, respondent pressed to keep his open extension of time to respond to the suit with Seventh-Day's counsel on the ground that after he had the results of a thorough accounting review, he would be in a position to approach Seventh-Day with an appropriate settlement offer. With Miller's consent, respondent hired bookkeepers and a certified public accounting firm to review the partnership records. In October 1986, respondent also commenced Miller's deposition which was apparently continued to a later date. (Exh. 3; R.T. pp. 62, 157-161.)

Miller testified that when he gave the cashier's checks to respondent to open the Riverside Thrift account, he told respondent to hold the funds for safekeeping until Miller notified respondent what should be paid out of the funds. He never told respondent he could take money out of the account at will. (R.T. pp. 35-36.)

3. Respondent's Proper and Improper Disbursements From the Riverside Thrift Account in 1986 and 1987.

Respondent's billing of December 11, 1986, to Miller showed that between September 26 and December 10, 1986, he had performed a total of 30.8 hours of services. At his fee of \$100 per hour, he was entitled to a fee of \$3,080 which he billed. As a credit, his bill deducted the initial \$2,000 retainer Miller had given him earlier for a balance due of \$1,080. On December 11, 1986, respondent withdrew this sum from the Riverside Thrift account and Miller had no objection to it. (Exhs. 3, 13; R.T. p. 37.)

As the record reflects, between December 1986 and August 1987, respondent disbursed a total of \$24,380.95 to bookkeepers, accountants and others with Miller's approval. However, between January 30, 1987, and September 23, 1987, respondent also disbursed a total of \$24,842 to himself without Miller's consent or knowledge, in 19 different withdrawals. (A small amount of one withdrawal (\$158) was used for court costs for Miller.) By September 23, 1987, the Riverside Thrift trust account balance stood at \$537.82. Thereafter, there was no activity in the account except for small, monthly interest additions and the balance of the account as of April 30, 1990, was \$644.60. (Exh. 1.)

As noted, respondent never sent bills to Miller for any of his 19 withdrawals, nor did he ever account to Miller for these disbursements. Review of the bank records indicates that all 19 of the disbursements were made by respondent in an identical manner. He would fill out a withdrawal slip and have Riverside Thrift personnel write a check to him for the particular amount withdrawn. He never placed any notation on the withdrawal slip as to the withdrawal's purpose or function. Some of the withdrawals were suspiciously very close together, with

5. As the judge correctly found (decision at p. 3 [finding of fact 5]), Riverside Thrift was not federally insured either as a bank or a savings and loan association. Long after most of the funds

from this account had been disbursed, the association became insolvent. At the time of the hearing below, funds could only be withdrawn upon advance notice and subject to availability.

several on the same day or on consecutive days. (Exh. 13.)

4. Respondent's Subsequent Failure After May 1987 to Perform Services, to Communicate Adequately With Miller or to Cooperate With Miller's New Counsel.

Respondent did perform a few services for Miller during 1987. On February 18, 1987, respondent wrote a two-page letter to Seventh-Day's counsel enclosing a detailed financial report and balance sheet prepared by the accounting firm which had reviewed Miller's partnership records. In this letter, respondent proposed settling Seventh-Day's suit by Miller's payment of \$13,000 to Seventh-Day. Respondent concluded his letter to Seventh-Day's counsel by stating that since partnership funds were "now being held in my client's trust account, the \$13,000 can be paid without further delay, upon acceptance of the offer."⁶ (Exh. 16.)

A week after respondent sent his February 18, 1987, letter to Seventh-Day's counsel, the latter replied to respondent asking for specific additional information about the distribution of funds revealed in the CPA report. Respondent never furnished this additional information. As a result, Seventh-Day's counsel revoked the open extension of time to answer the suit and respondent filed a demurrer on April 9, 1987. Superior court records showed that on May 7, 1987, respondent attended the hearing on the demurrer. (Exh. 12.) Upon the superior court's sustaining the demurrer with 30 days leave to Seventh-Day to amend the complaint, respondent never took any further action in the superior court suit.⁷ It is undisputed that respondent never resolved the dispute with Seventh-Day.

Miller thought that this matter might take about one year to resolve from the time he retained respon-

dent in September 1986. (R.T. pp. 51-52.) In 1986 and 1987, Miller called respondent frequently to find out the status of the matter and "rarely" received a return telephone call. On three or four occasions, after not having received a return call from respondent, Miller went to respondent's home. At some of those times, Miller's visits were by appointment. When Miller could locate respondent, respondent told Miller in general terms that things were "just moving along" and he was just waiting to see what was going to happen next. As noted, Miller was very concerned because the failure to pay whatever monies might be due to Seventh-Day affected his reputation with some in the Seventh-Day church and respondent was aware of Miller's concern. (R.T. pp. 38-41, 52-54.)

On April 1, 1988, Miller sent respondent a two-page letter complaining of respondent's failure to keep appointments, return Miller's calls, provide information he needed for filing of his partnership tax return and resolve the Seventh-Day litigation. Miller told respondent that he had contacted the State Bar and would be filing a complaint unless he heard from respondent immediately and received the help he had asked for from respondent, an accounting of all disbursements from the Riverside Thrift account and a distribution of the remaining trust funds to Miller. (Exh. 4.)

Within a month after sending the above letter to respondent, Miller went to Riverside Thrift and discovered that the balance in the account was only about \$395. He was "rather alarmed and very unhappy." (R.T. p. 48.) He hired another lawyer, Douglas F. Welebir, to represent him. After Welebir was himself unable to communicate with respondent in June 1988, Miller terminated respondent's services and instructed him to send Welebir within eight days all of Miller's documents and an accounting of the Riverside Thrift account. (Exhs. 5, 6.)

6. On February 18, 1987, the Riverside Thrift account contained over \$45,000. (Exh. 13.)

7. On February 16, 1988, Seventh-Day filed a first amended complaint. As discussed *post*, the action was dismissed in

June of 1989 after Miller discharged respondent and hired new counsel who settled the matter with Seventh-Day. (Exh. 12.)

The final events in this matter can be briefly stated and are appropriately reflected in findings of fact 18-23 of the judge's decision: Miller and Welebir were unsuccessful in receiving from respondent a substitution of attorneys, an accounting or any other papers and records, but in June 1989, were able to settle the matter successfully with Seventh-Day for Miller's payment of \$7,500. (R.T. pp. 135-136; see exh. 12.)

Although respondent ignored Miller's and Welebir's requests for accountings, papers, records and a substitution of attorney, respondent did hire counsel of his own who apparently convinced respondent that what he had done in using Miller's funds was wrong. At about the same time, respondent was expecting to receive a very large referral fee in a case involving many tenants suing a lessor of property for a large amount of damages. Respondent received this fee, \$66,667; and, on March 22, 1989, paid \$22,000 of that sum to Miller in care of Welebir. (R.T. pp. 182-187; exh. 22.) Miller used part of respondent's restitution to settle Seventh-Day's claim.

5. Respondent's Testimony in Mitigation.

At the hearing below, respondent gave several explanations for his conduct regarding his use of Miller's money. He first testified that all of the \$25,000 he withdrew was entirely for attorney fees. (R.T. pp. 202-203.) In colloquy, respondent stated that he was also entitled to the amounts of money he took as fees because he told Miller that defending the suit was going to cost money and respondent worked hard to save Miller something like \$80,000. Yet it is undisputed that Welebir, not respondent, settled Miller's dispute with Seventh-Day. In that colloquy, respondent also stated that what was wrong was his mistake in judgment in reaching the conclusion that he was entitled to those fees. (R.T. pp. 245-246.) Later in his argument to the hearing judge, respondent stated that he never denied owing the money and that he could have made restitution sooner. (R.T. pp. 263-264.) Respondent admitted his failure to keep timely or accurate records and he claimed that this was due to lack of experience. (R.T. pp. 155-158.) Respondent admitted that he used the funds he withdrew from the Riverside Thrift account for personal purposes (investments and to pay bills). (R.T. pp. 202-203.)

Prior to starting his private law practice, respondent had a poverty law and legal services background. He worked at the Western Center for Law and Poverty, had been a VISTA volunteer, and had worked for several legal services and legal aid programs, focusing on issues of fair housing and housing for the poor and disadvantaged. He had experienced financial pressures in private practice because of the modest means available to his clients to pay fees and because of a suit brought against him by landlords which forced him to drop all clients because of a conflict of interest. (R.T. pp. 260-261.) Respondent lived modestly with his wife and children. In October 1988, their third child was stillborn. Respondent admitted that this had no impact on his representation of Miller since Miller had terminated respondent's services prior to that time; nevertheless, it added to pressures on respondent thereafter.

Respondent characterized the Miller case as an aberration and testified that he has had adequate opportunity after the Miller case to represent people with large sums of money and has refused to do so. Since the Miller matter, he changed types of law practice and has been working in a community center in San Bernardino in the Mexican-American community where he provides legal services at reduced rates and even on a pro bono basis. (R.T. pp. 261-262.)

6. The Hearing Judge's Resolution of the Evidence.

From the foregoing evidence, the hearing judge found that respondent misappropriated \$24,842 from Miller's trust fund in 19 unauthorized withdrawals over an 8-month period, that he failed to complete work on Miller's behalf, failed to provide him with status reports as Miller had requested and failed to respond to Miller or Miller's new counsel, failed to complete a substitution of attorney form and failed to provide Miller with Miller's papers and records after Miller discharged respondent. The hearing judge concluded that respondent was culpable of violating section 6106 by virtue of the misappropriation, of violating section 6068 (m) by failing to respond promptly to reasonable status inquiries from Miller, of violating rule 8-101(B)(3) by failing to account to Miller regarding trust funds, of violating rule 2-111(A)(2) by failing to deliver to Miller his papers

and property upon discharge and of violating rule 6-101(A)(2) by failing to perform legal services competently.

The judge explained why he did not credit respondent's testimony that respondent had a good faith belief as to his entitlement to the trust funds as fees. The judge also considered a number of mitigating and several aggravating circumstances as well as the appropriate Standards for Attorney Sanctions for Professional Misconduct and guiding decisions of the Supreme Court. He concluded that respondent was not inherently venal and that he was not beyond rehabilitation, but that his misconduct stemmed from a clear failure to recognize or appreciate the high duties owed by an attorney to a client, particularly when handling trust funds. Accordingly, the judge recommended lengthy suspension rather than disbarment.

II. DISCUSSION

A. Procedural Claim of Unfairness Relative to Mitigating Circumstances.

Before us respondent raises one procedural issue. He asks for a re-referral to the hearing judge for a further hearing on factors in mitigation, asserting that the judge did not give him adequate time to prepare to present evidence in mitigation.

In a status conference held on July 6, 1990, about one month before the first trial date, the judge noted that the parties were advised of the judge's preference, where possible, to rule from the bench at the close of the culpability phase of trial and if culpability were found, to expect that the parties would be prepared to provide immediately evidence with respect to mitigation and aggravation.

At the first trial date, August 3, 1990, respondent stated that his wife was expecting to give birth to a child at any moment and that he was apprehensive in view of the tragic result of her most recent prior pregnancy. The first day of trial was completed without incident. The trial was set to be resumed Monday, August 6, 1990. The birth of respondent's child occurred during the weekend and respondent did not request any further continuances of trial.

After the parties resumed the trial on August 7, and the judge found respondent culpable, respondent objected to proceeding further, claiming inadequate time for preparation. At several times during the hearing of August 7, respondent stated he was tired, having had little sleep in the last several days. When the judge asked respondent whether he had contacted any potential character witnesses, respondent replied that he had not. (R.T. pp. 258-259.) As the judge recited in his decision (pp. 10, 11, 13-17), having observed respondent's conduct during the entire hearing, both before and after his claimed difficulties with being tired, the judge concluded that those problems did not affect respondent's ability to present his case adequately and the judge denied his request. As noted, respondent did cover a number of subjects of mitigation in his testimony, and that testimony was essentially un rebutted.

[2] The length of pendency of matters before the State Bar Court is a matter of great concern and continuances have been long disfavored by the court. (See, e.g., *Hawk v. State Bar* (1988) 45 Cal.3d 589, 597-598.) Considering all the circumstances, we cannot say that the judge's failure to grant the continuance was an abuse of discretion in view of the notice respondent had of how evidence would be presented and his failure to take any steps even to contact potential witnesses. (See *Kennedy v. State Bar* (1989) 48 Cal.3d 610, 616; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 453.)

B. Culpability.

In conducting this review at respondent's request, our procedures are well settled: We review independently the record of proceedings presided over by the hearing judge. Our review is not an "appeal" from the judge's decision. The judge's findings serve only as recommendations to us and we may adopt our own findings of fact and conclusions, even though varying from those of the hearing judge. (Rule 453(a), Trans. Rules Proc. of State Bar; *Fitzsimmons v. State Bar* (1983) 34 Cal.3d 327, 333.) As to matters of testimonial credibility, we do give great weight to the hearing judge who saw and heard all witnesses and who was in the best position to resolve issues pertaining to testimony. (Rule 453(a), Trans. Rules Proc. of State Bar.)

Applying these rules to respondent's request for review, we note that he takes issue with 10 of the 23 findings of fact of the hearing judge. For the most part, respondent attacks findings or parts thereof which are not critical to his culpability and many of his attacks on the findings are unexplained except by a simple citation to the portion of the record respondent has chosen to cite. While respondent does appear to admit his culpability of professional misconduct, he does not identify its basis. From the findings he has not chosen to attack and from his failure to attack any of the judge's conclusions, respondent must be held to have acceded to his culpability of: misappropriation of \$22,000 he later restored, failure to act competently on Miller's behalf, failure to render appropriate accountings to Miller, failure to communicate reasonably with Miller in response to his requests and failure to deliver to Miller papers and property to which Miller was entitled upon being discharged from employment.

[3] Respondent attacks a portion of finding 11, that he did no work during the period for which he withdrew \$2,500 from the Riverside Thrift account on January 30, 1987, and respondent cites for support of his attack on that finding work he performed in reviewing accounting reports, communicating with Seventh-Day's counsel and later filing a demurrer. However, those facts do not undermine the judge's finding since those services were not performed until *after* respondent withdrew the \$2,500. Moreover, as the hearing judge observed, respondent never suggested a value for the services he did perform in 1987 and his inattention to Miller's needs to resolve the matter was clear.

[3b] Respondent has also disputed the portion of finding 11 that he misappropriated the \$2,500 of the January 30, 1987, withdrawal. The judge noted that respondent's testimony that \$2,500 was an earned fee was not disputed by Miller. Nevertheless, by evaluating all of the other evidence, including the documentary evidence, the judge concluded that the fee in fact was not earned and that the \$2,500 withdrawal was a misappropriation. There is ample evidence in the record to support the judge's finding and we therefore adopt it.

As another example of respondent's attack on the findings, he disputes finding 12 by pointing out

that, contrary to the judge's finding that he failed to timely respond to the complaint, he filed a demurrer on which he prevailed. While respondent did take the action indicated and the judge so found (decision at p. 5 [finding of fact 13]), respondent fails to understand the true import of the judge's finding. We read finding 12 as a determination that respondent did not timely perform the services which Miller had requested to resolve the dispute over Seventh-Day's claim of entitlement to partnership assets of Fish 'n Ships. Although respondent had received a generous open extension of time to answer, he failed to pursue the matter diligently. When he finally responded to opposing counsel in February 1987 and opposing counsel asked for further information, respondent failed to follow through, causing opposing counsel to revoke the long-pending extension of time.

We also find supported by the evidence the remainder of finding of fact 12 that respondent failed to appear at the continued deposition of Miller; but we, like the hearing judge, accord little importance to that finding since Miller was not ultimately harmed by that failure.

We adopt the judge's findings and conclusion that respondent misappropriated \$24,842 from trust funds belonging to Miller and that by doing so he violated section 6106. By wilfully failing to promptly pay those funds to Miller when he requested them, he also violated rule 8-101(B)(4). [4] Although some recent decisions of our Supreme Court hold that an attorney's reasonable or unreasonable but honest belief of entitlement to fees from trust funds constitutes an offense or misappropriation violating only rule 8-101 and not also section 6106 (*Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1099; *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 332), in the case before us, respondent could not have held such an honest belief of entitlement to almost all of the money he withdrew as fees.

Very recently, in *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034 the Supreme Court concluded that an attorney's misappropriation was wilful and involved moral turpitude in facts somewhat akin to the present where the attorney claimed entitlement to some of the misappropriated funds as fees for legal services. "There is no doubt that the wilful misappropriation of a client's funds involves moral

turpitude.” (*McKnight v. State Bar*, *supra*, 53 Cal.3d at pp. 1033-1034, quoting *Bate v. State Bar* (1983) 34 Cal.3d 920, 923.) In this case there is an absolute paucity of documentary evidence to support any conclusion that respondent earned more than the \$3,080 he billed.

[5] For a few months after he was retained, respondent did provide services to Miller. He protected Miller’s rights by obtaining an extension of time to answer; and, with Miller’s consent, sought expert accounting services to attempt to determine Miller’s potential liability to Seventh-Day. However, commencing in about February 1987, coincident with his unauthorized use of Miller’s trust funds, respondent’s work for Miller flagged and ultimately ceased. At the same time, respondent became more unresponsive to Miller’s requests concerning the status of the matter. Considering the potential amount of the dispute at issue and Miller’s fear that his reputation would be affected with some members of the Seventh-Day church, Miller’s periodic attempts to seek information were reasonable as was his desire to have the matter concluded as soon as practical. Under the circumstances, we must conclude as did the hearing judge, that respondent violated section 6068 (m) and rule 6-101(A)(2).

It is also clear from the record that respondent was discharged from employment no later than June 1988. Nevertheless, respondent failed to execute a substitution of attorney and failed to return Miller’s papers and records, thus forcing Miller’s new counsel to represent Miller without access to that material. Fortunately for Miller, his new counsel was able to settle the dispute with Seventh-Day on favorable terms but by that time, there were almost no funds left in the Riverside Thrift account. Only by the fortuity of respondent’s restitution after a State Bar investigation had commenced but before formal charges had issued, was Miller able to make the settlement payment arranged by his new attorney. These facts support the hearing judge’s conclusion that respondent willfully violated rule 2-111(A)(2). We also agree with the judge that respondent did not violate his oath and duties as set forth in sections 6068 (a) and 6103. (See, e.g., *Baker v. State Bar* (1989) 49 Cal.3d 804, 815.)

C. Discipline.

[6] In assessing the appropriate discipline to recommend, we focus on the most serious aspect of respondent’s misconduct, his misappropriation of a large amount of his client’s trust funds. Regrettably, an attorney’s misappropriation of trust funds appears too frequently in the decisions of our Supreme Court as a basis for attorney discipline. In the very recent case of *McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1035, our Supreme Court repeated the familiar principles bearing on discipline for an attorney’s misappropriation of trust funds: “Misappropriation of client funds has long been viewed as a particularly serious ethical violation. [Citations.] It breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.] Although there is no “fixed” disciplinary formula [citation], misappropriation generally warrants disbarment unless “clearly extenuating circumstances” are present. [Citation.]” (*Id.*, quoting *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656; see *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.)

“Standard 2.2(a) of the Standards for Attorney Sanctions for Professional Misconduct [citation] specifically provides, ‘Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominates, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.’” (*McKnight v. State Bar*, *supra*, 53 Cal.3d at pp. 1035-1036, fn. omitted.)

In the case before us, respondent’s misappropriation was both large and manifested in 19 separate acts over a 8-month period. [7] While respondent did make restitution of most of the funds he misappropriated, he did so only after the intervention of a State Bar investigation, thus negating the otherwise mitigating effects of his amends. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 658, 664.) Respondent never established the value of some services he did perform for Miller in 1987 after he started misappropriating

the trust funds and we adopt the hearing judge's determination that respondent still owes Miller \$2,840 plus interest. Commenting on a similar situation, the recent *McKnight v. State Bar* opinion described the attorney's conduct as suggesting "both a distressing lack of appreciation of the seriousness of his misconduct and an absence of remorse for a substantial violation of his fiduciary obligations in trust account matters." (*McKnight v. State Bar, supra*, 53 Cal.3d at pp. 1036-1037.)

As we previously discussed, respondent's misconduct toward Miller did not stop at his serious misappropriation. Rather, it extended to his willful failure to perform needed services, his failure to communicate reasonably with Miller and Miller's new counsel and his failure to comply with ethical duties when Miller discharged him.

[8] Although respondent has no prior record of discipline, he had been admitted to practice less than seven years prior to the misconduct. As such, respondent's prior good record is not significant in mitigation. (See *Read v. State Bar* (1991) 53 Cal.3d 394, 426; *Kelly v. State Bar, supra*, 45 Cal.3d 658.)

[9] Respondent does deserve mitigating credit for his practice on behalf of poor and disadvantaged clients and we believe it should be weighed more heavily than did the hearing judge. [10] At the same time we agree with the judge that respondent's claim of inexperience does not mitigate his misappropriation of funds nor his breach of related fiduciary duties to Miller. [11] We also agree that although it did appear that respondent experienced stress from another case pressing him at the time he represented Miller and although respondent was most concerned about his wife's health, those factors would not serve as sufficient excuses to mitigate respondent's misappropriation. Respondent presented no evidence to link the pressure of his other civil case with his misappropriation of Miller's funds and his wife's health condition did not arise until 1988, after he had misappropriated his client's funds. Respondent did testify that at the time he misused Miller's funds he experienced financial pressures in not being able to pay his office rent, but we agree with the hearing judge's assignment of little weight to this factor.

We note that although respondent misappropriated Miller's funds by 19 withdrawals over an 8-month period, there was no evidence of misconduct toward any other client nor was there any evidence of intentional deceit of Miller. (See *Kelly v. State Bar* (1991) 53 Cal.3d 509, 518-519; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1069.)

We also agree with the hearing judge that despite the seriousness of respondent's misconduct, there was insufficient evidence of harm to Miller warranting separate consideration as an aggravating circumstance. We have previously identified the principal aggravating circumstances we see in this matter, which included respondent's other breach of duties to Miller beyond his misappropriation of substantial trust funds and his lack of appreciation of his duties as an attorney when either representing Miller or when handling Miller's funds. While the hearing judge's choice of suspension rather than disbarment appears to rest on a careful review of the factors, our analysis of very recent decisions of the Supreme Court and of this department involving misappropriation of funds with no prior record of discipline leads us to conclude that the referee's suspension recommendation is insufficient in degree.

In *Kaplan v. State Bar, supra*, 52 Cal.3d 1067, the Court disbarred the attorney who had no prior record in 12 years of practice prior to his misappropriation of \$29,000 of law firm funds in 24 acts over a 7-month period. Kaplan's acts of misappropriation were very similar to those of respondent in amount, duration and multiple acts; but unlike respondent, Kaplan deceived his partners and a State Bar investigator as to why he misused the money. Kaplan also engaged in misappropriation to further an expensive life style. On the other hand, Kaplan offered extensive favorable character evidence and completed restitution before State Bar proceedings started. Respondent did not complete restitution before State Bar proceedings started, but, respondent had served persons of low and moderate income for most of his relatively brief practice. In *Kaplan*, the hearing panel had recommended probation with two years actual suspension; the (former) review department recommended disbarment.

In *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, a majority of this department recommended disbarment of an attorney who had 15 years of blemish-free practice before misappropriating over \$66,000 of trust funds. In dissent, the Presiding Judge concluded that a three-year actual suspension as part of strict conditions of a five-year probation was appropriate. After misappropriating the funds, and unlike respondent, Kueker repeatedly wrote false letters to his client's agent over an 18-month period to conceal his misdeeds and was not forthcoming in the ensuing State Bar investigation. Kueker had also restored only about half of the funds he misappropriated although his client had declined offers of restitution once its complaint was made. The hearing referee in *Kueker* had recommended probation with actual suspension for two years and until Kueker made restitution.

In *McKnight v. State Bar, supra*, 53 Cal.3d 1025, the Supreme Court adopted the (former) review department's recommended one-year actual suspension (as part of a seven-year stayed suspension). The hearing panel had recommended only a ninety-day actual suspension as part of a four-year stayed suspension. McKnight, who had eight years of practice before his misconduct, wilfully misappropriated \$17,000 as a combination of unjustified attorney fees and an excess loan from his client. He failed to make restitution of half of the funds. Unlike respondent, Kaplan or Kueker, McKnight established that he suffered from a manic-depressive condition at the time of his misdeeds which caused a need for a higher level of spending although he established no causal connection between his affliction and the actual misconduct. In choosing the one-year suspension rather than disbarment, the Court gave great weight to McKnight's mental disorder which had a profound impact on his behavior and from which he had been successfully recovering.

Finally, in *Lipson v. State Bar* (1991) 53 Cal.3d 1010, the Supreme Court adopted the (former) review department's recommended two-year actual suspension, decreasing the hearing panel's disbarment recommendation. In one matter, Lipson borrowed money from his client without complying with the duties of rule 5-101. In another matter, Lipson wilfully misappropriated \$8,400. Lipson had

no prior record in over 42 years of practice, was candid with the State Bar but had not made restitution.

[12] In *Lipson v. State Bar, supra*, 53 Cal.3d at p. 1022, the Supreme Court recognized that misappropriation can be committed in different degrees of culpability, deserving of different discipline and the Court's discussion is apt to the present case: "Even where the most compelling mitigating circumstances do not clearly predominate, we have recognized extenuating circumstances relating to the facts of the misappropriation that render disbarment inappropriate. In *Edwards [v. State Bar]* (1990) 52 Cal.3d 28, 38], we said: 'As the term is used in attorney disciplinary cases, "wilful misappropriation" covers a broad range of conduct varying significantly in the degree of culpability. An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception Disbarment would rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of misappropriation, unaccompanied by acts of deceit or other aggravating factors.'"

[13a] Our independent record review leads us to the same conclusion as did the hearing judge that respondent's violations resulted more from his lack of understanding or recognition of his conduct measured against an attorney's duties rather than from innate venality. Since we conclude, as did the judge, that respondent can be adequately rehabilitated by lengthy suspension and strict conditions of rehabilitation, discipline short of disbarment is appropriate in this case.

[13b] Although we follow the judge's decision not to recommend respondent's disbarment, the record shows more serious misconduct and less mitigation than found in either *McKnight v. State Bar* or *Lipson v. State Bar* discussed *ante*. In that regard, the judge's finding of fact 59 that respondent has not admitted the true nature and serious import of his misdeeds further supports our conclusion as to the need for an extremely strict set of probationary conditions, including three years of actual suspension and until respondent satisfies the requirements of standard

1.4(c)(ii) before respondent is entitled to return to practice.

In his brief, respondent cites some misappropriation cases which have imposed less discipline than recommended even by the hearing judge but we observe that all of those cases involved either far less serious misconduct than we see in the present record or more compelling mitigating circumstances than in the present record or both. For example, although respondent cited *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357 for another point, the discipline imposed in *Lawhorn* for a far less serious misappropriation than occurred here was a five-year stayed, two-year actual, suspension.

III. FORMAL RECOMMENDATION

For the reasons stated above, we recommend to the Supreme Court that the respondent John Robert Tindall be suspended from the practice of law in the State of California for a period of five (5) years; that execution of the order for such suspension be stayed; and that respondent be placed on probation for said period of five (5) years under the following conditions:

1. That during the first three (3) years of said period of probation and until he makes restitution as set forth below in paragraphs 2 and 3, and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, he shall be actually suspended from the practice of law in the State of California.

2. That respondent shall make restitution to Verne Miller in the following amounts: (a) \$2,842 being the remainder of the misappropriated amounts; (b) interest at the rate of 10% per annum on the sum of \$2,842 from March 22, 1989, until the date paid; (c) the sum of \$4,000 which represents interest at 10% on the other \$22,000 that was misappropriated from the time of each individual misappropriation to the March 22, 1989 repayment. This \$4,000 shall also accrue interest at the rate of 10% per annum from the effective date of the Supreme Court's order until paid. Respondent shall furnish satisfactory evidence of said restitution to the Office of the State Bar Court, Los Angeles.

3. That respondent shall comply with conditions 3 through 13 of the conditions recommended by the hearing judge set forth in his decision on pages 21-25.

We further recommend that respondent be ordered to take and pass the California Professional Responsibility Examination prior to the expiration of his period of actual suspension.

Finally, we recommend to the Supreme Court that it include in its order a requirement that the respondent comply with the provisions of rule 955, California Rules of Court, and that respondent comply with the provisions of paragraph (a) of said rule with 30 days of the effective date of the Supreme Court order herein and to file the affidavit with the Clerk of the Supreme Court provided for in paragraph (c) of the rule within 40 days of the effective date of the order, showing his compliance with said order.

I concur:

NORIAN, J.

PEARLMAN, P.J., concurring:

I agree that the hearing judge's discipline recommendation cannot be reconciled with Supreme Court decisions on comparable facts. In my view, it is not a question of whether the discipline for the serious misconduct at issue here should be two years or three years suspension, but whether the mitigating evidence warrants three years suspension in lieu of disbarment. Discipline should be consistent with and proportional to that imposed in similar recent cases. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1309.) Moreover, there must be justification in the record for declining to recommend the discipline called for by the standards. (See *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) I agree that there are mitigating factors here which were not present in the recent Supreme Court decision imposing disbarment in *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, and find the record here comparable to the record presented to this review department in *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583 in which the majority recommended disbarment and I recommended three years actual suspension in light of Supreme Court precedent.

Both cases involved very serious wrongdoing against a single client with mitigating factors which persuaded the trier of fact that the respondent was not venal and that lengthy suspension was appropriate in lieu of disbarment. The Supreme Court has taken into account a referee's "firsthand opportunity to observe petitioner's demeanor" in accepting a recommendation not to impose disbarment for a single instance of misappropriation. (See *Snyder v. State Bar*, *supra*, 49 Cal.3d 1302.) Such deference appeared particularly appropriate in *In the Matter of Kueker*, since the referee made a specific finding that Kueker, 10 years after his misappropriation, presented no current risk to the public and little or no future risk of repeating his misconduct. These factors are significant in determining whether a sanction less than disbarment can adequately protect the public. (See *Friedman v. State Bar* (1990) 50 Cal.3d 235; *Amante v. State Bar* (1990) 50 Cal.3d 247, 254.)

In the court below, despite finding a lack of venality, the hearing judge found that as of the time of the hearing, respondent failed "to understand the true nature of his misconduct and has certainly not atoned for it." (Finding 58, decision p. 17.) As a consequence, the hearing judge recommended a standard 1.4(c)(ii) hearing prior to respondent's resumption of practice to safeguard the public in the event respondent does not gain insight into the nature of his misconduct. This requirement is essential. The burden will be on respondent at the time of that hearing to satisfy the court of his rehabilitation, learning in the law and fitness to practice. In the interim, respondent will have three years to gain insight into his misconduct. If he makes no better showing at the time of his 1.4(c)(ii) hearing than he did in this proceeding, he will not have satisfied his burden.