PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

FILED FEBRUARY 9, 2006

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **ALAN SCHUCHMAN**, A Member of the State Bar.	))))))	**00-O-13784** **OPINION ON REVIEW**

The State Bar and respondent Alan Schuchman both seek our review of the hearing judge's recommendation in a one-client matter that respondent be actually suspended for one year upon a finding of misappropriation of more than $100,000 (violation of section 6106 of the Business and Professions Code) and failure to inform a client of significant developments (violation of section 6068, subdivision (m) of the Business and Professions Code). The State Bar contends that the one-year actual suspension is insufficient and that disbarment would be appropriate based on the fact that the mitigating factors are not as compelling as found by the hearing judge. On the other hand, respondent contends that the one-year actual suspension is excessive and that an appropriate degree of discipline would be not more than a 90-day suspension because the hearing judge did not give sufficient weight to the mitigating factors.

Upon our independent review of the evidence (*In re Morse* (1995) 11 Cal.4th 184, 207), we find as additional aggravation that respondent engaged in multiple acts of misconduct and that his prior disciplinary matter bore some similarity to the present misconduct. We therefore recommend that respondent be actually suspended for two years, as part of a stayed suspension, and that he be required to demonstrate a satisfactory showing under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, prior to resuming the practice of law.

BACKGROUND

Respondent received his Juris Doctor degree from Brooklyn Law School in 1975. After passing the New York Bar exam, he practiced in New York until 1977 when he moved to California. He was admitted to the California Bar in 1978. His primary areas of law practice have been in personal injury, medical malpractice and products liability cases.

In 1979, respondent married Tina. They had a daughter, Lauren, in 1980, a son, Ethan, in 1985, and another son, Aaron, in 1991. At age three, Ethan was diagnosed with Tourette's Syndrome, then Asperger Syndrome, an autistic diagnosis. At age four, Aaron was also diagnosed with autistic features. They both required much care and attention and needed third-party help daily at a cost of approximately $2,000 a month.

Tina and respondent, both practicing attorneys, separated in 1992 and divorced in 1994. However, they have shared responsibility for the care of their children, physically and financially, through the years without problems.

In 1999, Lauren, then 21 years of age, suffered from anorexia, and respondent had to take her out of college and get her psychiatric help. Also in 1999, Tina developed a seizure disorder which hindered her law practice, and she was unable to carry her burden of child support.

By 1999, respondent was at least $68,519.58 in arrears in tax payments to the California Franchise Tax Board (FTB) for the years 1991 to 1998. Respondent was the sole obligor since Tina's 1991 to 1992 tax arrearage had been discharged in bankruptcy. Respondent worked out a settlement with the FTB wherein he would pay $500 a month but was unable to meet that payment schedule, and the FTB then deducted $500 a month from respondent's bank account. Respondent also faced $32,884 in federal tax liens. Respondent found himself unable to meet his daily child care expenses, the yearly college tuition ($24,000) for his daughter Lauren, and his business expenses.

FACTS

Respondent was hired by Douglas Thomas (Thomas) prior to September 1998, to represent him in a serious personal injury matter. The fee agreement entered into provided that respondent would receive a 33 1/3 percent contingency fee if Thomas's case settled before a lawsuit was filed and a 40 percent contingency fee if the case settled after a lawsuit was filed. Respondent filed a lawsuit against multiple defendants in this matter prior to September 1998. Subsequently, Thomas moved to San Leandro in northern California, leaving a telephone number and an address by which respondent communicated with him. A deposition of Thomas was taken during this time, for which Thomas traveled to Los Angeles. However, soon thereafter, Thomas did not answer respondent's telephone messages. Respondent sent Thomas a letter requesting that Thomas contact him. Respondent received a call from a deputy sheriff from a northern California county, either Alameda or San Francisco, inquiring whether he was trying to locate Thomas. The sheriff told him that Thomas was in custody, arrested for carjacking and kidnapping; that he was "in transit"; and that respondent could not reach him, but the sheriff would get the letter to him.

In December 1998, respondent, in mediation, settled Thomas's claim against one of the defendants for $15,000. He deposited the funds into his client trust account (CTA) at the Home Savings Bank after deducting his fee. Thomas was not at the mediation and was unaware of the settlement.

In April 1999, at a second mediation, respondent settled Thomas's claim against two other defendants for the sum of $200,000 and dismissed Thomas's personal injury case against all other defendants. Again, Thomas was not at the mediation and was unaware of the settlement. Respondent deposited the settlement funds in his CTA after deducting his fee. He

determined that Thomas's share of the settlement was $107,569.15[1] which was to be maintained in his CTA.

Respondent explained that he was acting under the authorization of his retainer agreement, which provided that if the client didn't contact him within 30 days, he had authority to settle the case, put the money in the CTA, pay the liens and attorney fees, and keep the money in the trust account for the client. The agreement also provided for a power of attorney, giving respondent authority to endorse and sign documents on behalf of his client in a situation such as this where the client was no longer available. The retainer agreement was not put into evidence.

The CTA balance in the Washington Mutual Bank fell below $107,569.15 on June 30, 1999, to $98,218.24; on July 31, 1999, it fell to $53,455.43; and on August 10, 1999, it fell to $40,974.23. There were at least 14 debits to the account. On August 11, 1999, $40,974.23 was withdrawn and the CTA was closed. Respondent stipulated that all of the funds were used for his own purposes.

On October 8, 1999, a new CTA was opened at the City National Bank in the amount of $980,000 from the Langford case, a separate and unrelated matter. Respondent received a fee of approximately $200,000 after paying referral fees and the attorney who worked with him.

According to respondent, it was not until December 1999 that he learned that Thomas was incarcerated in Pelican Bay State Prison.[2] He visited Thomas and informed him of the settlement of his case. However, an accounting was not given to Thomas at this time as respondent was awaiting resolution of a lien. Thomas told respondent that he knew of the settlement because his sister, Jo Hayward, had been contacted by the State Bar. Thomas

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[1]This amount represents the settlement proceeds of $215,000 less a 40 percent contingency fee of $86,000 and reimbursed costs of $21,430.85.

[2]We are not privy as to how respondent learned of the whereabouts of Thomas or why it took so long. We only note that respondent went to see Thomas after he received the Langford fees.

requested that respondent send him $500 and that a check in the amount of $100,000 be sent to his sister. Respondent requested written authorization from Thomas for distribution to his sister. According to respondent, he returned home and wrote a $100,000 check from the City National Bank account to Jo Hayward, dated December 29, 1999, and waited for the letter of authorization. He testified that he received this undated letter in April 2000, at which time respondent sent the check, dated December 29, 1999, to Jo Hayward in Oakland, California. Respondent testified that he again visited Thomas at Pelican Bay after April 2000 and prior to June 2000,[3] at which time he presented his accounting of the monies owed to Thomas. Subsequently, on July 14, 2000, he sent Jo Hayward another check for $20,000 in full payment (and more) for a total of $120,500.

The State Bar filed a six-count Notice of Disciplinary Charges on May 27, 2003, but dismissed counts three through six prior to trial.

On March 16, 2004, the State Bar and respondent entered into a stipulation as to the facts, and the State Bar submitted the issue of culpability on the stipulation.

CONCLUSIONS OF THE HEARING JUDGE

As to Count One, the hearing judge found respondent in violation of section 6106[4] of the Business and Professions Code, for the willful misappropriation of Thomas's $107,569.15, conduct involving moral turpitude. We agree. Respondent stipulated that all of Thomas's money was withdrawn and used for his own purposes. "The mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held

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[3]The parties stipulated that Thomas was incarcerated at Pelican Bay State Prison from about September 1998 through about December 1999. We have found no clarification in the record as to the correct dates of Thomas's incarceration period or the correct dates of respondent's visits to Thomas.

[4]Unless otherwise noted, all further references to section are to the Business and Professions Code.

in trust, supports a conclusion of misappropriation." [Citations.] (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474.) "An attorney's misconduct need not be in bad faith to be willful; rather, all that is required is 'a general purpose or willingness to commit the act or permit the omission.' [Citation.]" (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.) Here, the misappropriation was intentional. The finding of intentional misappropriation supports the conclusion of moral turpitude, even in the absence of evil intent. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020.)

As to Count Two, the hearing judge found respondent in violation of section 6068, subdivision (m), failure to keep Thomas reasonably informed of significant developments, finding that his effort or lack of effort to contact Thomas was unreasonable and insufficient. We agree with this conclusion. It was clear that respondent had no contact with Thomas since before the mediation in December 1998 until December 1999. Respondent testified that he called Thomas several times and wrote one letter to him before mediation, but that he received no response from him. We have no record of any effort by respondent to contact Thomas after mediation and receipt of the settlement funds except his testimony that he spoke to the deputy sheriff six or seven times without ever learning the whereabouts of Thomas. As we found in *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 643, "The fact that this failure to communicate was the result of respondent's loss of Sampson's file does not render him any less culpable [of violation of section 6068, subdivision (m)]."

AGGRAVATING CIRCUMSTANCES

The hearing judge found in aggravation that respondent has a prior record of discipline, which resulted in a private reproval. On November 8, 1996, respondent stipulated to the following:

Respondent settled a case for $7,000 and failed to deposit funds into his client trust account, failed to deliver funds in his possession to a client, and threatened disciplinary charges to obtain an advantage in a civil dispute. (Rules Prof. Conduct, rule 3-110(A), rule 4-100(A),

rule 4-100(B)(4) and rule 5-100(A).)[5] Respondent also failed to inform his client, from about November 1992 to January 1993, that a check had been received from the debtor in violation of section 6068, subdivision(m). However, no actual harm was found since there was no misappropriation of the funds, although respondent unreasonably held the uncashed check without depositing it into the CTA in an effort to resolve a fee disagreement.

No other aggravating factors were found by the hearing judge.

MITIGATING CIRCUMSTANCES

The following mitigating circumstances were found by the hearing judge:

1. Respondent had extreme family problems and financial difficulties:

a. Respondent's older son was diagnosed with Asperger's Disorder at age three, which disease caused significant impairment in social, occupational or other areas of functioning. His younger son was diagnosed with Attention Deficit Disorder with autistic-like behavior at age four. They both required constant supervision, necessitating third-party help at an approximate cost of $2,000 a month. They also required medical attention and medication. Respondent and his ex-wife, Tina, shared the physical and financial responsibility of caring for the sons.

b. In 1998 to 1999, respondent's daughter developed anorexia, and respondent brought her home from college to start therapy and treatment, causing further financial burden.

c. In 1999, Tina suffered from a seizure disorder, which hindered her ability to continue to practice law full-time and her ability to contribute physically and financially to the care of her sons. The physical and financial care of the three children primarily fell to respondent.

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[5]Unless otherwise noted, all further references to rule are to the Rules of Professional Conduct.

d. Respondent and Tina owed state and federal taxes for the years 1991 to 1992, and since Tina declared bankruptcy, the tax burden fell on respondent, along with the taxes for the years 1991 through 1998.

e. In 1999, respondent was unable to recover business and litigation costs of $166,753.

f. Respondent lost his home in foreclosure and was renting a home for $2,000 a month.

g. Respondent testified that in 1999 his financial problems intensified but were alleviated by the $80,000 fee received in the Thomas case in April. He further testified that between April 1999 to October 1999 his financial situation became desperate, and he felt he could not meet his financial obligations.

2. Respondent presented as character witnesses seven attorneys, his ex-wife, his rabbi, and a certified public accountant, all of whom have known him for many years. They testified to his honesty, trustworthiness and good moral character. They were all aware of the extent of respondent's misconduct, finding his misconduct to be aberrational and an exception to his normal course of conduct. They testified to his expression of remorse and shame, and all expressed doubt that he would do something like this again. They also attested to his devotion to his children. The hearing judge found that respondent presented an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities who were aware of the full extent of his misconduct.

3. Respondent's rabbi testified that respondent has volunteered every Sunday for approximately five years at the temple's food pantry, picking up food, bagging it, and distributing it to about 100 families. He testified that, in spite of respondent's family and financial problems, respondent has remained committed to community service.

Respondent testified that he assisted young lawyers who are just entering law practice. This testimony was corroborated by one of his witnesses. He also sponsored Beverly Hills High School students to work in his office in a work study program and contributes financially to various charities[6] whenever he has funds.

4. Respondent made restitution to Thomas voluntarily before commencement of disciplinary proceedings. The hearing judge found that this act of restitution confirmed respondent's position that he only intended to "borrow" the money until the Langford case settled.[7] (*Waysman v. State Bar* (1986) 41 Cal.3d 452, 458; *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366.)

5. Respondent cooperated with the State Bar by entering into a stipulation prior to trial, thus allowing the State Bar to submit the matter of culpability based on the stipulation.

DISCUSSION

The State Bar argues that the hearing judge erred in not finding multiple acts of misconduct as another ground of aggravation, contending that the misappropriation of the funds was not a single act but fourteen transactions over a six-week period. Respondent testified that he invaded the trust account when his bills came and that he didn't take the money unless he needed it to meet his expenses. In other words, every withdrawal from the trust account was made knowingly and intentionally and within a period of three to four months. With each withdrawal, of which there were at least 14, respondent had time enough to reflect on his

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[6]The State Bar directs our attention to respondent's 1999 tax return showing contributions of $6,398 to various charities, i.e., Metivta, Wilshire Boulevard Temple, and Diversity in Law Foundation.

[7]Respondent expected the Langford case to settle but had to go to trial, which took some time. Langford prevailed and received a judgment of $980,000, of which $392,000 was respondent's attorney fees.

actions and consider the consequences. We agree that the separate misappropriations of funds constitute multiple acts of misconduct in aggravation.

The State Bar further argues that greater weight should be given in aggravation to the prior misconduct since the prior violation was similar in nature to the present misconduct and is an indication that respondent is unable to conform to ethical norms. Although the prior misconduct did not demonstrate misappropriation, respondent withheld the client's uncashed check without depositing it in the CTA in an attempt to force a resolution of a fee disagreement, thus purposely delaying the delivery of funds to the client. We find that the charge of failure to deliver funds to which the client is entitled is similar in nature to the misconduct in the present case and give it more weight in aggravation than did the hearing judge. Moreover, respondent's prior discipline should have served to sensitize him to the importance of strict adherence to the trust account rules.

The State Bar challenges respondent's claim of financial difficulty. It has been held that since financial difficulties exist in virtually all misappropriation cases, we should consider as mitigation only financial difficulties that " 'are extreme and result from circumstances that are not reasonably foreseeable or that are beyond the attorney's control.' [Citation.]" (*Grim v. State Bar* (1991) 53 Cal.3d 21, 31.) Respondent's testimony of his difficulty began with the "ongoing" problems of his sons, medically and financially. He managed the finances with the help of Tina until the unexpected onset of Tina's seizure disorder in 1999 and Lauren's development of anorexia in 1998 to 1999. Respondent described his situation at that point as a "desperate" situation. We agree with the hearing judge that the unexpected family problems, corroborated by his ex-wife only, established compelling mitigating circumstances. While the State Bar correctly points to the fact that respondent has not provided any specific evidence on how his financial situation changed from "not desperate" on April 6, 1999, when he received $80,000 in fees, to "desperate" between April and August 1999, which led to the misappropriation of $107,000, we

nevertheless have no evidence contradicting respondent's testimony that he was seriously concerned that he would not be able to care for his children and was losing sleep over his "desperate" situation.

The State Bar also cites the nearly $2,400 in interest income recorded on his 1999 federal income tax return. Respondent testified at trial that the interest was derived from his personal savings account from prior years. However, on review, the record was augmented to show that the interest was derived from the CTA in which the $980,000 from the Langford case was deposited and which interest inured to the State Bar. Respondent's accountant admitted his error in recording the interest on respondent's tax return as income. The State Bar now argues that the interest was substantial and therefore respondent should have ensured that the interest was paid to his client and that the failure to do this was a breach of his fiduciary duty. We decline to discuss this further since this charge was not brought up or discussed below in any way.

The State Bar also challenges respondent's claim of extreme financial difficulties by pointing to the $6,398 in contributions made in 1999 to various charities. Since the record does not reveal the dates the contributions were made, we cannot conclude, as did the State Bar, that respondent made the contributions during the period he claimed he was in a desperate financial condition. We note only that the Thomas fee was received in April 1999 and the Langford fee was received in October 1999, and respondent testified that he made contributions whenever he had any money.

The State Bar argues that the character witnesses were not aware of the full extent of respondent's conduct because they were given a copy of the Stipulation of his prior disciplinary proceeding without the terms and conditions of his probation attached for review. They were also given a "Statement of Mitigation and Circumstances" in which there was a statement that the last withdrawal from the trust account was made to protect the funds from levy by the government. We find that the witnesses were aware that funds were taken from the trust account

for respondent's use without notification to the client, but we are unable to discern or speculate that the witnesses were misled and "might" have expressed less positive opinions of respondent's good character had they read the terms and conditions of the prior probation or been told that the misappropriated funds were used for respondent's own purposes. The witnesses did not condone or excuse respondent's misconduct but expressed that his misconduct was aberrational and stated that they felt this conduct would not be repeated.

The State Bar contends that respondent made restitution under threat of disciplinary proceedings and that fact should not be given any mitigating weight. Respondent testified that when he met with Thomas in December 1999 and informed him of the settlement and of the approximate amount to which Thomas was entitled, Thomas told him that he was aware of the settlement because his sister had been contacted by the State Bar. However, we find from the record that the first mention of the State Bar contacting respondent was in January 2000. There is no clear evidence that the restitution was made under threat of disciplinary proceedings.

DISCIPLINE

The primary issue on this review is the appropriate degree of discipline to be recommended. The discipline recommended by the hearing judge is a two-year stayed suspension and a two-year probation conditioned on a one-year actual suspension. The State Bar argues that the mitigating circumstances are not as compelling as the hearing judge found and that the appropriate discipline is disbarment, based on the misappropriation of over $107,000 for personal use. Respondent argues that the mitigating circumstances are more compelling than determined by the hearing judge and that the appropriate discipline is 90 days' actual suspension.

To arrive at a proper level of discipline, we must independently review all of the record consistent with the purpose of disciplinary proceedings, balancing the relevant factors including mitigating and aggravating circumstances. (Rules Proc. of State Bar, rule 305; *In re Morse*,

supra, 11 Cal.4th at p. 206.) The Standards for Attorney Sanctions for Professional Misconduct[8] provide guidance for our consideration. (*Ibid.*) Under standard 1.3, the primary purposes of discipline are to protect the public, courts, and legal profession; to maintain high professional standards by attorneys; and to preserve public confidence in the legal profession. Because the misconduct here involved willful misappropriation, the most relevant standard is 2.2(a). Standard 2.2(a) calls for disbarment of an attorney who has wilfully misappropriated trust funds unless the amount involved is insignificantly small or the most compelling mitigating circumstances clearly predominate. It states that for such compelling mitigating circumstances, disbarment shall not be imposed, but the discipline shall not be less than a one-year actual suspension from the practice of law.[9] Standard 2.4(b) provides that wilfully failing to communicate with a client shall result in reproval or suspension depending upon the extent of the misconduct and the harm to the client. The Supreme Court has established that the standards provide a guideline and not a mandate that the discipline be imposed. (*Boehme v. State Bar* (1988) 47 Cal.3d 448, 454; *Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550.) We also look to similar proceedings with comparable case law. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

We note that respondent has been found culpable of willful misappropriation of more than $100,000 and of failure to inform his client of significant developments, i.e., mediation and settlement. The misappropriation occurred between June 30, 1999, and August 11, 1999. Restitution was voluntarily made less than nine months later in April 2000, upon receipt of

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[8]Unless otherwise noted, all further references to standards are to the Standards for Attorney Sanctions for Professional Misconduct.

[9]While we recognize that the Supreme Court has previously expressed dissatisfaction with the requirement in standard 2.2(a) of a minimum one-year actual suspension for misappropriation of trust funds (see *In re Brown* (1995) 12 Cal.4th 205, 221), we note that this case involves willful misappropriation of a substantial amount of client funds, and therefore this case would not appear to raise the concerns expressed in *Brown.*

authorization from Thomas and before any disciplinary proceedings. "Misappropriation of a client's property is a gross violation of general morality likely to undermine public confidence in the legal profession and therefore merits severe punishment. [Citations.]" (*Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 450.) Misappropriation generally warrants disbarment unless "clearly extenuating circumstances" are present. (*Waysman v. State Bar, supra*, 41 Cal.3d at p.457.)

In recommending the one-year suspension, the hearing judge relied on *Lawhorn v. State Bar, supra*, 43 Cal.3d 1357 (*Lawhorn*), *Boehme v. State Bar, supra,* 47 Cal.3d 448 (*Boehme*), *Greenbaum v. State Bar, supra*, 15 Cal.3d 893 (*Greenbaum*), *Porter v. State Bar* (1990) 52 Cal.3d 518 (*Porter*), and *In re Mudge* (1982) 33 Cal.3d 152 (*Mudge*).

In *Lawhorn*, *Boehme*, *Greenbaum* and *Porter*, the attorneys misappropriated client funds in amounts ranging from $1,355.75 to $15,000, and those cases involved dishonesty and deceit in varying degrees. Extenuating circumstances were found in each case, e.g., difficult marital problems and serious health problems leading to extreme emotional difficulties directly responsible for the misconduct. The Supreme Court imposed discipline ranging from three months' to two years' actual suspension, finding that the public was adequately protected by suspension rather than disbarment. In *Mudge*, the attorney misappropriated $387,200 from two estates over a period of four and a half years. However, extenuating circumstances in mitigation were found, along with full restitution and incarceration of the attorney for eight months. The Supreme Court imposed a three-year actual suspension.

The State Bar, on the other hand, relied on *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 (*Spaith*), and *Grim v. State Bar* (1991) 53 Cal.3d 21 (*Grim*). Spaith misappropriated approximately $40,000, exercised deceit and misled his client as to the settlement funds for fifteen months, and only then made full restitution, after threat of complaint to the State Bar. We found that his financial and emotional problems were ongoing and not extraordinary or unforeseeable, and were not the cause of the misappropriation. Finding that the

aggravating circumstances far outweighed the mitigating circumstances, the Supreme Court imposed disbarment on our recommendation.

In *Grim*, the attorney misappropriated over $5,500. The Supreme Court found that the attorney intended permanently to deprive his client of her funds and repaid the funds after three years only under pressure of disciplinary proceedings. The court also found that the attorney's financial difficulties were neither extreme nor unforeseeable and that the aggravating circumstances far outweighed the mitigating circumstances. Disbarment was imposed.

The gravamen of this case is respondent's misappropriation of $107,000, a substantial amount, over a six-week period, from June 30, 1999, to August 10, 1999, when the account was closed with a balance of $40,974.23. We found serious unforeseen financial problems. Nevertheless, respondent made full restitution within eight to nine months after his misconduct and before any disciplinary proceeding commenced. We note that dishonesty, deceit and concealment were not a part of his misconduct, nor did we find a venal intent permanently to deprive Thomas of his funds as found in other misappropriation cases. Of course, lack of evil intent does not immunize an attorney's conduct from discipline. (*Murray v. State Bar* (1985) 40 Cal.3d 575, 582.) On the other hand, an attorney who takes clients' funds intending to keep them permanently and answers clients' 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. Here, respondent acted willfully but restitution was made as soon as he could. We have found more aggravating circumstances than did the hearing judge, but we find that the mitigating circumstances still greatly outweigh the aggravating circumstances. Respondent's character references are impressive, and so is his extensive community service. When we consider all of the relevant circumstances of this case, we conclude that the level of misconduct in this case falls between that in *Boehme* and that in *Mudge*.

Although the State Bar argues that disbarment is warranted in view of the substantial amount appropriated and respondent's prior discipline, we do not believe the facts of this case or the decisional law compel such severe discipline. Rather, we recommend increased discipline of two years' actual suspension as sufficient to protect the public, the courts and the profession. "Examination of cases in which this court has not disbarred an attorney found to have willfully misappropriated client funds reveals a variety of 'extenuating circumstances' that we have deemed sufficient to warrant a lesser punishment. In some cases, the attorney has presented evidence of compelling mitigating circumstances relating to the attorney's background or character or to unusual difficulties the attorney was experiencing at the time of the misconduct . . . ." *(Edwards v. State Bar* (1990) 52 Cal.3d 28, 37-38.) Indeed, there is considerable precedent supporting our recommendation of actual suspension of two years under circumstances similar to those that have occurred in this case.

For example, in the case of *Most v. State Bar* (1967) 67 Cal.2d 589, the attorney failed to report for over four months his receipt of a settlement check of more than $30,000, and only admitted to receiving the check when his client told him that the insurance company had notified the client of the payment. The attorney unilaterally took his legal fees from the insurance proceeds in a client trust account. He also refused to account for the funds in spite of repeated requests by his client. The Supreme Court made no findings of aggravating or mitigating circumstances, but nevertheless imposed two years' actual suspension, finding the attorney culpable of intentional misappropriation of over $20,000 held in trust for the client. (*Id.* at pp. 598-599.)

In the case of *Doyle v. State Bar* (1982) 32 Cal.3d 12, the Supreme Court imposed two years' actual suspension when the attorney commingled client funds in violation of the trust accounting rules, and also deliberately withheld a $32,000 insurance settlement for about 10 months despite repeated demands by the client. (*Id.* at pp. 17.) Respondent disbursed the funds

only after the client filed a complaint with the State Bar. (*Id.* at p. 24.) The Supreme Court thus found Doyle misappropriated more than $20,000 in settlement proceeds that he held in trust for a client for his personal use. Doyle had a prior disciplinary record for similar misconduct for which he received a public reproval. (*Ibid.*) In aggravation, the court found he had testified falsely at his hearing. But there were also mitigating circumstances in *Doyle* much like the instant matter in that the attorney suffered severe financial and family problems during the time period in question and, most importantly, he remitted the misappropriated funds before the disciplinary proceeding actually began. (*Ibid.*)

We also consider the case of *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, wherein a two-year actual suspension was prescribed. In *Hertz*, the attorney was found culpable of disbursing without authorization $15,000, which was to be held in trust for his client and the client's ex-spouse. The attorney disbursed $10,000 to the client for paying community debts, and he took $5,000 for his own fees, without the knowledge or consent of the ex-spouse or her attorney. (*Id.* at p. 462.) The attorney later replaced the funds he had withdrawn as his fee. *Hertz* involved a single-client matter, but there was protracted deceit perpetrated against opposing counsel and the courts as to the whereabouts of the funds. There was also substantial mitigation evidence including remorse for his wrongdoing and six character witnesses (including three judges) who attested to his high standing in the community, his diligence, and his substantial community service and pro bono activities. (*Id.* at pp. 467, 471.)

Finally, in *In re Mudge,* as discussed ante, the attorney had intentionally misappropriated $387,000 from two separate estates over a four and one-half year period. At the time of the misconduct, the attorney was experiencing financial and domestic problems, and he had no prior discipline and an outstanding reputation. (*Ibid.*) The attorney also participated in a number of community activities and made full restitution. (*Ibid.*) The Supreme Court determined that three years' actual suspension was warranted because the misappropriation involved "large sums of

money over a lengthy period of time." Moreover, the attorney compounded his misconduct by filing a false document with the court as part of a coverup.

In the instant case, respondent's misconduct was very serious involving a substantial amount of money, but he voluntarily repaid the money he misappropriated as soon as he was able and within eight to nine months. A key factor in our decision is the evidence of respondent's severe family problems with attendant financial consequences. Given the breadth and length of these problems, we find this case presents compelling mitigation. In light of the decisional law, we agree with the hearing judge that disbarment is excessive, harsh and not warranted, but an increased actual suspension of two years is appropriate. The recommendation is within the guidance of standard 2.2 and also appropriate in light of case law.

RECOMMENDATION

We recommend that respondent Alan Schuchman be suspended from the practice of law in the State of California for three years, that execution of that suspension be stayed, and that respondent be placed on probation for three years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first two years of probation and until respondent shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct;

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.

3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in

which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

6. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end 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 suspension will be terminated.

PROFESSIONAL RESPONSIBILITY EXAMINATION

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.

RULE 955

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.

COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

WATAI, J.

We concur:

STOVITZ, P. J.

EPSTEIN, J.