PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed August 6, 2018

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 15-O-11994
	)	
ANTHONY NGULA LUTI,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 207852.	)	
	)	

A hearing judge recommended that Anthony Ngula Luti be disbarred for intentionally misappropriating $15,000 that he agreed to hold in escrow for a colleague's client. The judge found Luti also committed three trust account violations.

Luti appeals. He asserts he did not misappropriate the escrow funds because his colleague/officemate authorized him to keep the money for debts owed. The hearing judge found Luti's testimony on this point not credible. Luti argues for more mitigation and that most charges be dismissed as time-barred. He requests discipline "short of disbarment," or for other just and proper relief. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and supports the hearing judge's decision.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we reject Luti's arguments and find him culpable of one trust account violation (commingling) and intentionally misappropriating $15,000. The applicable disciplinary standards call for disbarment for his misappropriation absent compelling mitigation that clearly predominates, which he did not prove. Like the hearing judge, we recommend that Luti be disbarred.

I. PROCEDURAL BACKGROUND

On September 16, 2016, OCTC filed a four-count Notice of Disciplinary Charges (NDC) alleging that Luti violated statutory and professional rules of attorney conduct when he (1) failed to maintain $15,000 in his client trust account (CTA) on behalf of his escrow clients; (2) committed an act of moral turpitude by misappropriating escrow funds; (3) failed to pay escrow funds upon request; and (4) commingled trust monies by issuing checks from his CTA for personal expenses.

On October 5, 2016, Luti filed a response to the NDC. As an affirmative defense, he pled that certain charges were barred by the five-year rule of limitations for disciplinary matters. (Rules Proc. of State Bar, rule 5.21.) He sought to dismiss counts one, two, and four on this ground in a pretrial motion, which the Hearing Department denied on January 6, 2017. On May 25, 2017, we denied Luti's petition for interlocutory review, and on July 26, 2017, the Supreme Court denied Luti's petition for review of our denial.

A three-day trial was held on September 21, 22, and 26, 2017. On the first day, the parties filed a limited Stipulation as to Facts and Admission of Documents (Stipulation). Luti stipulated only that he has been admitted to practice law in California since June 19, 2000, and that four OCTC exhibits and nine of his own exhibits could be admitted into evidence. During trial, Luti conceded that he commingled client trust funds by paying personal expenses from his CTA, as charged in count four. The hearing judge issued her decision on October 27, 2017, recommending that, under the relevant disciplinary standard, Luti be disbarred for intentionally misappropriating $15,000 in escrow funds.

II. FACTS[1]

A. Luti Agreed to Hold $15,000 Pursuant to Written Escrow Agreement

Vivid Entertainment New York, LLC (Vivid) is an adult entertainment company. In 2009, Vivid entered into a business deal with Kristin Davis. Vivid agreed to deposit $15,000 into an escrow account, to be paid to Davis when she completed the terms of the agreement. Luti did not form an attorney-client relationship with Vivid or Davis. Instead, Michael Weremblewski represented Vivid and Pamela Koslyn represented Davis.

Koslyn recommended that Luti serve as the escrow agent; he was her landlord and officemate, and they had worked together on a litigation case. Luti agreed. In August 2009, Luti entered into a three-page written "Escrow Agreement" to be escrow agent for the transaction. He would receive a $500 escrow fee from Vivid. Though Luti signed the Escrow Agreement, he testified he never read it.

B. The Escrow Agreement

The Escrow Agreement set forth the parties' duties. Vivid was to give Luti $15,000 to deposit into his CTA. Luti was to deliver the escrow funds to Davis if she performed her obligations under the Escrow Agreement, or if Vivid directed him in writing to do so. Luti was to return the money to Vivid if notified in writing that Davis failed to fulfill her obligations. No deadline for Davis's performance was specified. Luti could resign as escrow agent by giving Vivid and Davis five days' notice and after he delivered the money as directed by them. Only Vivid and Davis together could terminate Luti's escrow services, and all three (Vivid, Davis, and Luti) had to agree in writing to amend, modify, extend, supersede, or cancel the Escrow Agreement.

---

[1] The factual background is based on the Stipulation, trial testimony, documentary evidence, and factual and credibility findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A); *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032–1033.)

C. Luti Withdrew the Escrow Funds Immediately after Deposit

On October 5, 2009, Luti deposited the $15,000 check from Vivid into his CTA, making the balance $15,730.75. A few days later, Luti began to withdraw money from his CTA for personal use. He made more than a dozen withdrawals or transfers in October. By October 30, 2009, the CTA balance was $1,704.87, and by March 20, 2010, the balance fell to $0.46.

Sometime in 2010, Koslyn asked Luti about the escrow money. He told her he used it to pay personal obligations. Believing he had taken the money wrongfully, Koslyn consulted an ethics attorney, who advised her to notify everyone involved.

On October 12, 2010, Koslyn emailed a letter to Weremblewski and Davis. She informed them that Luti told her he had used the $15,000 to pay personal obligations. She stated that Luti assured her that he intended to repay it, but had not done so. Koslyn apologized for recommending Luti and suggested that a new escrow agent be appointed. She also said that Luti had agreed that she deposit $3,150 in office rent she owed him into her CTA for the new escrow holder, and that she could do the same with the rent owed to Luti from another officemate. In total, Koslyn deposited $7,830 into her CTA, which the parties have referenced as the "de facto" escrow. On October 23, 2014, Koslyn paid Vivid the $7,830.

D. Luti Remained Escrow Agent until 2015

Luti received a copy of Koslyn's October 12, 2010 letter. He did not respond or withdraw as escrow agent.

Five years later, Vivid and Davis attempted to terminate the Escrow Agreement. On February 3, 2015, Weremblewski sent Luti a "Release of Escrow Funds Agreement" signed by Davis and a representative from Vivid. Weremblewski demanded that Luti disburse $7,170 to Vivid (the balance of the $15,000 less $7,830 that Koslyn paid from the "de facto" escrow).

On February 22, 2015, Luti sent a reply letter to Weremblewski. He asserted, among other things, that Koslyn had released him as escrow agent "as far back as October of 2010—almost 5 years ago," and that she had authorized him to use the escrow funds for back rent for her office lease and for attorney fees she owed him in a litigation matter. When Luti did not disburse the funds to Vivid, Weremblewski filed a State Bar complaint.

E. OCTC Investigated the Complaint and Filed Disciplinary Charges

While OCTC investigated Weremblewski's complaint, it discovered that Luti had commingled funds in his CTA. Between April 1, 2009, and May 24, 2010, Luti issued eight checks totaling $4,848 from his CTA to pay for personal expenses, including housekeeping services, the Golden State Rottweiler Club, season tickets to the L.A. Clippers, and tuition for his daughter's school. At trial, Luti admitted he paid these personal expenses from his CTA.

OCTC filed disciplinary charges in September 2016. On December 20, 2016, Luti wrote a check to Vivid for $7,170, the remaining amount owed from the $15,000, and noted on the check that it was for "Escrow Refund."

III. CULPABILITY[2]

A. Count One: Failure to Maintain Client Funds in Trust (Rules of Prof. Conduct, Rule 4-100(A))[3]
Count Three: Failing to Pay Client Funds upon Request [Rule 4-100(B)(4)][4]

The hearing judge found Luti culpable of failing to maintain $15,000 in escrow funds, in violation of rule 4-100(A) (count one), and failing to pay client funds upon request in violation of rule 4-100(B)(4). We find Luti not culpable of both counts and dismiss them with prejudice.

---

[2] We analyze the charges out of order to address the dismissed counts first.

[3] Rule 4-100(A), in relevant part, requires an attorney to deposit and maintain in a trust account "[a]ll funds received or held for the benefit of clients." All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

[4] Under rule 4-100(B)(4), "a member shall. . . "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

The escrow funds were for a business transaction, and not an attorney-client matter. It is undisputed that Vivid and Davis were not Luti's clients. Thus, the monies Luti held in trust as a fiduciary escrow agent for Vivid and Davis were not subject to rule 4-100(A) or rule 4-100(B)(4), which both specifically address *client* funds. While an attorney may acquire certain duties related to non-client funds, those obligations derive from the fiduciary relationship, not from rule 4-100. (See *Galardi v. State Bar* (1987) 43 Cal.3d 683, 691 [respondent owed fiduciary duties, including accounting duties, to non-client joint venturers].)

B. Count Two: Moral Turpitude/Misappropriation (Bus. & Prof. Code, § 6106)[5]

We agree with the hearing judge that Luti intentionally misappropriated $15,000 in escrow funds, an act involving moral turpitude, dishonesty, or corruption, in violation of section 6106 (count two). An attorney serving as an escrow holder owes fiduciary duties to the parties to the escrow. (*Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155 ["When an attorney receives money on behalf of a third party who is not his client, he nevertheless is a fiduciary as to such third party"].) An escrow holder must comply strictly with the instructions of the parties and owes fiduciary duties to them to do so. (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711; see *Crooks v. State Bar* (1970) 3 Cal.3d 346, 355 [attorney acting as escrow breached fiduciary duty to third party involved in transaction by distributing funds in violation of escrow agreement].)

OCTC correctly contends that Luti's fiduciary duty to Vivid and Davis as the escrow agent was as simple as it was sacred: to safeguard the $15,000 escrow funds and disburse them according to the express terms of the Escrow Agreement. He failed to do so and instead took

[5] Section 6106 states, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." All further references to sections are to the Business and Professions Code.

the bulk of the money within the first 30 days of the 2009 deposit. By 2010, Luti's CTA balance had fallen to $0.46 and that same year, he told Koslyn that he no longer had the escrow funds.[6]

That Luti's CTA balance fell below $15,000 raises an inference of misappropriation, which Luti now has the burden to rebut. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) His primary defense is that Koslyn orally instructed him to keep the escrow funds to pay for debts she owed him. The hearing judge did not believe Luti's testimony on this point, reasoning that (1) it was not credible when compared to Koslyn's credible testimony,[7] (2) it was contradicted by the written Escrow Agreement, (3) Luti knew Koslyn had no authority to unilaterally alter the terms of the Escrow Agreement, and (4) as the hearing judge stated, applying Vivid's and Davis's entrusted funds toward attorney fees in another litigation matter and for Koslyn's back rent "makes absolutely no sense."

Other evidence supports the hearing judge's credibility findings. First, Luti failed to present written evidence of his purported oral agreement with Koslyn. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935, fn. 13 [attorney's unexplained failure to substantiate testimony with evidence expected to be produced is strong indication testimony not credible].) Second, his claim that he did not read the Escrow Agreement does not excuse him from performing its terms. Third, Luti has not explained why he allowed Koslyn and his other officemate to fund the "de facto" escrow with rent money owed to him if Koslyn had authorized him to take the $15,000. Fourth, his 2016 restitution check to Vivid was for an "Escrow Refund." Giving great weight to the judge's credibility findings (*McKnight v. State Bar*, supra,

[6] Though the NDC states Luti misappropriated $13,295.13, the hearing judges found he misappropriated $15,000. We agree. Since Luti's CTA balance fell to $ 0.46 in 2010, and he told Koslyn he had taken all the escrow monies by then, there was adequate notice that he misappropriated the full $15,000. (Rules Proc. of State Bar, rule 5.41(B)(2) [NDC must contain facts describing violations in sufficient detail to permit preparation of defense].)

[7] Koslyn testified emphatically that she never authorized Luti to keep the escrow funds: "That never happened, either October 5th through 8th or ever."

53 Cal.3d at pp. 1032–1033), and independently considering the entire record, we agree that Luti's testimony was not credible. We find Luti culpable of moral turpitude by intentional misappropriation, as charged in count two. (*Bates v. State Bar* (1983) 34 Cal.3d 920, 923 [willful misappropriation of entrusted funds involves moral turpitude].)

C. Count Four: Paying Personal Expenses from CTA [Rule 4-100(A)]

Luti admitted at trial, and the hearing judge found, that he commingled funds during 2009 and 2010 by paying personal expenses from his CTA, in violation of rule 4-100(A).[8] Bank records establish Luti's culpability.

Luti argues his commingling was already considered in a prior 2013 disciplinary matter. He is incorrect. His stipulation for his prior commingling, discussed below in aggravation, does not include the 2009 and 2010 payments from his CTA that are at issue here.

Luti also requests that this charge be mitigated because he had to use his CTA for private banking needs after he discovered fraudulent activity on his personal accounts. This argument fails. "You *can't* make payments out of your client trust bank account to cover your own expenses, personal or business, or for any other purpose that isn't directly related to carrying out your duties to an individual client." (The State Bar of Cal., Handbook on Client Trust Accounting for California Attorneys (2016) ("Handbook"), § VI, p. 19.)[9] In view of this strong admonition against using a CTA for personal expenses, Luti could easily have used other means to counteract the fraudulent activity short of invading his CTA—such as opening new personal accounts.

[8] Rule 4-100(A), in relevant part, provides that "[n]o funds belonging to the member . . . shall be deposited [in the CTA] or otherwise commingled therewith . . . ."

[9] The Handbook is available only on-line at the following website: <http://www.calbar.ca.gov/Portals/0/documents/ethics/Publications/CTA-Handbook.pdf> [as of July 31, 2018].)

IV. LUTI'S REQUEST TO DISMISS CHARGES AS TIME-BARRED[10]

A. Issues and Arguments

Luti asks us to dismiss count one (failure to maintain funds), count two (misappropriation), and count four (commingling) on the ground that the charges were filed beyond the limitations period. Since we dismissed count one, we examine this argument only as it relates to counts two and four.

Rule 5.21(A) provides that a disciplinary proceeding based solely on a complainant's allegations must begin within five years from the date of the violation. However, rule 5.21(C)(1) provides that the five-year limit is tolled while "the member represents the complainant, the complainant's family member, or the complainant's business or employer." Luti argues that the alleged misappropriation and commingling are time-barred because they occurred in 2009 and 2010, more than five years before the 2016 NDC was filed. He also argues that the tolling provisions do not apply.

As to count four (commingling), we find that the five-year limitation does not apply because it was not based solely on a complainant's allegations. The State Bar discovered Luti's bank records that show he paid personal expenses out of his CTA while it was investigating Weremblewski's complaint about the misappropriation. We deny Luti's motion to dismiss count four as time-barred.

As to count two (misappropriation), we acknowledge that the five-year limitations period applies because the charge was based solely on Weremblewski's complaint. The issue before us is whether the tolling provision under rule 5.21(C)(1) applies where, as here, the attorney serves as a fiduciary (an escrow officer), rather than in an attorney-client relationship. Luti asserts that the tolling provision applies only to attorney-client relationships, because the rule states that

[10] Luti renews most of his arguments that the hearing judge, this court, and the Supreme Court previously rejected in his pretrial request to dismiss.

tolling occurs while the member *represents* the complainant, or the complainant's family member, business, or employer. He argues that the tolling provision cannot apply to him because he never represented Davis or Vivid as clients. He urges us to find that the plain meaning of the word "represents" applies only to attorney-client relationships, and he states no case law exists indicating that an attorney "represents" parties when serving as an escrow officer to parties represented by other counsel. OCTC counters that the word "represents" should apply to an attorney acting as a fiduciary, such that the rule of limitations is tolled as long as the fiduciary relationship exists.

B. Legal Analysis

To begin, we interpret rule 5.21 consistently with Supreme Court authority. (*In the Matter of Sheppard* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 91, 98 [State Bar's rule-making authority subject to inherent authority of Supreme Court].) The Supreme Court and this court are equally concerned with protecting the public, the courts, and the profession from both unscrupulous attorneys acting solely in their fiduciary capacity, and those acting in their representative capacity. " 'An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity of an attorney.' " (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373, quoting *Worth v. State Bar* (1976) 17 Cal.3d 337, 341).) Similarly, under section 6106, the legislature makes an attorney's commission of any act involving moral turpitude, dishonesty, or corruption a cause for disbarment or suspension "whether the act is committed in the course of his relations as an attorney *or otherwise*." (Italics added.)

Contrary to Luti's argument, appellate courts have used the word "represents" to describe the limited agency of an escrow relationship, stating that the agent "only *represents* a principal insofar as he carries out the escrow instructions." (*Hannon v. Western Title Insurance Co.*

(1989) 211 Cal.App.3d 1122, 1127; *Lee v. Escrow Consultants, Inc*. (1989) 210 Cal.App.3d 920–921, citing *Kirby v. Palos Verdes Escrow Co*. (1986) 183 Cal.App.3d 57, 64.) Further, rule 5.4(14) defines complainant as "a person who alleges misconduct by a State Bar member," without requiring that the complainant be a client or former client. Thus, neither the rule nor case law requires us to limit the tolling provision to attorney-client relationships. To do so would subvert long-established Supreme Court and legislative authority regarding the regulation of attorneys who commit misconduct while acting as fiduciaries.

Luti requests that if the tolling provision applies, it should be prospective only and should not apply to him. OCTC contends such a request is not relevant because this principle applies when a decision "changes a settled rule." (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378–379.) We agree with OCTC. Applying the provisions of rule 5.21(C)(1) to fiduciary relationships would be an interpretation of a rule, not a change of a settled rule.

We conclude that rule 5.21(C)(1) applies to fiduciary relationships just as it does to attorney-client relationships; thus, the five-year rule of limitations is tolled so long as the fiduciary relationship lasts. Luti remained as the escrow agent until at least February 2015, when Weremblewski presented him with the Release of Escrow Funds Agreement. Count two was therefore timely filed in 2016, and Luti's motion to dismiss it as time-barred is denied.

V. AGGRAVATION OUTWEIGHS MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[11] requires OCTC to establish aggravating circumstances by clear and convincing evidence. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [evidence that leaves no substantial doubt and is sufficiently strong to command the unhesitating

[11] All further references to standards are to this source.

assent of every reasonable mind.) Standard 1.6 requires Luti to meet the same burden to prove mitigation.

A. Aggravation

1. Diminished Weight for Prior Record of Discipline

Luti has one prior record of discipline, which is an aggravating factor. (Std. 1.5(a).) On December 28, 2012, he stipulated to three trust account violations. (State Bar Court Case No. 12-O-14855; Supreme Court Case No. S209215.) From January to August 2012, he used his CTA to pay personal and business expenses, in violation of rule 4-100(A) (commingling), deposited client funds into his CTA knowing the account was subject to fraudulent debits by an unauthorized person, in violation of his common law fiduciary duty to his clients and in violation of section 6068, subdivision (a) (failure to support all laws), and mishandled client funds by continuing to deposit them into his CTA, knowing about the fraudulent debits, in violation of section 6106 (moral turpitude through gross negligence).

Luti's prior misconduct was aggravated by multiple acts of wrongdoing and by indifference because he deposited client funds into his CTA despite knowing about fraudulent debits and after being advised to close the account. He received mitigation for having no prior discipline record, cooperating with the State Bar by entering into a stipulation, and causing no harm. On May 14, 2013, the Supreme Court ordered the stipulated discipline and suspended Luti from the practice of law for two years, stayed, with two years' probation, including a 120-day actual suspension.

The hearing judge properly assigned limited aggravation to Luti's prior discipline because the commingling in that case occurred in 2012, which is *after* he committed most of the 2009 and 2010 misconduct in the present case. While we consider a prior discipline to be aggravating "[w]henever discipline is imposed" (*Lewis v. State Bar* (1973) 9 Cal.3d 704,715),

diminished weight is appropriate here because Luti did not have an opportunity to heed the import of his prior discipline before he committed the present misconduct (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 619).[12]

2. Moderate Weight for Multiple Acts of Wrongdoing

The hearing judge found moderate aggravation for Luti's multiple acts of wrongdoing. (Std. 1.5(b).) Three instances of misconduct are considered multiple acts (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647), and such acts are not limited to the counts pled (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279). Since we found Luti culpable of two counts of misconduct, which included issuing eight checks for personal expenses from his CTA, we affirm the hearing judge's finding of moderate mitigating weight for his multiple acts of misconduct.

3. Significant Weight for Lack of Insight

The hearing judge correctly assigned significant aggravation for lack of insight. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317 [attorney's lack of insight into wrongfulness of actions may be aggravating factor].) Though Luti has maintained that Koslyn authorized him to take the escrow money, the judge found that there was no credible evidence "supporting this version of events." (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14 [attorney who fails to accept responsibility for actions and seeks to shift responsibility to others demonstrates indifference and lack of remorse].) While the law does not require Luti to be falsely penitent, it "does require that [he] accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Luti's failure to do this demonstrates his lack of insight and raises concerns about future misconduct.

[12] We note that even after Luti was disciplined in 2013, he did not pay restitution to Vivid until 2016.

B. Mitigation

1. Moderate Weight for Good Character

Luti is entitled to mitigation if he establishes "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of his misconduct." (Std. 1.6(f).) The hearing judge assigned "great weight" in mitigation to Luti's good character evidence. We assign moderate weight, as the witnesses do not constitute a wide range of references in the legal and general communities, as required by the standard.

Seven witnesses who had long-term relationships with Luti testified to his good character. They included five attorneys, a former law enforcement officer, and a legal assistant. The witnesses described Luti as straightforward, upright, conscientious, honest, and diligent. One witness said Luti was a "truth warrior" while another stated he was "very good with the clients." The witnesses had a basic understanding of the charges and their high opinion of Luti did not change despite them. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to testimony of attorneys due to their "strong interest in maintaining the honest administration of justice"].) Though the witnesses did not widely represent both the legal *and* general communities (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar. Ct. Rptr. 363, 387 [three attorneys and three clients did not constitute broad range of references]), the quality of their impressive testimony merits moderate mitigating weight.

2. Limited Weight for Cooperation with State Bar

Spontaneous cooperation with the State Bar is mitigating. (Std. 1.6(e).) The hearing judge did not discuss this factor, however, we assign limited credit because Luti entered into a non-extensive pretrial Stipulation with easy-to-prove facts. (*In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 318 [limited weight for non-extensive stipulation to

easy-to-prove facts].) And though Luti admitted at trial that he made personal payments from his CTA, as charged in count four, he contested culpability on the most significant charges.

3. No Credit for Excessive Delay or Restitution, and Limited Credit for Remorse

Standard 1.6(i) provides mitigation for excessive delay by OCTC in conducting disciplinary proceedings where it causes prejudice to the member. Determining excessive delay requires a case-by-case determination. (*Sodikoff v. State Bar* (175) 14 Cal.3d 422, 431-432.)

OCTC filed disciplinary charges in September 2016, which was approximately 18 months after Weremblewski filed his State Bar complaint against Luti. Cases recognizing excessive delay have involved much longer periods of time than 18 months. (See e.g., *In the Matter of Wolff, supra*, 5 Cal. State Bar Ct. Rptr. at p. 9 [four-year in delay excessive]; *In the Matter of Klein* (1994) 3 Cal. State Bar Ct. Rptr. 1, 12 [five-year delay excessive].) Further, excessive delay merits mitigation only if it caused specific and legally cognizable prejudice, such as the loss of evidence. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 774; see *In re Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 361 [seven-year delay not excessive where no legally cognizable prejudice].) Luti failed to demonstrate that the 18-month delay in filing charges was excessive or that he suffered prejudice. Like the hearing judge, we do not find excessive delay that merits mitigating credit.

We further reject Luti's mitigation request for paying restitution. Standard 1.6(j) provides that mitigation is available where restitution is paid without the threat or force of disciplinary proceedings. Luti did not pay Vivid until December 2016, which was three months after disciplinary charges were filed.

Finally, Luti requests mitigation for his remorse. (Std. 1.6(g).) He cites to his trial testimony that he admitted he wronged Vivid, and explained that he probably should have immediately read the Escrow Agreement, communicated more with Koslyn, and followed up on

Weremblewski's letter. These actions, he testified, might have avoided this State Bar complaint. We acknowledge that Luti's statements demonstrate some personal remorse at trial, yet he did not take "prompt objective steps, demonstrating spontaneous and recognition of the wrongdoing and timely atonement," as required by standard 1.6(g). It was Koslyn, not Luti, who created and funded the "de facto" escrow to repay Vivid and, as noted, Luti paid restitution only after the NDC was filed. For these reasons, we assign limited mitigation for remorse.

VI. DISBARMENT IS THE APPROPRIATE DISCIPLINE[13]

Our disciplinary analysis begins with the standards which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow them whenever possible (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and look to comparable case law. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

Standard 2.1(a) is most applicable. It provides that disbarment is the presumed sanction for intentional misappropriation "unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate." Luti intentionally misappropriated $15,000, a significant amount. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [$1,355.75 held to be significant amount].) Further, his mitigation is not compelling nor does it predominate over his serious misconduct and aggravation, particularly his lack of insight.

Misappropriation of trust funds "breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.]" (*Kelly, supra*, 45 Cal.3d at p. 656.) It is grave misconduct for which disbarment is the usual discipline. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.) "Even a single 'first-time' act of

[13] The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to maintain the highest professional standards; and to preserve public confidence in the legal profession. (Std. 1.1.)

misappropriation has warranted such stern treatment." (*Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 657.) [14]

Luti raises a host of arguments against disbarment. First, he asserts that the hearing judge did not consider his good character evidence. He is incorrect. In her decision, the judge summarized the testimony of the seven character witnesses and gave it "great weight" in mitigation. The judge also stated in her decision that she recommended disbarment as the proper discipline after considering the aggravating and *mitigating* circumstances.

Second, Luti challenges the judge's reliance on *Chang v. State Bar* (1989) 49 Cal.3d 114. In *Chang*, the attorney misappropriated $7,900 in client funds, failed to provide an accounting, and made misrepresentations to his client and the State Bar. (*Id*. at pp. 120-122.) The Supreme Court ordered Chang's disbarment, noting that his lack of remorse or candor, serious misconduct, and failure to pay restitution gave reason to doubt whether he could conform his conduct to ethical standards. (*Id*. at p. 129.) The hearing judge found *Chang* comparable because, like Chang, Luti committed serious misconduct and lacked insight. This properly gave the hearing judge little assurance Luti would comply with professional standards.

Third, Luti contends the present case is not like *Chang* because Luti's case is mitigated by a "plethora of factors." This is not correct, as we found three mitigating circumstances—good character, cooperation, and remorse—to which we assigned only moderate or limited weight.

Finally, Luti argues that his actions were negligent, and disbarment is too severe. This argument fails. Luti intentionally misappropriated $15,000, and failed to offer compelling mitigation that clearly predominates as support for us to deviate from the presumptive discipline

[14] See also *Gordon v. State Bar* (1982) 31 Cal.3d 748 (disbarment for $27,000 misappropriation; 13 years discipline-free practice, financial and emotional difficulties, remorse, and lack of harm); *In the Matter of Spaith*, *supra*, 3 Cal. State Bar Ct. Rptr. 511 (disbarment for $40,000 misappropriation and intentionally misleading client about funds; emotional problems, repayment of money, 15 years discipline-free practice, strong character evidence, and candor and cooperation with State Bar).

of disbarment called for in standard 2.1(a). Considering Luti's lack of insight and other aggravating factors, when compared with his limited mitigation, we find no reason to depart from the standards. (*Blair v. State Bar*, supra, 49 Cal.3d at p. 776, fn. 5 [clear reasons for departure from standards should be shown].) Luti chose to use $15,000 of entrusted funds for personal obligations at the expense of his ethical, professional, and fiduciary duties to Vivid and Davis. We recommend that Luti be disbarred to protect the public, the courts, and the legal profession.[15]

VII. RECOMMENDATION

We recommend that Anthony Ngula Luti be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Luti comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment.

VIII. ORDER

The order that Anthony Ngula Luti be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective October 30, 2017, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

PURCELL, P. J.

WE CONCUR:

HONN, J.

McGILL, J.

[15] We have independently reviewed each of Luti's arguments on review. Those not specifically addressed have been considered as lacking in factual and/or legal support.