PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

FILED APRIL 20, 2006

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **ROBERT H. SACK** A Member of the State Bar.	)	**00-O-13349** **OPINION ON REVIEW**

Respondent Robert H. Sack requests review of a decision recommending he be placed on a two-year suspension, stayed on conditions of probation for three years with an actual suspension of two years, his return to practice conditioned, inter alia, on the payment of $41,497.50, plus interest, in restitution. The parties entered into a joint pretrial stipulation as to facts and culpability, whereby respondent admitted culpability to 20 counts of misconduct.

The hearing judge found that respondent caused substantial harm to his clients by recklessly turning over operation and control of his law practice for nearly two years to non-lawyers. Respondent stipulated that he committed a passel of ethical violations ranging from conflict of interest to moral turpitude. It appears that respondent's lay staff misappropriated $100,000 or more of trust funds.

Respondent argues that the hearing judge weighed mitigating and aggravating circumstances incorrectly, resulting in an excessive recommendation of discipline. The State Bar submits that the level of discipline imposed by the hearing judge was proper.

Upon independent review of the record (Rules Proc. of State Bar, tit. II, State Bar Court Proceedings, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207) and a balancing of all relevant factors (*McCray v. State Bar* (1985) 38 Cal.3d 257, 273), we find that although some of respondent's mitigating circumstances deserve added weight than accorded by the hearing judge,

their balance against serious aggravating circumstances in this case justifies the level of discipline recommended by the hearing judge. We also conclude that her recommendation is consistent with applicable standards for degree of discipline and rests on comparable case law.

I. THE RECORD

A. Procedural History

Respondent was charged with 30 counts of misconduct in five separate sets of client cases. The parties submitted a "Joint Pretrial Stipulation as to Facts and Conclusions of Law," wherein respondent admitted culpability to 20 different counts of misconduct.[1] The parties submitted an additional joint stipulation "as to Facts regarding Restitution."[2]

On review, we deferred submission following oral argument in view of respondent's notice of intent to introduce evidence filed November 14, 2005. We decline to consider the evidence offered by respondent.

B. Factual Background

Our findings are based on the parties' factual stipulations as supplemented by the testimony of respondent.

Respondent was admitted to practice law in California on June 15, 1993, and has no record of prior discipline. Respondent has been a licensed real estate agent since 1979. For a year and a half after admission, respondent worked in the area of workers' compensation with

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[1]Respondent admitted culpability to violations of Rules of Professional Conduct, rule 3-700(D)(2) (failing to refund unearned fees), rule 3-310(C)(1) (representing conflicting clients without consent), two counts of rule 3-110(A) (intentionally, recklessly, or repeatedly failing to perform services with competence), four counts of rule 4-100(B)(1) (failing to notify clients of receiving funds), five counts of rule 4-100(A) (failing to maintain client funds in trust account), and violations of the Business and Profession Code, section 6106 (commission of any act involving moral turpitude), two counts of section 6090.5, subdivision (a)(2) (sought agreement to withdraw disciplinary complaint) and four counts of section 6068, subdivision (m) (failed to respond to inquiries). All further references to rule(s) are to the provisions of the Rules of Professional Conduct, and all further references to section(s) are to the provisions of the Business and Professions Code.

[2]Restitution was stipulated to have been made in the total amount of $5,415.

two different firms. In approximately late 1994, respondent began doing both contract work for other attorneys and work as a solo practitioner in criminal law and personal injury matters. In January 1998, respondent opened his own law practice in Los Angeles. He operated at this location from January 1998 to September 2000[3] as a sole practitioner.

Respondent's office primarily handled personal injury cases, but he did some work in criminal matters and real estate law. He had four to six employees working for him at any given time, whom he hired to do secretarial work, such as answer phones, file paperwork, and open the mail. His assistant manager, Jay Shin, was responsible for advertising, interpreting and dealing with clients. The evidence suggests that respondent had a clientele who predominantly spoke Korean. Respondent testified that he did not speak Korean, suggesting he relied on Shin to communicate with his clients. Respondent also hired Charles Rim, an outside Certified Public Accountant (CPA), to oversee all bookkeeping functions for his office. All of his employees were non-lawyers.

During this time and thereafter, respondent lived in Morro Bay, San Luis Obispo County; approximately 210 miles and a 3-½ hour distance from his newly-opened practice in Los Angeles. In February 1998, the health of respondent's wife began to suffer due to complications with her pregnancy. Her susceptibility to migraine headaches became intensified and began to occur more frequently. She also developed a condition of frequent vomiting and became increasingly dependent on her husband. His wife's condition worsened at the birth of their child and due to complications, the baby was in the neonatal unit for one week. Respondent felt torn

[3]There is a discrepancy between the stipulation and the testimony, regarding when this law office closed. In testimony respondent claims he closed in "late 1999," and this is corroborated by a stipulated fact that he closed his California Center Bank accounts in November 1999, but the stipulation admits misconduct occurring at the same office in August/September 2000. The discrepancy is immaterial in view of the parties' comprehensive stipulation.

between the fiduciary obligations he owed his clients and the moral obligations owed to his family.

Beginning around February 1998, respondent's time spent at his office fluctuated between none to three days a week for the remainder of the existence of this practice. The parties stipulated in part that, "[b]eginning in or about early 1998 and continuing through the end of 1999, [r]espondent failed to properly supervise his non-attorney employees, and thereby failed to manage and control the operations of his law practice . . . [His] employees, all non-attorneys, interviewed prospective clients on behalf of [r]espondent, evaluated their cases, accepted employment on [r]espondent's behalf, and received advanced fees without any input or oversight by [r]espondent. Respondent's non-attorney employees also performed legal services, negotiated, settled and collected funds on clients' claims without the knowledge, authorization or consent of the clients."

Additionally, respondent relied on Rim, his CPA, to keep him informed of the status of his client trust accounts. At most, respondent would review his check ledgers in only a cursory way. Due to this, in four of the five charged cases, he failed to maintain client funds in his trust accounts. Further, respondent's staff issued over 24 insufficiently funded checks to clients. Respondent admitted that he did not spend enough time reviewing trust account records, and that he relinquished all control to Rim because he expected that if there were a problem, Rim would tell him. Rim never reported any problems to respondent. Respondent testified that from 1998 to 1999 he had no "red flags" to lead him to believe there were any problems.

However, this practice came to a close at the end of 1999 when respondent discovered Shin writing a check out of an account that respondent had not opened. Respondent went to the bank and discovered that two accounts had been opened in his name without his authorization. That same day, respondent fired his employees, took his name off the door and left with his files. Subsequently, respondent filed lawsuits against Shin, Rim and California Center Bank. Respondent testified that he then learned that Shin had been taking clients' money for his own

use. Respondent further testified that he filed two lawsuits against Rim, one for malpractice and the other for filing fraudulent and inaccurate tax returns. The former lawsuit had not been resolved at the time of his testimony and the latter resulted in a judgment for respondent of $15,000. The lawsuit against California Center Bank claimed forgery, conspiracy and fraud and was settled out of court with an undisclosed cash settlement. Respondent testified that since his misconduct, he has revamped his office policies, he does not have any employees working for him and no one has access to his client trust accounts.

C. The Five Client Matters

1. Case No. 00-O-13349 - The James Oh Matter (Counts 1-4)

In January 1998, family members of James Oh wished to adjust their visa status. Oh sought the legal services of respondent and was told by Shin[4] that respondent could handle this immigration matter for a fee of $32,000. Oh gave Shin two checks payable to respondent, one for $4,000 and one for $20,000. Oh later gave Shin an additional check, payable to "cash" for $8,000. After repeated attempts to contact respondent, between February 1998 and September 1999, Oh never met or spoke to respondent about his immigration matters and respondent never performed any legal work on Oh's case. In September 1999, Oh demanded a refund of the $32,000 advanced to respondent. Shin agreed and between September 9 and November 30, 1999, he gave Oh at a minimum 23 checks in the amount of either $3,000 or $3,500, none of which were negotiable due to insufficient funds. Oh filed a lawsuit in the Los Angeles Superior Court against respondent and several of his employees, and he complained to the State Bar against respondent for professional misconduct. Respondent filed for bankruptcy and subsequently his debt to Oh was discharged. Oh tried to re-set the trial against respondent in the state court action, but the court ordered respondent dismissed as a defendant. In June 2002, respondent sent a letter to Oh's counsel whereby he threatened a contempt action and sanctions

[4]Shin introduced himself to Oh as the "director" of respondent's law office.

motion against Oh for re-opening the state action but offered to relent if Oh would agree to withdraw his State Bar complaint against respondent.

Respondent's misconduct with Oh lasted over four years, starting in February of 1998 when he failed to do any work on Oh's case and failed to communicate with him and ending in June 2002, with the letter to Oh's attorney threatening contempt if Oh did not withdraw his complaint with the State Bar.

Respondent stipulated to culpability in four counts of misconduct: Count 1, intentionally, recklessly or repeatedly failing to perform services with competence, in willful violation of rule 3-110(A); Count 2, wilfully failing to respond promptly to status inquiries, per section 6068, subdivision (m); Count 3, wilfully failing to refund unearned fees, per rule 3-700(D)(2); and Count 4, seeking an agreement to withdraw a disciplinary complaint, proscribed by section 6090.5, subdivision (a)(2).

The stipulation regarding restitution makes no mention of any restitution paid to Oh, but respondent testified that he had paid him $4,000.

2. Case No. 00-O-13651 - The Yang Matter (Count 5)

In February 1998, Chul Ki Yang sustained injuries in a car accident and sought the services of respondent's law firm. Yang's personal injury claim was settled for $2,750 in early 1999. Respondent's employees deposited this check and issued a $950 check to Yang from respondent's trust account. This check was returned due to insufficient funds[5] and an employee at respondent's office issued another check for the same amount from her personal account. This check was also rejected for insufficient funds.

Respondent stipulated to his culpability in Count 5, that he wilfully failed to maintain client funds in a trust account as required by rule 4-100(A).

In April 2003, respondent paid Yang the $950 owed to him.

[5]Respondent stipulated that this trust account was frequently overdrawn between January and September 1999.

3. Case No. 00-O-14522 - The Chong and Mina Oh Matter (Counts 7, 8, 11, 12)

In February 1998, after meeting only with Shin, Chong and Mina Oh[6] hired respondent to handle their automobile accident claims. Thereafter, the Ohs repeatedly tried to contact respondent to discuss the progress of their claims but they never spoke to him and he never returned their calls. Unknown to them, their insurance claims were settled for a total of $5,000 and settlement drafts were received by respondent's office. Respondent's employees forged the Ohs' names on the release forms and on their settlement checks, depositing them into respondent's trust account.

In August or September of 1999, the Ohs went to respondent's office and demanded to know the progress of their claims. Shin told them that the property damage portion of their claim had been paid, but that he and respondent had spent it. The Ohs directed they be paid this portion of their settlement and Shin paid them in cash. At least 15 times prior to the Ohs being paid any portion of their settlement, respondent's trust account dropped well below the $5,000 he was required to hold for them.

The Ohs contacted their insurance carrier in September or October of 2000 and discovered that all of their claims had been settled. Thereafter, they complained to the State Bar about respondent and filed a civil action in the Los Angeles County Superior Court against respondent and his employees for legal malpractice, fraud, and conversion. In April 2001, respondent sent a letter to the Ohs' attorney and offered them a settlement on the condition that they withdraw their disciplinary complaint with the State Bar.

Consequently, respondent's misconduct spanned over three years from early 1998, with his failure to respond to his client's inquiries, into 1999 when respondent failed to maintain his trust account properly and as late as April 2001 with his letter requesting that the Ohs withdraw their complaint against him.

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[6]The record refers to the Ohs as Chong and Mina. We will refer to them as the Ohs. Also, the record does not show whether the Ohs were related to James Oh.

Respondent stipulated to culpability in four counts of misconduct: Count 7, wilful failure to notify his client of the receipt of client funds, per rule 4-100(B)(1); Count 8, wilful failure to maintain client funds in a trust account, per rule 4-100(A); Count 11, wilful failure to keep his clients reasonably informed of significant developments, as required by section 6068, subdivision (m), and Count 12, seeking an agreement to withdraw a disciplinary complaint, proscribed by section 6090.5.

In December of 2001, respondent paid the Ohs $2,000.

4. Case No. 00-O-14675 - The Lee Matter (Counts 13, 14) and The Lee and his Passengers Matter (Counts 17-20)

Chul Lee sought the services of respondent with two different automobile accident claims. In the first claim, Lee alone was injured in an accident. Without his knowledge, consent or authorization, his claims were settled for $3,750 and his name was forged on both the release and his settlement drafts. Lee did not know that any recovery had been made on his case until April 2000. In the meantime, on six different occasions, respondent's trust account dropped below the amount required to be held for Lee.

In the second Lee case, Lee and five of his passengers, Hwa Lee, Sina Lee, Doo Lee, Yoon Sun Lee, and Mi Nah Lee, were involved in a five-car accident.[7] Lee and his passengers employed respondent's office to handle their claims. They were never informed of the possible conflicts that could arise with this joint representation. Respondent's office negotiated with the insurance company on behalf of all parties involved. Six checks were sent to respondent's office made payable to each of the clients for $2,000. Respondent's employees endorsed the client names on the checks and deposited them all into the trust account. Neither Lee nor his passengers were ever told that money had been received on their behalf by respondent's office.

[7]It is unclear when this accident occurred. The stipulation variously states the accident as occurring on July 3, 1998, and July 3, 1999. From the totality of the admissions in this matter, we determine that this accident occurred in July 1998.

Several times between April 1999 and September 1999, respondent's trust account fell below the required amount of $2,000 to be held for each client.

Respondent stipulated to his culpability of six counts of misconduct in both Lee matters: Count 13, wilful failure to notify his client of receipt of client's funds, per rule 4-100(B)(1); Count 14, wilful failure to maintain client funds in a trust account, per rule 4-100(A); Count 17, wilful failure to keep a client reasonably informed of significant developments, as proscribed by section 6068, subdivision (m); Count 18, wilful acceptance of representation of more than one client in a matter in which the interests of the clients are potentially conflicted, without the informed written consent of each client, per rule 3-310(C)(1); Count 19, wilful failure to notify six clients of receipt of client funds, per rule 4-100(B)(1); and Count 20, wilful failure to maintain client funds in a trust account, per rule 4-100(A).

The stipulation regarding restitution makes no mention of restitution to either Lee or his passengers. Respondent testified that he holds $15,000 in a trust account for these clients and that Lee refused to accept it.

5. Case No. 02-O-11677 - The Miles Matter (Counts 24, 25, 28)

In August 1998, Sachiko Miles was involved in an automobile accident and hired respondent to handle her claim. Miles never spoke directly with respondent. She repeatedly tried to contact respondent to check the status of her case but was told that he was either busy or not in the office.

Respondent's office demanded payment from Miles's insurance company based upon medical bills that she had incurred from services provided to her totaling $3,215.50. Two drafts made payable to Miles were sent to respondent's office. In April and May of 1999, respondent's employees forged Miles's name and deposited the checks without her knowledge. In October 2000, Miles called respondent's office and found the number had been disconnected. Miles contacted her insurance company and was told for the first time that her claims had been paid.

Several times between April and October 1999, respondent's trust account had a negative balance, well below the required amount to be held for the client.

Respondent stipulated to violating Count 24, wilful failure to notify a client of receipt of client funds, per rule 4-100(B)(1), Count 25, wilful failure to maintain client funds in a trust account, per rule 4-100(A), and Count 28, wilful failure to respond promptly to the reasonable status inquiries of a client, as required by section 6068, subdivision (m).

In May 2003, respondent paid Miles $2,465.

6. General Counts re: Competence and Moral Turpitude (Counts 29, 30)

Respondent stipulated that from early 1998 through the end of 1999, he failed to supervise his non-attorney employees. Due to this failure, his employees performed legal services by negotiating, settling and collecting funds on clients' claims without their knowledge or consent. Additionally, during this period respondent repeatedly failed to communicate with his clients. In many instances, the clients never spoke with or met respondent, their sole communication being with non-attorney employees. Respondent also stipulated to losing control of his client trust accounts, resulting in the issuance of numerous checks against insufficient funds and the misappropriation of clients' money.[8]

Respondent stipulated that by failing to supervise his employees for at least two years, he intentionally, recklessly, or repeatedly failed to perform services with competence, as required by rule 3-110(A), and by allowing his non-attorney employees to control and manage all aspects of his practice, he committed an act of moral turpitude, wilfully violating section 6106.

[8]In a civil complaint against his former employees, respondent claimed that his employees misappropriated more than $100,000 in client funds for their own use.

II. EVIDENCE RE: MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigating Circumstances

1. Prior Misconduct

Respondent has no prior record of misconduct. The hearing judge gave very little weight to this because his misconduct was serious, and lasted for two years,[9] and he was in practice less than five years before the misconduct started.

2. Emotional Difficulties

Respondent's misconduct and the decline in his wife's health occurred at approximately the same time. His misconduct started shortly after opening his practice in January 1998, and his wife became ill in February 1998.

It was respondent's intention when he started his practice that, during his three-day work week, he would stay at his sister-in-law's house in Los Angeles. Due to his wife's inability to take care of herself during her pregnancy, she would call respondent up to 20 to 30 times a day requesting that he come home. On multiple occasions, he left work to take her to emergency care. He began to suffer from insomnia and back pain acquired in a past car accident, which became aggravated by the long drive back and forth from Los Angeles to his home in Morro Bay. More and more, respondent's problems at home made him more dependent on his office staff to run the day-to-day operation of his law firm. After birth, his baby had complications, and was in the Neonatal Intensive Care Unit for six or seven days. Also, his wife continued to experience illness. Respondent presented evidence from a psychologist, Dr. John Dobbs, that during 1998-1999, respondent's anxiety interfered with his cognitive processes and that his increasing fatigue rendered him temporarily less capable of maintaining supervision of his law practice. In addition, Dr. Dobbs testified with reasonable certainty that during the period of 1998 and 2000, respondent suffered from an adjustment disorder caused by his wife's increasing

[9]As mentioned earlier, respondent's misconduct lasted over four years, starting in February 1998 and ending in June 2002, with a violation of section 6090.5.

illness during her pregnancy. Dr. Dobbs testified that during his interview with respondent he detected no residual evidence of the disorder.

The hearing judge gave Dr. Dobb's testimony very little weight because his analysis was largely based on an interview with respondent four years after the misconduct occurred. Also, his disorder, according to respondent's witness, did not incapacitate respondent, and was a temporary condition. The hearing judge found it pertinent that although respondent's disorder was characterized as temporary, his misconduct was not. Finally, the hearing judge found the expert's testimony unreliable because the expert did not understand the scope of the charges against respondent.

3. Character Witness Testimony

Respondent offered the testimony of three character witnesses: his current employer, Dr. Sugarman, an attorney and physician concentrating in medical malpractice cases;[10] his sister-in-law and client, Pamela Scott; and a former client, Richard Gehring.

The hearing judge gave limited weight to respondent's character witnesses because they did not represent a broad range of references from the community and they did not know the nature and extent of the charges against him.

4. Cooperation with the State Bar

Respondent cooperated with the State Bar by admitting culpability in 20 counts of misconduct. The hearing judge did acknowledge this cooperation, but did not mention how she weighed it as a mitigating factor.

B. Aggravating Circumstances

The hearing judge found the following to be aggravating circumstances: multiple acts of wrongdoing, significant harm to the clients, lack of appreciation and failure to fully account to clients for wrongdoing.

[10]As summarized by the hearing judge, Sugarman testified that respondent is a very capable and reliable lawyer, that he relied on respondent extensively and that for the two years that respondent had worked for him, he had no problems with his performance.

1. Multiple Acts of Wrongdoing

Respondent stipulated to extensive misconduct beginning in January 1998, and ending in June 2002. Two of these acts occurred in April 2001 and June 2002, long after respondent's awareness that he failed to supervise his practice.

The hearing judge found that respondent's misconduct involved six[11] different client matters and various different acts, including failure to adequately supervise his office staff, failure to communicate with clients, and committing an act of moral turpitude.

2. Significant Harm to Clients

By February 1998, respondent's office had taken in $32,000 of client Oh's money. No work was done on Oh's case. Other than respondent's testimony that he had paid Oh $4,000, there has been no evidence that he has paid back any portion of the fees Oh paid to respondent's office.

Respondent alleged in a complaint he filed in the Los Angeles County Superior Court against his former law office employees that between 1998 and 1999 his employees failed to disburse and misappropriated more than $100,000 in client funds held in trust.

The hearing judge found that significant harm to clients was evidenced by this loss of over $100,000.

3. Lack of Appreciation and Failure to Fully Account to Clients for Wrongdoing

Respondent testified that shortly after shutting down his office, he sent letters to all of his clients explaining that his office had closed, to find another attorney, and to contact him to pick up their files. No other evidence was offered showing his efforts to find other assistance for the clients who had hired him to rectify wrongs done to them.

[11]We have treated as a single case the Lee accident claim and the accident claims of Lee and his five passengers.

In January 1999, $950 was received by respondent's office in the case of Yang. Yang did not receive this money until April 2003,[12] after the State Bar had advised respondent in November 2000 that an investigation had been opened in that matter. In January 1999, respondent's office received $5,000 in the case of the Ohs. In December 2001, the Ohs were paid $2,000 after respondent was notified by the State Bar in February 2001 that an investigation had been opened in this matter. Respondent's office received over $15,000 on behalf of the Lee case. Respondent testified that he had tried to pay this money to Lee, but that Lee refused. He further testified that he had $15,000 waiting in a trust account for Lee. No other evidence was offered to support this. In 1999, over $3,000 was received by respondent on behalf of the Miles matter. Miles was paid $2,465 in 2003, after respondent was notified that the State Bar had opened an investigation regarding this matter.

The hearing judge concluded that respondent failed to fully account to clients and lacked appreciation for his wrongdoing because he still owed client Oh $32,000, the Ohs $2,000, and client Miles $747.50.

III. DISCUSSION

A. Culpability

The parties stipulated to key facts and respondent's culpability in this matter. Neither respondent nor the State Bar dispute the hearing judge's findings or conclusions in this regard. After independent review of the record (Rules Proc. of State Bar, tit. II, State Bar Court Proceedings, rule 305(a); *In re Morse*, *supra*, 11 Cal.4th 184, 207), we find that there is clear and convincing evidence supporting all stipulated counts of misconduct.

On review, respondent's dispute is limited to the level of discipline recommended and the weight given to mitigating and aggravating circumstances. We now turn to these issues.

[12]Per the stipulation before us, Yang was given a closed account check in December 1999 for $950 out of the personal account of one of respondent's employees. Yang's settlement check had been received in January 1999.

B. Discipline

The hearing judge recommended a two-year stayed suspension, three years of probation, and an actual suspension of two years from the practice of law conditioned, inter alia, on respondent paying $41,497.50, plus interest, in restitution. Respondent urges that we recommend no more than an actual suspension of less than six months. The State Bar does not challenge the hearing judge's level of discipline.

The purposes of disciplinary proceedings and of sanctions are to protect the public, the courts and the legal profession. (*In re Silverton* (2005) 36 Cal.4th 81, 91 [quoting Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.3].)[13]

In determining the appropriate level of discipline, we first look to the standards for guidance. (*In re Morse, supra*, 11 Cal.4th 184, 206.) Under standard 1.6(a), when there are two or more applicable standards, and the sanctions differ, the more severe sanction applies. Of the applicable sanctions, the most severe is standard 2.6(a)[14], because it provides for either suspension or disbarment, depending on the gravity of the offense or the harm to the victim.[15]

1. Cases

To determine the appropriate discipline, decisional law provides further guidance. (*In re Morse, supra,* 11 Cal.4th 184, 207; *In re Brown* (1995) 12 Cal.4th 205, 217.) We focus on cases relied on by the hearing judge, cited by the parties, and those that contain similar factual situations. Those cases are: *In the Matter of Steele* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 708; *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119; *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411; *In the Matter of Malek-*

[13]All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

[14]Standard, 2.2(b) mandates at least a three-month actual suspension, standard 2.3 calls for either suspension or disbarment and standard 2.4(b) calls for either reproval or suspension.

[15]Standard 2.3 provides for a suspension or disbarment, depending upon harm to the victim *and* the magnitude of the act.

Yonan (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627; and *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403.

In *In the Matter of Steele, supra*, 3 Cal. State Bar Ct. Rptr. 708, Steele's misconduct occurred over the course of eight years. For more than two years, Steele allowed a non-attorney employee to control his office. Steele knew his employee was misrepresenting himself as an attorney but did nothing to stop it because the employee brought in business. He allowed the employee to become a signatory on his client trust account, and gave him all accounting duties. Even after his employee admitted to embezzling $25,000, Steele continued to employee him and did not report him to the authorities. In addition, Steele commingled his personal funds in the client trust account (at one point withdrawing approximately $50,000 dollars in personal funds for a deposit on a house) and was dishonest with insurers. His lack of candor at trial was an aggravating factor, and there was little evidence of mitigation. Steele was disbarred.

In *In the Matter of Sampson, supra*, 3 Cal. State Bar Ct. Rptr. 119, Sampson's misconduct occurred over two years. For one year, he delegated control of his office to a non-lawyer. This resulted in two cases where he failed to maintain client trust funds, failed to perform legal services competently, and recklessly disregarded his trust accounts. Sampson also failed to pay $25,163 in medical liens owed to a chiropractor. Although his actions were not construed as intentional misappropriation, he misused the settlement funds for his own purposes and recklessly disregarded his trust account obligations. In aggravation, Sampson committed multiple acts of misconduct, and significantly harmed the medical provider. Sampson's lack of discipline for 13 years prior to his misconduct counted as a mitigating factor. Sampson received a stayed suspension and a three-year probation, conditioned on actual suspension for eighteen months and until he fully paid the $25,163 owed to the medical provider.

In *In the Matter of Jones, supra*, 2 Cal. State Bar Ct. Rptr. 411, Jones opened a personal injury law office with a non-attorney, and from the outset they agreed that they would split attorney fees. For over two years, the non-attorney managed the office with no supervision, and

accepted hundreds of clients without Jones' knowledge. Jones never opened a trust account, never did an accounting of the general account that was in place, and in the two years the law office existed, was at the office a total of 10 to 15 times. Due to this arrangement, the non-attorney collected $2.15 million in settlements and collected $716,000 in attorney fees. At one point, Jones received reliable information that the non-attorney was using cappers, but did not immediately stop it. Jones discovered that the non-attorney was taking cases in Jones' name that he was unaware of and that medical providers had not been paid. He confiscated all of the files, reported the situation to the police and paid $57,000 of his own money to reimburse the delinquent payments. In aggravation, Jones committed multiple acts of wrongdoing, caused considerable harm to medical lienholders, and failed to observe minimal standards of professional responsibility for the operation of a law practice. In mitigation, Jones cooperated fully with the prosecution, paid $57,000 in restitution, and was involved in pro bono work. Jones was suspended for three years, stayed, on condition of a three-year probation, and an actual suspension of two years.

In *In the Matter of Malek-Yonan, supra*, 4 Cal. State Bar Ct. Rptr. 627, Malek-Yonan operated a high-volume personal injury practice. For a year and a half, without proper protective procedures in place, she delegated most of the control of her clients' funds to non-attorney employees. She never reviewed trust account documents, nor reconciled the trust accounts. This failure to safeguard client funds resulted in the embezzlement of $1.7 million from her and her clients She admitted that she had no idea how much of the money belonged to her in fees, belonged to the clients, or to the medical providers. Also, Malek-Yonan threatened a creditor that she would make him a part of a criminal investigation if he did not stop requesting money from her. Upon discovering the embezzlement, Malek-Yonan went through her files, determined who was still owed money, and paid them. In aggravation, Malek-Yonan committed multiple acts of wrongdoing. In mitigation, weight was given to her pro bono work, to her prompt effort to rectify her wrongs, her steps towards restitution, and some weight was given to her character

witnesses. Malek-Yonan was suspended for five years, suspension was stayed and she was put on probation for five years, with an actual suspension of 18 months.

In *In the Matter of Blum, supra*, 4 Cal. State Bar. Ct. Rptr. 403, Blum and her husband, an attorney, were partners in a law firm and co-signatories on their client trust account. Blum became engrossed in litigation, and her husband took over management of the law firm. Under her husband's direction, deposits were made to the incorrect account, some disbursements were made from the wrong account, and bookkeeping was chaotic. His management resulted in trust fund deficiencies. During his control of the office, Blum made no inquiries into the status of the financial situation, and her husband directed the staff not to tell her anything. As a result, in two of her cases, clients' funds were not maintained in the client trust account. In aggravation, Blum engaged in multiple acts of misconduct, and her conduct significantly harmed her clients. In mitigation, prior to her misconduct, Blum had 14 years of discipline-free practice. In addition, she was under extreme emotional difficulties during the time of misconduct, she stipulated to the facts and a mental examination by a State Bar-appointed psychiatrist, she made restitution to her harmed clients, and had character witnesses. Blum was suspended from the practice of law for three years, with execution of said suspension stayed and she was placed on probation for two years, conditioned on an actual suspension of 30 days from the practice of law.

In the case before us, respondent's misconduct occurred over a four-year time period. The breadth of it occurred because he relinquished all responsibility and control of his law practice to non-attorney employees. This mismanagement began and ended in two years. Respondent's subsequent two attempts to persuade his clients to withdraw their State Bar complaints against him occurred within two years after he closed his office. These actions are relevant to show that respondent lacked recognition of his wrongdoing. That said, we agree with the hearing judge that the nature and extent of respondent's misconduct most resembles that of Jones. Like Jones, for two years due to respondent's lack of supervision, a non-attorney had complete reign over respondent's practice and client funds. Jones set up a practice without a

client trust account in place. Respondent effectively did the same by not actively overseeing his client trust account(s) and waiting for "red flags". Jones' behavior was more serious than respondent's in that he intentionally split fees with a non-attorney, he had clues that capping was occurring but did not immediately stop it, and he was completely removed from the office, only appearing there 10-15 times in two years. Although respondent's management of his office was reckless, it was not intentional. Respondent never intended his employees to share in attorney fees, and never gave them authority to do so. But from the very beginning, respondent created a situation that inherently deprived his clients of adequate representation. He opened his practice 210 miles from his home, in a community where clients who spoke Korean depended on Shin, and he delegated all client contact and office operations to non-attorney employees, whom he failed to supervise. Additionally, after gaining control of his office, respondent failed to pay his clients the total amount owed to them and continued to violate ethical rules concerning the administration of justice.

C. Mitigating and Aggravating Circumstances

Respondent's misconduct is balanced with mitigating and aggravating factors. (*In re Morse, supra*, 11 Cal.4th 184, 206; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776.) Respondent must prove mitigating circumstances by clear and convincing evidence (std. 1.2(e)), and the State Bar must prove aggravating circumstances by clear and convincing evidence (std.1.2(b).). All circumstances will be looked at individually, but when evaluating their impact on discipline, we will judge them in their totality. (*McCray v. State Bar*, *supra*, 38 Cal.3d 257, 273.)

1. Mitigation

We agree with the hearing judge that respondent's lack of a prior record is not a mitigating factor. A lack of a prior record will qualify as a mitigating factor if there have been *many* years of practice without misconduct. (See std. 1.2(e)(i); see also *In re Naney* (1990) 51 Cal.3d 186, 196 [in practice only seven years prior to misconduct not a strong mitigating factor]; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 658 [seven and one-half years without misconduct

insufficient for mitigation]; *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [six years without prior discipline not strong mitigation]; *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831, 837 [six years prior to misconduct not enough]; *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 417 [six or seven years not enough time to be considered as substantial mitigation].) Respondent was in practice for approximately four and a half years prior to his misconduct. This does not constitute the years required to make the lack of prior discipline a mitigating factor.

Significant mitigating weight should be given to respondent's emotional difficulties. Standard 1.2(e)(iv) requires respondent to prove through expert testimony that his misconduct is directly attributable to physical and mental difficulties and provide clear and convincing evidence that he no longer suffers from these disabilities. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443 [summarizing std. 1.2(e)(iv)].) Also, domestic difficulties and marital problems have been considered mitigating, if they are extreme and directly responsible for the misconduct. (*In re Demergian* (1989) 48 Cal. 3d 284, 294; *In re Naney, supra*, 51 Cal.3d 186, 197; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 519.) Respondent testified that he was constantly pressured to go home to his wife, due to her debilitating pregnancy and the complications their baby suffered after birth. He also provided evidence from Dr. Dobbs that respondent suffered from a temporary cognitive disability caused by anxiety, directly attributable to his wife's health which caused him to be less capable of supervising his office. Dr. Dobbs also testified that respondent no longer suffered from this disorder. We believe that respondent met his burden of providing clear and convincing evidence that his emotional difficulties are a mitigating factor.

We agree with the hearing judge that weight should be given to respondent's cooperation with the State Bar. Significant mitigating weight is given where the respondent cooperates with the State Bar, admitting to facts and culpability. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079; *Pineda v. State Bar* (1989) 49 Cal.3d 753, 760; *In the Matter of Johnson* (Review

Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.) Respondent stipulated to a majority of the background facts and admitted culpability to 20 out of 30 charged counts of misconduct. This deserves significant weight.[16]

2. Aggravation

We agree with the hearing judge that respondent engaged in multiple acts of wrongdoing. Respondent did nothing to insure that the interests of his clients were protected for two years, resulting in five different cases of misconduct and multiple injuries to clients. Under standard 1.2(b)(ii), repeated acts of similar misconduct are properly considered an aggravating circumstance. (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149-1150.) Although we agree that, under standard 1.2(b)(iv), respondent's misconduct caused significant harm, we do not base this on respondent's allegations against his former employees for misappropriating $100,000. Instead, we find that the $28,000 respondent still owes client Oh has caused Oh significant harm.[17]

In addition, we find respondent's failure to rectify or atone for his misconduct, as described in standard 1.2(b)(v), to be a significant aggravating circumstance. "'An attorney's failure to accept responsibility for, or to understand the wrongfulness of, her actions may be an aggravating factor unless it is based on an honest belief in innocence.' [Citation.]" (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380.) Specifically, evading responsibility for the consequences of misconduct is considered aggravating under the standard. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647.) Respondent admitted that if he had been more involved in his practice, the harm to his clients would not have occurred. If respondent realized that his inattention caused clients harm, then his attempts to persuade clients to drop discipline charges against him suggest a lack of responsibility for the

[16]Respondent argues that he has been discipline free for five years and that this should be considered a mitigating factor. The record shows that he has been discipline free for three years, his last violation occurring in 2002.

[17]Respondent testified that he paid client Oh $4,000 out of the $32,000 owed to him.

harm caused. Additionally, throughout this disciplinary proceeding, respondent continued to deny he owes the attorney fees paid to him by Oh.

IV. CONCLUSION

Although we have given more weight to mitigating circumstances than the hearing judge, we agree that they are still outweighed by the evidence of serious aggravating circumstances.

When we balance all relevant factors, as noted *ante*, we reach the same essential conclusion as the hearing judge; that this case most resembles *In the Matter of Jones*, *supra,* 2 Cal. State Bar Ct. Rptr. 411.

Although we have weighed respondent's arguments in support of lesser discipline, the weight of aggravating factors, including harm to clients, coupled with the potential and probable likelihood of far greater harm than found in just these five matters before us, fails to justify less discipline than in *Jones*.

V. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent Robert H. Sack be suspended from the practice of law for two years, that execution of such suspension be stayed and that respondent be placed on probation for a period of three years on the following conditions: that he be actually suspended for two years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, and until he makes restitution to: (1) James H. Oh, in the amount of $32,000 plus 10% interest per annum from January 21, 1998; (2) Chong Oh and Mina Oh in the amount of $3,000 plus 10% interest per annum from January 19, 1999; (3) Chul Lee in the amount of $3,750 plus 10% interest per annum from August 27, 1999; (4) Chul Lee, Hwa Lee, Sina Lee, Doo Lee, Yoon Sun Lee, and Mi Nah Lee in the amount of $2,000 each plus 10% interest per annum from March 23, 1999, and (5) Sachiko Miles in the amount of $747.50 plus 10% interest per annum from May 5, 1999. We recommend that respondent be ordered to pay each of these restitution amounts to the

Client Security Fund to the extent of any payment from the fund to the individuals named above, plus interest and costs, in accordance with Business and Professions Code section 6140.5, and that he furnish satisfactory proof of all restitution payments to the Office of Probation of the State Bar. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

We also recommend that during the period of his probation, respondent shall comply with the following condition of probation:

If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent shall file with each required report a certificate from respondent and a certified public accountant or other financial professional approved by the State Bar's Office of Probation in Los Angeles, certifying that: respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Client's Funds Account"; and respondent has kept and maintained the following:

i. a written ledger for each client on whose behalf funds are held that sets forth:
    1. the name of such client,
    2. the date, amount, and source of all funds received on behalf of such client,
    3. the date, amount, payee and purpose of each disbursement made on behalf of such client, and
    4. the current balance for such client;

ii. a written journal for each client trust fund account that sets forth:
    1. the name of such account,
    2. the date, amount, and client affected by each debit and credit, and
    3. the current balance in such account.

iii.. all bank statements and canceled checks for each client trust account; and

iv. each monthly reconciliation (balancing) of (i), (ii), and (iii) above, and if there are any differences between the monthly total balances reflected in (i), (ii), and (iii) above, the reason for the differences, and that respondent has maintained a written journal of securities or other properties held for a client that specifies:

1. each item of security and property held;
2. the person on whose behalf the security or property is held;
3. the date of receipt of the security or property;
4. the date of distribution of the security or property; and
5. the person to whom the security or property was distributed.

If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of perjury in the report filed with the State Bar's Office of Probation for that reporting period. In this circumstance, respondent need not file the accountant's certificate described above.

The requirements of this condition are in addition to those set forth in rule 4-100, Rules of Professional Conduct.

We further recommend that respondent comply with the remaining conditions of probation, numbered 2 through 6, adopted by the hearing judge in her decision, except that all references to the Probation Unit shall be deemed references to the State Bar's Office of Probation. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for three years will be satisfied, and the stayed portion of suspension will be terminated.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar

Examiners during the period of his actual suspension and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

We further recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in paragraphs (a) and (c) of that rule within 30 and 40 calendar 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 Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

STOVITZ, P. J.

We concur:

EPSTEIN, J.

WATAI., J.