FILED JUNE 21, 2012

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **NATHAN M. SHILBERG,** **Member No. 178212** A Member of the State Bar.	)	**Case Nos.: 11-O-15464-DFM** **DECISION**

INTRODUCTION

Respondent Nathan Shilberg (Respondent) is charged here with three counts of misconduct involving a single client matter. The counts include allegations of wilfully violating (1) Business and Professions Code section 6106 (moral turpitude - dishonesty including misappropriation and unauthorized endorsement)[1]; (2) section 6068(d) (seeking to mislead a judge); and (3) section 6106 (moral turpitude - misrepresentation to court). The court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on February 14, 2012. On March 12, 2012, Respondent filed his response to the NDC, admitting most of the facts giving rise to the charges of misconduct in this matter but denying culpability.

[1] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

On March 19, 2012, the initial status conference was held in the case. At that time the case was scheduled to commence trial on June 6, 2012.

On May 17, 2012, the State Bar requested leave to file an amended NDC in the case, adding counts 2 and 3. Respondent filed an opposition to this request on June 4, 2012. On June 5, 2012, this court entered an order granting the State Bar's request to amend the NDC. This order also (1) required the State Bar to produce Lionel Lilliard, the complaining witness, for deposition in Los Angeles on June 6, the day when the trial was scheduled to commence; and (2) trailed the actual commencement of trial until June 12, 2012, due to the fact that this court was still fully engaged in conducting a previously scheduled trial. The newly-added allegations of the amended NDC were deemed denied by Respondent.

Trial was commenced and completed on June 12, 2012. The State Bar was represented at trial by Deputy Trial Counsel Timothy Byer. Respondent acted as counsel for himself.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in California on December 1, 1995, and has been a member of the State Bar at all relevant times.

Case No. 11-O-15464

Facts

On or about January 27, 2009, Respondent filed a Voluntary Petition under Chapter 13 on behalf of Lionel Lilliard (Lilliard) in the U.S. Bankruptcy Court. On or about July 14, 2009, this proceeding (*First Bankruptcy* action) was dismissed due to Lilliard's failure to make payments required by the bankruptcy plan.

On July 22, 2009, Respondent filed a second Voluntary Petition under Chapter 13 in the Bankruptcy Court (the *Second Bankruptcy* action) on behalf of Lilliard. This action was filed, in part, to protect Lilliard's vehicle from being repossessed by the lender.

On or about December 15, 2009, Respondent filed a Notice of Modified Chapter 13 Plan Prior to Confirmation in the *Second Bankruptcy* action. The notice stated that the Confirmation Hearing would be held on December 16, 2009.

On December 16, 2009, the hearing was held, with the creditors objecting to plan confirmation. On December 18, 2009, the court issued an order continuing the confirmation hearing to March 10, 2010. In addition, due to the fact that Lilliard was once again behind in payments required by the plan, the order included the following additional provisions:

> "2. On or before January 19, 2010, Debtor [Lilliard] must (a) be current on all plan payments; (b) provide Trustee with pay stubs through the end of June 2009 sufficient to verify six months' pre-petition income; and (c) provide the Trustee with tax returns for two years; or
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> 3. If the Debtor is not able to timely accomplish the requirements set forth in paragraph 2 of this Order, then the Trustee may submit an order vacating the March 10, 2010 hearing and dismissing the case under 11 U.S.C. §§ 105(a) and 1307(c)(1)[.]"

In order to obtain the funds necessary to make the required payments, Lilliard was required to withdraw them from his 401(k) account. When it became clear that the funds might not be available in time to have them deposited in the Trustee's bank account (located in Tennessee) by the January 19 deadline, Lilliard and Respondent discussed ways in which they might prevent the dismissal from being ordered by the Trustee pursuant to the court's order. Respondent suggested to Lilliard that if Lilliard would provide to Respondent before January 19 a $1,050 check, made payable to the Trustee and representing the amount of money required to satisfy the court's order, Respondent would execute and transmit to the Trustee a declaration that Respondent had received the funds and was in the process of forwarding them to the Trustee. It was Respondent's hope that this assurance by Respondent, that the funds were in his possession

and were in the process of being sent to the Trustee, would cause the Trustee not to dismiss the action.

The January 19 deadline fell on a Tuesday. Monday, January 18, 2009 was the Martin Luther King holiday. Respondent was not working on that holiday, but a member of his staff, Karen Heckendorf, was expected to be at the office. Pursuant to an advance agreement with Respondent, Lilliard went to the office on January 18, 2009 and there delivered to Heckendorf an envelope, addressed to Respondent, containing a check in the amount of $1,050 drawn on Lilliard's checking account at the Bank of America. At Respondent's prior instruction, the check was made payable to "David L. Skelton (trustee)" and had a notation "Bankruptcy Payment". The check, however, did not have a January 18 date. Instead it had been post-dated by Lilliard to January 23, 2010, the coming Saturday.

When Respondent came into the office on Tuesday, January 19, he was unhappy to learn that the check had been post-dated. When he then used the Bank of America's automated information system to see if there were funds available in Lilliard's account to cover the check, he learned that there were not. In fact, the balance in Lilliard's account at that time was only $31.66. On each of the following business days during the balance of that week, Respondent re-checked the balance in Lilliard's account and determined each day that no new funds had been deposited. Due to Respondent's awareness of Lilliard's history of not making required payments and given the absence of any available funds to cover the post-dated check, Respondent was both unable and unwilling to execute any declaration stating that funds from Lilliard were then being held by Respondent and were in the process of being forwarded to the Trustee's account.

On Saturday, January 23, 2010, Lilliard finally deposited into his account the $1,050 required to cover the check that he had previously provided to Respondent. When Respondent learned at some point during that same day that funds were now in Lilliard's account, he

remained concerned about personally assuring the Trustee that the funds were under his control, given the possibility that the balance in Lilliard's account would again be depleted before the January 23 check could be transmitted to the Trustee's account in Tennessee. At the same time, as of January 23, Respondent had confirmed from the bankruptcy court's docket that his client's bankruptcy action had still not been dismissed. As a result, there remained the possibility that Respondent could convince the Trustee to postpone dismissing the proceeding. In an apparent effort to guarantee that the funds would actually remain under his control, Respondent decided to add his own name as a payee of the check and then deposit the check into his own bank account, also at the Bank of America. This would have the effect of taking the funds out of the reach of Lilliard. Respondent then carefully added his name as an alternative payee of the check and then deposited the check into his general operating account (GAO). Respondent accomplished the deposit by use of an ATM on either Sunday, January 24, or Monday, January 25. Whichever date was the case, the deposit was posted to Respondent's account on Monday, January 25. Knowing on Monday, January 25, that he could now personally assure the Trustee that he was then holding the required funds, Respondent then contacted the Trustee that day, only to learn that the dismissal had already been ordered. Two days later, on January 27, 2010, Lilliard's car was repossessed.

Lilliard was very angry when his car was repossessed, and he immediately contacted Respondent to complain. Up to that time, Respondent had not told Lilliard that he had not sent a declaration to the Trustee the prior week, he had not asked Lilliard to provide a different check, he had not called Lilliard to complain that there were not funds in the bank account, he had not gotten advance approval for adding his name as a payee on the check, and he had not told Lilliard in advance that he was going to deposit the check into his own account. When Lilliard angrily contacted Respondent about the car being repossessed, Respondent elected not to tell him

what had happened. Instead, he told Lilliard that an unspecified mistake had been made and that he, Respondent, would take steps to get the car back. Respondent then moved to file yet another bankruptcy petition (the *Third Bankruptcy* action) on Lilliard's behalf, using a portion of the funds being held in his operating account to pay the filing fee. Other portions of the funds were being used by Respondent to pay for his law firm's operating expenses.

The *Third Bankruptcy* was filed on February 2, 2010. On February 1, 2010, the day prior to this new action being filed, Respondent filed an ex parte application in the *Second Bankruptcy* action, seeking an award of attorneys' fees in the amount of $3,300, a figure based on the bankruptcy court's standard guidelines. On February 16, 2010, the court issued an order awarding such fees to Respondent and authorizing the Trustee to pay that amount, "subject to funds at hand." Because the funds then held by the Trustee were well less than $3,300, the fees ultimately received by Respondent from the Trustee were only slightly more than $1,000. Respondent did not disclose to the court, either in his request for fees in the *Second Bankruptcy* action or in the *Third Bankruptcy* action, that he had been holding $1,050 of Lilliard's funds in his operating account. At trial Respondent acknowledged that he should have done so. Perhaps ironically, had Respondent forwarded Lilliard's funds to the Trustee after the January 19 deadline and had the action still been dismissed, Respondent would have received back all of these same funds as his fees in *Second Bankruptcy* action. As will be noted below, Respondent eventually ended up having all of the $1,050 go back to Lilliard, even though Respondent had previously used portions of that money to pay the filing fee for the *Third Bankruptcy* action.

After filing the *Third Bankruptcy* action, Respondent worked hard to recover Lilliard's car. He filed an adversary action against the creditor and obtained a delay in the car being sold. Ultimately, however, this adversary action proved to be unsuccessful, and it was eventually dismissed by the court.

During the same time that Respondent was working to regain Lilliard's car, he continued not to disclose to him what had happened with the $1,050. Lilliard eventually learned from his bank that his prior check to the Trustee had been altered and that his money had been deposited into Respondent's general operating account. In August, 2010, while the *Third Bankruptcy* action was still pending, Lilliard accused Respondent of fraudulently taking the money, submitted a statement of fraudulent activity to the Bank of America, and succeeded in getting the $1,050 charged back from Respondent's account to his own.

On September 16, 2010, a hearing in the *Third Bankruptcy* action was held. Both Respondent and Lilliard were present, as well as counsel for the creditor who had repossessed the car. Lilliard was once again delinquent in making payments pursuant to a proposed bankruptcy plan and the adversary action had by then proved unsuccessful. Lilliard's car, however, had still not been sold. Respondent, aware that Lilliard was now accusing him of misappropriating funds, reported to the bankruptcy court at this hearing regarding his prior mishandling of the $1,050. Respondent also discussed with the court the fact that the nature and magnitude of Lilliard's other debts made poor the prospect of any workable bankruptcy plan being fashioned, a conclusion with which the bankruptcy court agreed. When the court then asked to hear directly from Lilliard regarding his desire to go forward with the bankruptcy, either in pro per or with an attorney, Lilliard replied that he wanted to meet jointly with Respondent and the attorney for the company that had repossessed his car to see if they could "hash this out." In the course of that discussion, Respondent stated on the record that he was waiving any claim for attorneys' fees in the *Third Bankruptcy* action. At the end of the hearing, the matter was continued by the court. The action was eventually dismissed, and Lilliard's car was sold at auction.

Count 1 – Section 6106 [Moral Turpitude - Dishonesty including Misappropriation and Unauthorized Endorsement]

In Count One of the First Amended NDC, the State Bar alleges that Respondent committed acts of moral turpitude by "(a) writing his name on the $1,050 check without authorization from the Chapter 13 Trustee or Lilliard; (b) depositing the $1,050 check into his GAO [general operating account] without authorization from the Chapter 13 Trustee or Lilliard; (c) using the funds as his own without authorization from the Chapter 13 Trustee or Lilliard; and (d) misrepresenting to Lilliard that Respondent had forwarded the $1,050 to the bankruptcy trustee and therefore did not know why Lilliard's vehicle had been repossessed[.]"

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty, or corruption. While moral turpitude generally requires a certain level of intent, guilty knowledge, or wilfulness, a finding of gross negligence will support such a charge where an attorney's fiduciary obligations, particularly trust account duties, are involved. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.) An attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.)

Respondent's actions in adding himself as a payee on the check made payable to the Trustee, surreptitiously depositing the funds into his own general operating account, and then using portions of those funds to pay his own operating expenses constituted acts of moral turpitude. (See, e.g., *Murray v. State Bar* (1985) 40 Cal.3d 575, 583-4.) Even if Respondent's original intent was not malevolent, his failure to seek advance authorization from his client for his actions and his subsequent failures to return the funds to Lilliard and to disclose his past actions vitiate any finding of good faith and evidence acts in wilful violation of the section 6106.

With regard to the remaining allegation against Respondent in this court, this court finds that there was not clear and convincing evidence that Respondent ever affirmatively

misrepresented to Lilliard that he had forwarded the $1,050 to the Trustee or that he did not know why the repossession had occurred. Indeed, Lilliard made no such factual accusation during his testimony in this matter. Nor did Lilliard make any such explicit accusation in his written statement to the Bank of America.

Count 2 - Section 6068, subd. (d) [Seeking to Mislead Judge]
Count 3 – Section 6106 [Moral Turpitude – Misrepresentation to Court]

Section 6068, subdivision (d), makes it a duty of an attorney never to seek to mislead a judge by an artifice or false statement of fact or law. Section 6106, as previously noted, prohibits acts of moral turpitude by an attorney, including misrepresentations of fact to a court.

In Count 2 of the First Amended NDC, the State Bar alleges that Respondent sought to mislead the bankruptcy court at the September 16, 2010 hearing "by misrepresenting to the bankruptcy court that he had had possession of Lilliard's check for a preceding five day period during which he called the bank daily to check [on] the availability of funds[.]" In Count 3, the State Bar alleges that this alleged misrepresentation constituted an act of moral turpitude. These two counts were added to the NDC just prior to the commencement of trial. In support of the above allegations, the State Bar relies on the testimony of Lilliard, who testified that he presented his check to Respondent personally on Saturday, January 23, 2010, rather than dropping it off at Respondent's office on Monday, January 18, 2010.

This court finds that the evidence supporting these two counts was not clear and convincing, and it therefore dismisses them both. Lilliard's recollection was disputed by Respondent's testimony. It was also directly contradicted by testimony admitted via a declaration from Karen Heckendorf, who stated under oath that Lilliard had personally handed her an envelope on January 18, 2010, containing the check. Of significance to the court are the facts that the envelope, in which the check was delivered, was provided by Respondent to the State Bar in 2011 (well before counts 2 and 3 were added to the NDC) and that Lilliard

acknowledged at trial that the handwriting on it was his own. On the envelope, Lilliard had written "Nathan Shilberg From Lionel Lilliard" and "BK payment." Lilliard testified that he and Respondent had agreed in advance to meet in person and actually did so. If Lilliard had expected to deliver the check to Respondent personally that day and had he actually done so (as he claims), there would have been no reason for Lilliard to have put the check into an envelope and inscribe on it the handwritten delivery directions described above. Instead, he would have expected to hand the check to Respondent when he got to the meeting, and he merely would have done that when he got there. In contrast, had Lilliard been told to deliver the check to Respondent's office on Monday, January 18, at a time when Lilliard had been told that Respondent would not be present (but that another office member would be), putting the check into an envelope and writing the above delivery information on it would have been both appropriate and expected.

This court's conclusion regarding the accuracy of Respondent's recollection is further buttressed by the fact that Respondent told the bankruptcy court on September 16, 2010 that he had been checking the balance of Lilliard's account throughout the week of January 18 after receiving the check and had seen that there were not sufficient funds in the account to cover the check. At the time of these 2010 statements by Respondent, he had not yet seen a copy of Lilliard's bank statement which showed the $31 account balance during that week. If Respondent had not been checking the balance of the account on each of the days during that week, as he said, there would have been no way for him to have known of the account's low balance during those days. In addition, unless he had already been given the post-dated check, there would have been no reason for him to have then been checking the account balance.

In addition to the above, it is unclear why Respondent would have had any motivation to lie to or mislead the bankruptcy court about his having held a post-dated check from Lilliard for

the five days before he deposited it into his own account. Respondent's clear intent in making his comments to the court was to acknowledge his mishandling of the funds, not to justify his actions. The fact that he had the check for nearly a week --and thus could have forwarded it to the Trustee in time for it to have been deposited before the action was dismissed—was more potentially an aggravating factor than a mitigating one.

Finally, this court finds that the memory/credibility of Lilliard was very poor on the specific details of his dealings with Respondent. Lilliard's demeanor at trial and his difficulty answering specific questions made clear to this court that his actual recollection of the specific details of past events was generally weak. Too often he answered "did you" questions with "I would have" answers or provided other forms of responses that were evasive.

Accordingly, Counts 2 and 3 are dismissed with prejudice.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)[2] The court finds the following with respect to alleged aggravating factors.

Multiple Acts of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. While the State Bar charged all of Respondent's acts of moral turpitude in a single count, Respondent's misconduct nonetheless included multiple acts of moral turpitude, each of which could have been separately charged. As such, they are an aggravating factor. (Std. 1.2(b)(ii).)

[2] All further references to standard(s) or std. are to this source.

Significant Harm

The evidence does not support a finding that Respondent's misconduct caused Lilliard to suffer significant harm. It cannot be concluded that the *Second Bankruptcy* action was dismissed because of Respondent's actions. Instead, the evidence is uncontradicted that the bankruptcy court had issued an order that the action could be dismissed if Lilliard failed to make the required payments by January 19 and that Lilliard failed to provide any funds to transmit to the Trustee for those payments until well after that deadline had passed. Any conclusion by this court that the Trustee might have ignored Lilliard's violation of the court's deadline would be inappropriate speculation.

Similarly, there is a dearth of evidence showing that Lilliard suffered any significant harm as a result of Respondent's misappropriation of the $1,050. Had Respondent handled the funds as Lilliard had directed him to do, Lilliard's funds would have gone to the Trustee, who would have then paid them either to the car company or to Lilliard as attorneys' fees. Instead, Lilliard was able to get all of the $1,050 back from Respondent through the charge-back by the Bank of America--at no cost to Lilliard and in time for Lilliard to make the money available to pay for his repossessed car, if Lilliard had wanted to use it for that purpose. In sum, the only demonstrated economic consequence of the delay in Lilliard getting his funds back from Respondent was that Respondent ended up using his own money to pay the filing fee for the *Third Bankruptcy* action, received only a reduced fee on the *Second Bankruptcy* action, and then received no fee at all for his extensive work on the *Third Bankruptcy*.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds the following with respect to alleged mitigating factors.

No Prior Discipline

Respondent had practiced law in California for just over 14 years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline. Respondent's lengthy tenure of discipline-free practice is a significant factor in mitigation. (Std. 1.2(e)(i); *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 350; *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589; cf. *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 520; *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 688; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [mitigating weight of such a long period of discipline-free service does not rule out possible disbarment in appropriate case].)

Candor/Cooperation

Respondent demonstrated candor to the State Bar and to this court regarding the circumstances showing his misconduct. In addition, at the time of his formal response to the charges, he admitted most of the underlying facts in the case, allowing it to be tried in one day, with most of the trial time being devoted to the disputed issues on which Respondent prevailed. While Respondent did not admit any culpability in the matter until the trial had commenced, he is entitled to some mitigation for the above actions, albeit limited. (Std. 1.2(e)(v); see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50; cf. *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts but "very limited" where culpability is denied].)

Remorse

The court declines to find remorse as a mitigating factor here. While Respondent did express remorse to the bankruptcy court in September 2010, he did so months after his misconduct had occurred and only after learning that Lilliard was accusing him of fraud.

Further, Respondent did not voluntarily return the misappropriated funds to Lilliard, who instead reclaimed his funds by filing a fraudulent activity complaint with the Bank of America about the altered check. Finally, while Respondent acknowledged some culpability for his misconduct during the trial of this matter and expressed some remorse over his mishandling of the $1,050, that acknowledgement came only at the time of trial and only after Respondent had previously formally denied culpability in the case. Under such circumstances, remorse is not an appropriate mitigating factor. (Std. 1.2(e)(vii); *In the Matter of Spaith*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 519.)

No Harm

Although this court has declined to find harm as an aggravating factor in this matter, it also declines to find that Respondent has presented clear and convincing evidence that no harm resulted from his misconduct. Had Respondent elected to send to the Trustee the check from Lilliard, rather than making it unavailable by altering it and then depositing it into his own account, it is possible that the Trustee might have either deferred dismissing the case or reversed any prior decision to do so. By depositing Lilliard's check in his own account and then deciding to use the money, rather than transferring it to the Trustee, Respondent deprived Lilliard of that possible outcome. The evidence is not clear and convincing that making the effort would have been to no avail.

In addition, Lilliard was deprived of the use of the money that he had entrusted to Respondent from January until August, 2010. Although the harm caused by that loss of use of the funds was not "significant harm", it was nonetheless harm. (See *Kelly v. State Bar* (1991) 53 Cal.3d 509, 519; *In the Matter of Spaith, supra*, 3 Cal. State Bar Ct. Rptr. at p. 518.)

Pro Bono Work/Community Service

Respondent testified that he regularly performs pro bono work for various indigent clients. Respondent, however, offered only his own testimony to establish these efforts. While such pro bono efforts are a mitigating factor, this court assigns only modest weight to the mitigation evidence offered here. (See *Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [pro bono and community service as mitigating factor]; but see *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [limited mitigation weight for community service established only by respondent's testimony].)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case

must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.) We determine the appropriate discipline in light of all relevant circumstances, including aggravation and mitigation. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Discipline for the misconduct here is covered by standards 2.2(a) and 2.3.

Standard 2.2(a) provides: "Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances."

Standard 2.3 provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." Acts of moral turpitude by an attorney are grounds for suspension or disbarment even if no harm results. (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 220.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. Here, that would be the sanction set forth in standard 2.2.(a).

In applying standard 2.2(a), the courts have recognized that the term "wilful misappropriation" covers a broad range of conduct varying significantly in the degree of culpability. (See, e.g., *Edwards v. State Bar* (1990) 52 Ca1.3d 28, 38.) In cases where the misappropriation is "wilful" but where only one client has been harmed, disbarment is rarely appropriate. (*Ibid.*) In misappropriation cases, discipline of less than disbarment is also warranted where the circumstances show that the misappropriation of entrusted funds was an isolated event. (See , e.g., *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1360-1361, 1366-1368; *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 628.)

In line with existing case law, the State Bar does not ask that Respondent be disbarred for his misconduct here, but instead recommends that the discipline be the minimum one year of actual suspension set forth in standard 2.2(a).

With that recommendation this court agrees. The sanction of disbarment is not appropriate or necessary in the instant case. Respondent has a lengthy period of discipline-free practice in an area where client complaints are frequent, and his misconduct involves a single instance of misappropriation. His misconduct in this case was aberrational, the amount of money misappropriated by him was insignificant, there was no showing of significant harm sustained by the client, and there is little or no reason to fear that the misconduct will be replicated at any time in the future. The one-year actual suspension is in accord with both the standard and the cases. (See, e.g., *Edwards v. State Bar* (1990) 52 Cal.3d 28; *Hipolito v. State Bar, supra* ["A year of actual suspension, if not less, has been more commonly the discipline imposed in our published decisions involving but a single instance of misappropriation."]; *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 288; *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708)

On the other hand, Respondent contends that this court should not adhere to the minimum sanction set forth in standard 2.2(a) and asks that this court impose discipline that does not include any period of actual suspension. This court declines to follow that approach. Although there are reported decisions where the courts, including the Supreme Court, have declined to follow the minimum dictates of standard 2.2(a), those cases have generally been instances where the respondent was less blameworthy than Respondent here. It is to be remembered that Respondent's misconduct here entailed several different acts of intentional wrongdoing. He intentionally altered the check of his client in order to be able to deposit the client's funds into his own account. Unless expressly granted, an attorney does not have the authority to endorse a client's signature on negotiable instruments payable to the client. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 794-795.) He then took client funds and deposited them into his general operating account instead of a client trust accord. (cf. Rules of Prof. Conduct, rule 4-100(A) ["All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import"].) Then, after learning that Lilliard's case had been dismissed, he inappropriately and surreptitiously elected to retain the diverted funds and to treat them as earned fees. This unilateral use by Respondent of the client's funds to pay his own fees, without notice to the client or approval of the bankruptcy court, violated both the standards of professional conduct (see, e.g., *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358) and the rules governing bankruptcy proceedings. Then, within just a few days of the misappropriation, Respondent intentionally used portions of the money to pay for the expenses of running his office. Later, when Respondent should have disclosed his retention of the funds to the bankruptcy court, he failed to do so. Finally, during most of 2010, Respondent

did not disclose his prior actions to his client, who was instead allowed to continue to believe that the funds had been sent to the Trustee.

In support of his contention that actual suspension should not be recommended, Respondent cites to this court two cases as authority: *Palomo v. State Bar, supra*, 36 Cal.3d 785; and *Himmel v. State Bar* (1971) 4 Cal.3d 786. Neither of these cases, however, provides adequate support for Respondent's request that standard 2.2(a) not be followed. Both of these cases were decided before standard 2.2(a) was adopted. In *Himmel*, the Supreme Court commented on the fact that the "there is no conformity as to punishment ascertainable from the [misappropriation] cases." That was precisely the type of problem that adoption of the standards was intended to resolve. In addition, in both cases the court found that there was an absence of wrongful intent. In contrast to those cases, the misappropriation here was effected by Respondent personally and it was intentional. Further, *Himmel* also does not support a conclusion that no actual suspension should be recommended here. Instead, the *Himmel* court affirmed a recommended discipline that included three months of actual suspension, and it did so even though the misappropriation had resulted only from the attorney's failure to supervise his office personnel. Such was not the case here.

As a final comment, this court notes that the *Himmel* court, in affirming the three-month actual suspension that had previously been recommended by the State Bar Disciplinary Board, described the sanction as "lenient." Since that time both the Supreme Court and this court have repeatedly emphasized that misappropriation by an attorney of entrusted client funds is a particularly serious ethical violation that breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. Given the Supreme Court's most recent admonition to all regarding the deference to be given to the standards (see *In re Silverton, supra*, 36 Cal.4th 81, 91-92), there is every reason to conclude that

it would not again approve of any such "lenient" sanction for an attorney's intentional misappropriation of a client's entrusted funds. (See, e.g., *Edwards v. State Bar, supra,* 52 Cal.3d at pp. 37-39.)

RECOMMENDED DISCIPLINE

Actual Suspension

For all of the above reasons, it is recommended that **Nathan Shilberg** be suspended from the practice of law for two years; that execution of that suspension be stayed; and that Respondent be placed on probation for two years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first one year of probation.
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, 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, 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. Within thirty (30) days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy

to discuss these terms and conditions of probation and must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.

5. Respondent must report, in writing, to the State Bar's Office of Probation 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).[3] 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.

[3] To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

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 the State Bar's Client Trust Accounting School and provide satisfactory proof of such completion to the State Bar's Office of Probation. 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.

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.

MPRE

It is further recommended that Respondent take and pass the Multistate Professional Responsibility Examination during the period of his actual suspension. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

Rule 9.20

The court recommends that Respondent be ordered to comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule

within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[4]

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and that such payment obligation be enforceable as provided for under Business and Professions Code section 6140.5.

Dated: June _____, 2012

DONALD F. MILES
Judge of the State Bar Court

[4] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is also, *inter alia*, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)