

PUBLIC MATTER - NOT DESIGNATED FOR PUBLICATION

FILED FEBRUARY 4, 2009

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of)

THEODORE CARL LUEBKEMAN)

A Member of the State Bar.)
_____)

05-O-04973

OPINION ON REVIEW

The State Bar requests our review of the hearing judge's decision recommending that respondent receive a one-year stayed suspension on conditions of probation including a 60-day actual suspension for trust account violations, including misappropriation of \$2,200 of client funds. The State Bar contends that the appropriate level of discipline for respondent's misconduct is the one-year actual suspension pursuant to standard 2.2(a) of the Standards for Attorney Sanctions for Professional Misconduct.¹

We review the record de novo (*In re Morse* (1995) 11 Cal.4th 184, 207), and we adopt most of the hearing judge's factual findings and culpability conclusions, but find fewer factors in mitigation. Based upon all relevant circumstances, as well as the standards and guiding case law, we conclude that the hearing judge's discipline recommendation is insufficient to protect the public, the courts and the profession, and to preserve public confidence in the legal profession. Thus, we recommend that respondent be suspended from the practice of law for two years, that the suspension be stayed and that respondent be placed on probation for two years on conditions including a six-month period of actual suspension.

¹All further references to "standards" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

I. PROCEDURAL HISTORY

On June 5, 2006, the State Bar filed a Notice of Disciplinary Charges charging respondent with three counts of misconduct. Respondent filed an amended response on August 25, 2006. On December 21, 2006, respondent and the State Bar filed a stipulation as to facts and conclusions of law. Respondent stipulated to violating the following: 1) rule 4-100(A) of the Rules of Professional Conduct² for failing to maintain client funds in a trust account; 2) Business and Professions Code³ section 6106 for misappropriating at least \$2,200; and 3) rule 4-100(A) for commingling his personal funds with client funds. The stipulation also contains circumstances in mitigation and aggravation. The mitigating circumstances included respondent's candor and cooperation in entering into a stipulation, his 24 years of practice with no prior discipline, and an acknowledgment that respondent's client received the disbursement from the client trust account because the bank honored the insufficiently funded (NSF) check issued by respondent. The aggravating circumstances included multiple acts of misconduct and an uncharged violation of rule 4-100(B)(3).

Since the parties stipulated to the findings of fact and conclusions of law, including issues of mitigation and aggravation, the hearing judge set a briefing schedule on the appropriate level of discipline. When respondent filed his February 20, 2007 brief, he included information about mitigation that was not included in the parties' stipulation. On February 26, 2007, the State Bar filed a motion to strike respondent's brief regarding discipline because it incorporated information about his financial difficulties, his medical diagnosis of attention deficit disorder (ADD), and his wife's health problems, none of which was mentioned in the parties' stipulation.

²All further references to "rules" are to the Rules of Professional Conduct, unless expressly noted.

³All further references to "sections" are to the Business and Professions Code, unless expressly noted.

In addition, the State Bar offered a number of evidentiary objections to respondent's brief. During a status conference, the hearing judge denied the State Bar's motion to strike respondent's brief on discipline. Instead, the hearing judge afforded respondent an additional three weeks to provide documentary evidence to support his claims of mitigation.

Thereafter, numerous status conferences were held and continued, providing respondent with repeated opportunities to produce evidence in support of his mitigation claims. The State Bar objected at every instance. An evidentiary hearing on mitigation issues was ultimately held on October 3, 2007 – over nine months after the parties submitted their stipulation as to facts and conclusions of law. At the hearing, the judge accepted respondent's psychiatrist's letter over the State Bar's objection. The hearing judge also stated that she was going to "modify" the parties' stipulation to include the following mitigation: respondent's severe financial distress; his wife's serious physical ailments and surgeries; and his depression and ADD. Despite the State Bar's objections, the hearing judge stated that justice required she consider all of the mitigating circumstances in the case even though respondent was not "timely" with the additional mitigating evidence. Neither party produced any witnesses.

On January 14, 2008, the hearing judge filed her decision finding respondent culpable of all of the misconduct to which he had stipulated. In addition to the stipulated mitigating circumstances, the hearing judge found that respondent suffered from extreme emotional and financial difficulties due to his wife's surgeries and their resulting bankruptcy at the time he engaged in his misconduct. The hearing judge also found respondent was extremely remorseful for his conduct. However, the judge reversed her earlier ruling and denied admission of the letter from respondent's doctor as inadmissible hearsay. Additional aggravation included uncharged misconduct of failing to maintain client trust account records or individual client ledgers in

violation of rule 4-100(B)(3). The hearing judge recommended a one-year stayed suspension, two years' probation and a 60-day actual suspension.

II. PROCEDURE AND EVIDENTIARY ISSUES

In addition to the ultimate level of discipline, the primary issue on review is the admissibility of evidence in mitigation submitted in the hearing department. In general, "the hearing judge has broad discretion in determining the admissibility and relevance of evidence," but we apply independent de novo review if the proffered evidence is inadmissible as a matter of law. (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 401.)

We cannot overlook the unorthodox nature of this proceeding. This matter was continued at least nine times over ten months due to respondent's failure to provide the requested documentation to support his claims of mitigation. Moreover, despite the State Bar's objections, respondent was permitted to submit documents to the court via mail or facsimile, and outside the context of a formal evidentiary hearing where the documents could have been properly marked for identification, offered into evidence, and subject to objection on the record. Since no formal process was followed, this court was left to search the official court file in an attempt to locate the referenced documents. While the hearing judge may have been lenient with the rules of evidence due to respondent's out-of-state residence, this relaxed evidentiary approach failed to provide an adequate record on review.⁴ (Cf. *In re Mostman* (1989) 47 Cal.3d 725, 741.)

⁴The following are the only documents contained in the official court file, and thus, at issue:

1) March 2, 2007 cover letter from respondent, with attached January 13, 2005 letter from Dr. Daniel Kim, and first page of Voluntary Petition of Bankruptcy, Chapter 7, filed October 4, 2005;

2) March 13, 2007 fax transmission from respondent, with attached six pages of medical records regarding Melissa Luebkehan;

3) March 30, 2007 cover letter from respondent, with attached March 27, 2007 letter from Andrew M. Abarbanel, M.D.; and,

4) May 1, 2007 two-page letter from Andrew M. Abarbanel, M.D.

A. Exclusion of Psychiatrist's Letter

We agree with the hearing judge's ultimate decision to exclude the letter from respondent's doctor as inadmissible hearsay since the doctor did not testify as to the contents of the letter and was not subject to cross-examination by the State Bar. (See Evid. Code, §§ 711, 1200; *In re Ford* (1988) 44 Cal.3d 810, 818 [character reference letters excludable from State Bar Court hearing as hearsay absent a stipulation to the contrary].) Likewise, we reject as unsupported by the record respondent's arguments in mitigation in his responsive brief regarding his medical diagnosis.

B. Evidence of Respondent's Wife's Medical Records and Their Bankruptcy Petition

The State Bar contends that the hearing judge erred by affording respondent mitigation for emotional and financial difficulties because respondent's wife underwent surgeries and they filed bankruptcy in 2005. We find that such evidence was not properly admitted and therefore it was error to consider it in mitigation.

The record is void of any evidence that respondent formally introduced, or the hearing judge admitted into the record, regarding his bankruptcy petition or his wife's medical records. (See Rules Proc. of State Bar, rule 306(a) ["the Review Department shall consider as evidence only that which was made part of the record in the Hearing Department in the proceeding under review"].) Further, as objected to by the State Bar, consideration of such evidence was in violation of the Evidence Code because it was not properly authenticated and constituted inadmissible hearsay. (See Evid. Code, §§ 1200 and 1401.) Thus, such information should not have been considered by the hearing judge, and we do not consider it on review. (See, e.g., *In the Matter of Ainsworth* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 894, 900 [exhibits never entered into evidence are not considered on review absent motion to augment record].)

C. Respondent's Request to Participate in ADP

Respondent contends in his responsive brief on review that his relocation to Missouri should not prevent him from participating in the State Bar Alternative Discipline Program (ADP). The written order denying respondent's ADP request was served on October 23, 2006, and the hearing judge orally denied respondent's renewed request on April 12, 2007.

Respondent failed to seek review of either ruling. As such, we decline to review the hearing judge's denial of respondent's ADP request because the time for seeking such review has expired. (Rules Proc. of State Bar, rule 807(a) [review of decision to deny respondent admittance to ADP shall only be pursuant to rule 300]; Rules Proc. of State Bar, rule 300(b) [“aggrieved party may petition the Review Department for review of an order within fifteen (15) days of the service of a written order by judge of the Hearing Department, or of the making of an oral order on the record, whichever is later”].)

III. FINDINGS OF FACT AND CULPABILITY DISCUSSION

A. Findings of Fact

The parties stipulated to the facts and we adopt those facts, which we briefly summarize below.

Respondent was admitted to the practice of law in California on October 12, 1981, and has been a member of the State Bar of California at all times since that date.

Respondent maintained a client trust account at Bank of America (CTA) from June to October 2005. On August 3, 2005, he received a disbursement check for \$46,185.96 from the Domingo Family Trust on behalf of his client, Redencion Villarama. Respondent deposited the check into the CTA, and the next day he subtracted his fee of \$4,332.50 from the CTA for the Villarama matter. Thereafter, respondent was required to maintain the sum of \$41,853.46 in the CTA on behalf of Villarama, but the balance soon fell below that amount.

From August 15 through August 23, 2005, respondent withdrew a total of \$2,200 from the CTA for himself, as follows:

<u>Date</u>	<u>Amount</u>
August 16, 2005	\$ 700
August 17, 2005	\$ 500
August 19, 2005	\$ 300
August 22, 2005	\$ 700
Total	\$2,200

Respondent did not make any of these withdrawals on behalf of Villarama.

Respondent failed to maintain any attorney-client trust account ledgers for his attorney-client trust account or an individual client ledger for Villarama or the Domingo Family Trust.

On August 30, 2005, respondent deposited into the CTA funds belonging to him which were received from Radomir Vukadin in the amount of \$2,650. These funds represented respondent's earned fees, his interest in them was already fixed, and the funds belonged to him at the time of deposit.

On August 30, 2005, respondent issued a CTA check to Villarama in the sum of \$41,853.46. On September 1, 2005, the CTA's balance was approximately \$40,084.28. On September 6, 2005, the bank honored the check despite the insufficient funds, but notified both respondent and the State Bar that respondent's CTA balance was overdrawn by \$449.18.

On September 6, 2005, respondent deposited in the CTA funds which he received from Kenneth Kasik in the amount of \$2,920. These funds represented respondent's earned fees, his interest in them was already fixed, and the funds belonged to him at the time of deposit. Kasik's check was dishonored because Kasik had insufficient funds in his account.

On September 7, 2005, respondent transferred from his general account into the CTA funds belonging to him in the amount of \$449.18 to cover the overdraft from the CTA.

B. Culpability

1. Count 1: Rule 4-100(A) - Failure to Maintain Client Funds in Trust Account

The hearing judge found that respondent violated rule 4-100(A) by failing to maintain \$41,853.46 in the CTA on behalf of Villarama. We agree. Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited and maintained in a client trust account. The balance of the CTA on September 1, 2005, was \$40,084.28, and five days later, the balance was overdrawn by \$449.18 after respondent issued a check to Villarama. Accordingly, respondent willfully failed to maintain client funds in a trust account by failing to maintain a balance of \$41,853.46 in the CTA, in violation of rule 4-100(A). (See *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 504 [by allowing balance of client's trust account to fall below the amount owed to client, respondent willfully mishandled trust funds in violation of rule 4-100(A)].)

2. Count 2: Section 6106 – Misappropriation

The hearing judge found respondent committed an act involving moral turpitude, dishonesty or corruption, in violation of section 6106, by misappropriating \$2,200 from the CTA. We agree. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618 [respondent's misappropriation of funds from client trust account violates section 6106].)

We disagree with the State Bar's contention that the actual amount of respondent's misappropriation totaled \$4,419.18. The parties stipulated that respondent misappropriated "at least \$2,200" from the CTA. Respondent deposited \$41,853.46 into the CTA on behalf of Villarama, withdrew \$2,200 for his own personal use between August 16 and August 22, 2005, and deposited personal funds totaling \$2,650 on August 30, 2005. On September 1, 2005, the balance of the CTA was \$40,084.28. The State Bar alleges that \$2,650 of the \$40,084.28 represented respondent's personal funds, and thus, as of September 1, 2005, only \$37,434.28 of

the funds could be traced to the deposit made on behalf of Villarama (i.e., \$40,084.28 - \$2,650 = \$37,434.28). According to the State Bar, the difference between the amount respondent was required to maintain in the CTA (\$41,853.46) and the amount remaining in the CTA as of September 1, 2005, which represented the amount held in trust for Villarama (\$37,434.28) equals \$4,419.18.

Regardless of the strong inferences that may be drawn from the balances in the CTA on August 30 and September 1, 2005, “the State Bar’s burden requires it to present proof in the form of stipulated facts or admissible evidence to support” the amount of money respondent misappropriated. (*In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 635.) The stipulated facts fail to provide clear and convincing evidence that respondent misappropriated \$4,419.18. There is a factual gap as to what occurred between August 30 and September 1, 2005, and we cannot infer that respondent misappropriated \$4,419.18 when there has been no showing that the balance dipped as low as \$37,434.28. (Cf. *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 618 [“[O]nce the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn.”].) Since we must resolve all reasonable doubts in favor of respondent (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240), without any additional information we are unable to determine what did or did not occur on the day in between August 30, 2005, and September 1, 2005. Thus, we limit our culpability determination to a finding that respondent misappropriated \$2,200.

3. Count 3: Rule 4-100(A) – Commingling

In addition to requiring that client funds be deposited and maintained in a client trust account, rule 4-100(A) prohibits a member of the Bar from commingling the member’s personal funds in the client trust account. We agree with the hearing judge’s finding that respondent

willfully violated rule 4-100(A) by depositing into the CTA \$2,650 of personal funds. (See *In the Matter of Doran* (1998) 3 Cal. State Bar Ct. Rptr. 871, 876 [respondent deposited personal funds into client trust accounts and used accounts for personal expenses, in violation of rule 4-100(A)].)⁵

We also agree with the hearing judge's finding that respondent did not commingle his personal and client funds when he attempted to deposit a check from Kasik into the CTA. Since Kasik's check was dishonored, there was no actual money to commingle with client funds. (See *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 858 [attorney violates rule against commingling of funds "merely by the attorney's commingling of his client's money with his own"].)

IV. MITIGATION AND AGGRAVATION

The primary purpose of these disciplinary proceedings is not to punish but to protect the public, the courts, and the legal profession. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856-857.) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Rather, we determine the appropriate discipline in light of all relevant circumstances, including mitigating and aggravating circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

A. Mitigation

In mitigation, the parties stipulated to the following: 1) respondent's lack of a prior discipline record in 24 years of practice at the time of his misconduct in 2005 (std. 1.2(e)(i)); 2) respondent's cooperation with the State Bar in reaching a stipulation (std. 1.2(e)(v)); and

⁵Respondent's transfer of \$449.18 from his general account into the CTA to cover the overdraft does not support a finding of culpability for commingling. The evidence clearly establishes that respondent deposited the funds to restore funds that were wrongfully withdrawn. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 978-979 ["An attorney's restoration of funds wrongfully withdrawn from a trust account is not a further violation of the Rules of Professional Conduct as a prohibited 'commingling' of attorney and client funds."].)

3) the client received her funds because the bank honored the NSF check. We agree that respondent's lack of a prior discipline record in 24 years of practice is a compelling mitigating factor, and we further agree that respondent's candor and cooperation is entitled to mitigation. However, based on the limited record before us, we see no justification to provide mitigating credit to respondent for the bank's decision to honor a NSF check. Thus, while the client did receive her funds, we note that this was fortuitous since respondent paid the client with a NSF check. Under the circumstances, we decline to reward such negligent behavior by an attorney.

As discussed *ante*, neither respondent's wife's medical records nor the couple's bankruptcy petition was properly included in the record below. Since such evidence was never properly admitted, the hearing judge erred by considering the evidence in mitigation. Accordingly, without such evidence, respondent failed to meet his burden of establishing that his financial and emotional difficulties are mitigating circumstances. (Std. 1.2(e)(iv); *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 311 [respondent's burden to establish mitigating circumstances by clear and convincing evidence].)

Finally, we reject the hearing judge's finding that respondent was "extremely remorseful for his conduct" under standard 1.2(e)(vii). Respondent did not testify at the evidentiary hearing and there is no other evidence to support this finding in mitigation.

B. Aggravation

We agree with the hearing judge's determination that respondent committed multiple acts of wrongdoing by withdrawing funds from the CTA for his personal use on four separate occasions, commingling personal funds with the funds of his clients, and by failing to maintain any attorney-client trust account ledgers for his CTA. (Std. 1.2(b)(ii).)

Respondent stipulated to willfully violating rule 4-100(B)(3) by failing to maintain any CTA records or individual client ledgers. We agree with the hearing judge's finding that

respondent's admission to failing to maintain complete records of all funds in violation of rule 4-100(B)(3) is uncharged misconduct in aggravation. (Std. 1.2(b)(iii); see *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.)

V. LEVEL OF DISCIPLINE

Respondent is culpable of the willful misappropriation of \$2,200 of entrusted client funds, aggravated by his multiple acts of wrongdoing regarding his CTA and additional uncharged misconduct for failing to maintain any client or trust account records, and mitigated by his lack of a prior discipline record in 24-years of practice and his candor and cooperation in this proceeding. On review, the State Bar argues that, although this is not a disbarment case, the mitigating circumstances are insufficient to justify a departure from the one-year minimum actual suspension provided for under standard 2.2(a). While we agree that this is not a disbarment case, we find that the mitigating circumstances do warrant a departure from the one-year actual suspension set forth in the standard.

Respondent's most serious misconduct involved misappropriation of client funds for which the applicable standards provide a range of discipline from actual suspension to disbarment.⁶ The relevant sanction is set forth in standard 2.2(a), which provides that willful misappropriation of entrusted funds shall result in disbarment unless the amount is insignificantly small or compelling mitigating circumstances predominate, in which case the discipline shall be not less than one year of actual suspension. The Supreme Court has stated that the standard "correctly recognizes that willful misappropriation is grave misconduct for

⁶In addition to standard 2.2(a), standard 2.3 also applies to respondent's violation of section 6106 and provides that an act of moral turpitude, fraud or intentional dishonesty "shall result in actual suspension or disbarment" according to the gravity of the offense or the harm, if any, to the victim. Since standard 1.6(a) provides, in part, that "[i]f two or more acts of professional misconduct are found . . . and different sanctions are prescribed . . . the sanction imposed shall be the more or most severe of the different applicable sanctions," we apply standard 2.2(a) to this case.

which disbarment is the usual form of discipline.” (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 38.) However, to the extent the standard suggests that a one-year actual suspension must “invariably be imposed, the standard is not faithful to the teachings of [the] court’s decisions. [Citation.]” (*Ibid.*) Rather, the standard should be “regarded as a guideline, not an inflexible mandate.” (*Ibid.*) Thus, in addition to the relevant standard, we look to prior cases for further guidance on the appropriate level of discipline in this case. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

In *Edwards v. State Bar, supra*, 52 Cal.3d 28, Edwards was culpable of willful misappropriation of \$3,000 of a client’s settlement funds. Edwards’ residence was threatened with foreclosure so he wrote a check on his trust account to prevent the foreclosure. Edwards knew that the funds did not belong to him and he subsequently reimbursed the account by depositing \$3,000 of his own money, but only after he had issued a NSF check to his client. In aggravation, Edwards failed to maintain trust account records. He also admitted to “periodic commingling and periodic misappropriation of trust funds, including kiting client funds,” which supported a finding in aggravation that he engaged in “multiple acts of misappropriation” under standard 1.2(b)(ii).⁷ Mitigating factors included full restitution three months after the misappropriation, a 12-year clean record of practice at the time of the misconduct, and voluntary steps to improve his management of trust funds. The Supreme Court rejected a recommendation of two years’ actual suspension in favor of a one-year actual suspension. (*Id.* at pp. 38-39.)

In *Hipolito v. State Bar* (1989) 48 Cal.3d 621, Hipolito misappropriated \$2,000 from a client by depositing a settlement check in his general account after tendering to the client a personal check for the client’s share of the settlement. The bank returned the personal check for

⁷Standard 1.2(b)(ii) provides that it shall be considered an aggravating circumstance “that the current misconduct found or acknowledged by the member evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.”

insufficient funds, and, as a result of severe financial difficulties, Hipolito was unable to make restitution promptly. Additionally, Hipolito was found culpable of abandonment in a second matter involving another client, which “appears to have resulted from the same forces leading to the misappropriation, namely, [Hipolito’s] poor management skills.” (*Id.* at p. 627, fn. 3.) In mitigation, the attorney demonstrated remorse, made restitution voluntarily as soon as he was able, had no prior discipline during eight years of practice, made an extraordinary demonstration of good character, and hired a management firm to prevent his misconduct from recurring, which the court found to be a “significant mitigating factor because it supports the conclusion that the public would be protected by a shorter period of actual suspension.” (*Id.* at pp. 626-627.) Concluding that Hipolito’s misconduct “stemmed from inexactitude and insolvency, not greed or venality” (*id.* at p. 628), the Supreme Court declined to order disbarment and imposed an actual suspension for one year.

In *Howard v. State Bar* (1990) 51 Cal.3d 215, the Supreme Court imposed a six-month actual suspension instead of the one-year actual suspension provided for in standard 2.2(a). In *Howard*, approximately three years after being admitted to practice law, Howard misappropriated approximately \$1,300 from a client's personal injury settlement proceeds and failed to communicate with the client for approximately two months. There were no aggravating factors. The Court noted that respondent was entitled to little weight in mitigation for the three years she practiced prior to her misconduct and for tendering restitution nine months later but only upon service of a lawsuit. Acknowledging the mandatory language of standard 2.2(a), the Court explained that it is “not bound to follow the standards in talismanic fashion,” but is “permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Id.* at pp. 221-222.) The Court determined that a six-month actual suspension was sufficient based upon Howard's extensive expert and lay testimony in mitigation that established

she had lifelong psychological problems leading to drug and alcohol abuse that contributed to her misconduct and that she had been sober for approximately two and one-half years at the time of trial. Despite the single incident of misappropriation and the relatively small amount, the Court rejected the attorney's request for a three-month suspension, noting that substantial discipline was necessary to "ensure continuing public faith in the fidelity of lawyers and in the practice of law as a vital service to clients and community." (*Id.* at p. 223.)

Subsequently, in *Bates v. State Bar* (1990) 51 Cal.3d 1056, the Supreme Court addressed another situation involving the willful misappropriation of \$1,229.75 of client trust funds and misrepresentations to the client's new counsel regarding those funds. This misconduct was aggravated by Bates' refusal to make restitution of the misappropriated funds until after the State Bar referee issued a decision. In addition to the attorney's 14 years of practice prior to his misconduct and the testimony demonstrating respondent's reputation in the legal community for competence and integrity, the court found the attorney's recovery from alcoholism was a significant factor in mitigation. The Supreme Court approved the recommendation of three years' stayed suspension, probation, and six months' actual suspension. (*Id.* at pp. 1061-1062.)

Here, as in *Edwards*, *Hipolito*, *Howard* and *Bates*, the respondent willfully misappropriated client funds under compelling mitigating circumstances. Based on the foregoing cases, we determine that six months' actual suspension is the appropriate discipline recommendation in respondent's case. We start with the similarity respondent's case has with the attorney in *Edwards* who was given one-year actual suspension based on standard 2.2(a). Respondent misappropriated for his personal use approximately the same amount as Edwards, and as in *Edwards*, respondent commingled his funds with the funds in the CTA while failing to maintain any CTA records. Conversely, however, Edwards' misconduct was more extensive. Although respondent committed multiple acts of misconduct relating to his CTA, his

misappropriation of \$2,200 from his client by withdrawing funds on four separate occasions occurred during a one-week period. The record does not support a finding of “multiple acts of misappropriation” as in *Edwards*. Also, respondent has many more years of discipline-free practice than Edwards. Despite his more extensive misconduct, Edwards also established that he took voluntary steps to improve the management of his trust funds, which is a significant factor in mitigation that supports the conclusion that the public would be protected by a shorter period of discipline than otherwise required (see *Hipolito v. State Bar*, *supra*, 48 Cal.3d at pp. 627-628); a factor respondent failed to prove.

In *Hipolito*, like *Edwards*, the attorney’s misconduct was more egregious than the misconduct in the present case, including a 13-month delay in repayment of funds to the client and the abandonment of a second client in an unrelated matter. However, while Hipolito had only eight years of a discipline-free practice prior to his misconduct compared to respondent’s 24 years, Hipolito had significantly more mitigation, i.e., remorse, extraordinary demonstration of good character, proven financial difficulties and corrective management practices. Considering the extent of culpability, and balancing the factors in mitigation and aggravation, we believe that respondent is entitled to a lower level of discipline than the one-year actual suspension imposed in *Edwards* and *Hipolito*.

Next, we look at the *Howard* and *Bates* cases wherein the attorneys each received six months’ actual suspension. Howard and Bates also misappropriated approximately the same amount of money as respondent. However, unlike respondent, Howard and Bates did not restore the funds or pay restitution until they were either threatened with a lawsuit or the State Bar became involved, and Bates made misrepresentations about the misappropriated funds to the client’s subsequent counsel. But Howard and Bates provided proof of serious personal problems such as alcoholism that contributed to the misconduct, and clear and convincing evidence that

their addictions were under control. Respondent, on the other hand, has provided no admissible evidence to explain his wrongdoing. In fact, despite the numerous continuances at respondent's request, he was unable to properly and sufficiently present his case in mitigation in the hearing department. And while there is clear evidence that respondent failed to properly manage his trust account and maintain records, there is no evidence that these problems have been corrected.

We note that respondent's culpability solely for commingling his personal funds with the funds in the CTA in violation of rule 4-100 would justify a three-month actual suspension. (Std. 2.2(b).) However, respondent's willful misappropriation of client funds in violation of section 6106 "is not a mere technical lapse, but a serious breach of duties of ancient vintage that are indispensable to communal life. [Citation.]" (*Howard v. State Bar, supra*, 51 Cal.3d at p. 221.) We find that respondent's lengthy years of discipline-free practice, his candor and cooperation during these proceedings and the rather short one-month period of the CTA violations, provide sufficient extenuating circumstances to justify our departure from the one-year actual suspension specified in standard 2.2(a). Nonetheless, based on the limited record before us, we find that "public confidence in the legal profession would be undermined" if we were to recommend less than six months actual suspension for willful misappropriation of entrusted funds. (*Id.* at p. 223.) Thus, upon independent review of the record and analysis of relevant case law, we determine that the appropriate degree of discipline is suspension for two years, stayed, on conditions including six months' actual suspension.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that respondent Theodore Carl Luebke be suspended from the practice of law in the State of California for two years, that execution of that suspension be stayed, and that respondent be placed on probation for two years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first six months of the period of his probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of this probation.
3. Respondent must maintain, with the State Bar 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)(1).) 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. (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 submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.
5. Reporting requirements:
 - a. 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, 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; a
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.

b. 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 Probation Unit for that reporting period. In this
circumstance, respondent need not file the accountant's certificate described
above.

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

6. Subject to the proper or good faith assertions of applicable privileges, respondent must
answer fully, promptly, and truthfully, any inquiries of the Office of Probation [and any
probation monitor assigned under these conditions] which are directed to respondent
personally or in writing, relating to whether respondent is complying or has complied
with the conditions contained herein.

7. Within one year of the effective date of the discipline herein, respondent must submit
to the Office of Probation satisfactory evidence of completion the State Bar's Ethics
School and passage of the test given at the end of that session. This requirement is
separate from any Minimum Continuing Legal Education Requirement (MCLE)
requirement, and respondent shall not receive MCLE credit for attending Ethics School
(Rules Proc. of State Bar, rule 3201).

8. 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 two years will be satisfied, and the
suspension will be terminated.

VII. 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 within one year of the effective date of the Supreme Court order in this matter and to

provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VIII. RULE 9.20

It is further recommended that respondent be ordered to comply with rule 9.20, California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order herein. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

IX. COSTS

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

REMKE, P. J.

We concur:

EPSTEIN, J.

STOVITZ, J.⁸

⁸Hon. Ronald W. Stovitz, Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.