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<b>State Bar Court of California</b> <b>Hearing Department</b> <b>Los Angeles</b> <b>ACTUAL SUSPENSION</b>		
Counsel For The State Bar  <b>Kim Kasreliovich</b> Deputy Trial Counsel 845 S. Figueroa Street Los Angeles, CA 90017 (213) 765-1378  Bar # 261766	Case Number(s): <b>13-O-12261 - PEM</b>	For Court use only  <div style="text-align: center; font-size: 2em; font-weight: bold;">FILED</div> <div style="text-align: center; font-size: 1.5em; font-weight: bold;">AUG 25 2014</div> <div style="text-align: center; font-weight: bold;">STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO</div>
Counsel For Respondent  <b>Arthur Margolis</b> Margolis & Margolis LLP 2000 Riverside Dr Los Angeles, CA 90039 (323) 953-8996  Bar # 57703	Submitted to: <b>Settlement Judge</b>  STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING  ACTUAL SUSPENSION  <input checked="" type="checkbox"/> PREVIOUS STIPULATION REJECTED	
In the Matter of: <b>JOSEPH S. FOGEL</b>  Bar # 156746  A Member of the State Bar of California (Respondent)		

PUBLIC MATTER

**Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.**

**A. Parties' Acknowledgments:**

- (1) Respondent is a member of the State Bar of California, admitted **December 16, 1991**.
- (2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.
- (3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **15** pages, not including the order.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."

(Effective January 1, 2014)



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- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".
- (6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."
- (7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.
- (8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):
- Until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 5.130, Rules of Procedure.
  - Costs are to be paid in equal amounts prior to February 1 for the following membership years: **two billing cycles following the effective date of the Supreme Court Order.** (Hardship, special circumstances or other good cause per rule 5.132, Rules of Procedure.) If Respondent fails to pay any installment as described above, or as may be modified by the State Bar Court, the remaining balance is due and payable immediately.
  - Costs are waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs".
  - Costs are entirely waived.

**B. Aggravating Circumstances [Standards for Attorney Sanctions for Professional Misconduct, standards 1.2(f) & 1.5]. Facts supporting aggravating circumstances are required.**

- (1)  **Prior record of discipline**
- (a)  State Bar Court case # of prior case
  - (b)  Date prior discipline effective
  - (c)  Rules of Professional Conduct/ State Bar Act violations:
  - (d)  Degree of prior discipline
  - (e)  If Respondent has two or more incidents of prior discipline, use space provided below.
- (2)  **Dishonesty:** Respondent's misconduct was intentional, surrounded by, or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.
- (3)  **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.
- (4)  **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice.
- (5)  **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.

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- (6)  **Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.
- (7)  **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.
- (8)  **Restitution:** Respondent failed to make restitution.
- (9)  **No aggravating circumstances** are involved.

**Additional aggravating circumstances:**

**C. Mitigating Circumstances [see standards 1.2(g) & 1.6]. Facts supporting mitigating circumstances are required.**

- (1)  **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.
- (2)  **No Harm:** Respondent did not harm the client, the public, or the administration of justice.
- (3)  **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings.
- (4)  **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.
- (5)  **Restitution:** Respondent paid \$ \_\_\_\_\_ on \_\_\_\_\_ in restitution to \_\_\_\_\_ without the threat or force of disciplinary, civil or criminal proceedings.
- (6)  **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.
- (7)  **Good Faith:** Respondent acted with a good faith belief that was honestly held and reasonable.
- (8)  **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical or mental disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and the difficulties or disabilities no longer pose a risk that Respondent will commit misconduct.
- (9)  **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.
- (10)  **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.
- (11)  **Good Character:** Respondent's extraordinarily good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.

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- (12)  **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.
- (13)  **No mitigating circumstances** are involved.

**Additional mitigating circumstances:**

**No Prior Discipline - see the Attachment to the Stipulation, page 10**  
**Pro Bono Work - see the Attachment to the Stipulation, page 10**  
**Remedial Measures - see the Attachment to the Stipulation, page 11**  
**Pretrial Stipulation - see the Attachment to the Stipulation, page 11**

**D. Discipline:**

- (1)  **Stayed Suspension:**
- (a)  Respondent must be suspended from the practice of law for a period of **two years**.
- i.  and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.2(c)(1) Standards for Attorney Sanctions for Professional Misconduct.
- ii.  and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii.  and until Respondent does the following:
- (b)  The above-referenced suspension is stayed.

(2)  **Probation:**

Respondent must be placed on probation for a period of **one year**, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18, California Rules of Court)

(3)  **Actual Suspension:**

- (a)  Respondent must be actually suspended from the practice of law in the State of California for a period of **six months**.
- i.  and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct
- ii.  and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii.  and until Respondent does the following:

**E. Additional Conditions of Probation:**

- (1)  If Respondent is actually suspended for two years or more, he/she must remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and learning and ability in the general law, pursuant to standard 1.2(c)(1), Standards for Attorney Sanctions for Professional Misconduct.

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- (2)  During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- (3)  Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
- (4)  Within thirty (30) days from 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. Upon the direction of the Office of Probation, Respondent 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 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. Respondent must also state whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next 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 period of probation and no later than the last day of probation.

- (6)  Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the probation monitor.
- (7)  Subject to assertion 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 probation conditions.
- (8)  Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.
- No Ethics School recommended. Reason: .
- (9)  Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.
- (10)  The following conditions are attached hereto and incorporated:
- |   |   |
|---|---|
| <input type="checkbox"/> Substance Abuse Conditions | <input type="checkbox"/> Law Office Management Conditions |
| <input type="checkbox"/> Medical Conditions         | <input checked="" type="checkbox"/> Financial Conditions  |

#### F. Other Conditions Negotiated by the Parties:

- (1)  **Multistate Professional Responsibility Examination:** Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National

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Conference of Bar Examiners, to the Office of Probation during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 5.162(A) & (E), Rules of Procedure.**

No MPRE recommended. Reason:

- (2)  **Rule 9.20, California Rules of Court:** Respondent must comply with the requirements of rule 9.20, 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's Order in this matter.
- (3)  **Conditional Rule 9.20, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she must comply with the requirements of rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.
- (4)  **Credit for Interim Suspension [conviction referral cases only]:** Respondent will be credited for the period of his/her interim suspension toward the stipulated period of actual suspension. Date of commencement of interim suspension:
- (5)  **Other Conditions:** If Respondent attends a session of either State Bar Ethics School or State Bar Client Trust Accounting School and passes the test given at the end any time after May 1, 2014, those classes will fulfill the probation requirements listed on page 5, section E(8) and page 8, section d.

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In the Matter of: <b>JOSEPH S. FOGEL</b>	Case Number(s): <b>13-O-12261 - PEM</b>
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**Financial Conditions**

**a. Restitution**

- Respondent must pay restitution (including the principal amount, plus interest of 10% per annum) to the payee(s) listed below. If the Client Security Fund ("CSF") has reimbursed one or more of the payee(s) for all or any portion of the principal amount(s) listed below, Respondent must also pay restitution to CSF in the amount(s) paid, plus applicable interest and costs.

Payee	Principal Amount	Interest Accrues From

- Respondent must pay above-referenced restitution and provide satisfactory proof of payment to the Office of Probation not later than

**b. Installment Restitution Payments**

- Respondent must pay the above-referenced restitution on the payment schedule set forth below. Respondent must provide satisfactory proof of payment to the Office of Probation with each quarterly probation report, or as otherwise directed by the Office of Probation. No later than 30 days prior to the expiration of the period of probation (or period of reprobation), Respondent must make any necessary final payment(s) in order to complete the payment of restitution, including interest, in full.

Payee/CSF (as applicable)	Minimum Payment Amount	Payment Frequency

- If Respondent fails to pay any installment as described above, or as may be modified by the State Bar Court, the remaining balance is due and payable immediately.

**c. Client Funds Certificate**

- 1. If Respondent possesses client funds at any time during the period covered by a required quarterly report, Respondent must file with each required report a certificate from Respondent and/or a certified public accountant or other financial professional approved by the Office of Probation, certifying that:
  - a. 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 "Clients' Funds Account";

b. 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 cancelled checks for each client trust account; and,
- iv. each monthly reconciliation (balancing) of (i), (ii), and (iii), above, and if there are any differences between the monthly total balances reflected in (i), (ii), and (iii), above, the reasons for the differences.

c. Respondent has maintained a written journal of securities or other properties held for clients that specifies:

- i. each item of security and property held;
- ii. the person on whose behalf the security or property is held;
- iii. the date of receipt of the security or property;
- iv. the date of distribution of the security or property; and,
- v. the person to whom the security or property was distributed.

2. 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 Office of Probation for that reporting period. In this circumstance, Respondent need not file the accountant's certificate described above.

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

**d. Client Trust Accounting School**

- Within one (1) year of the effective date of the discipline herein, Respondent must supply to the Office of Probation satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School, within the same period of time, and passage of the test given at the end of that session.





## CONCLUSIONS OF LAW:

10. By misappropriating, with gross negligence, \$14,694.18 of funds that Mandalia was entitled to receive, Respondent committed an act involving moral turpitude, dishonesty or corruption in willful violation of Business and Professions Code section 6106.

11. By allowing his client trust account balance to fall below the \$15,334 that Respondent was required to maintain on behalf of Mandalia, Respondent failed to maintain the balance of funds received for the benefit of a client and deposited in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import in willful violation of the Rules of Professional Conduct, rule 4-100(A).

## ADDITIONAL FACTS RE MITIGATING CIRCUMSTANCES.

**No Prior Discipline:** Respondent had been in practice for 21 years at the time of the misconduct. Although Respondent's failure to maintain Mandalia's funds in his client trust account is deemed serious, Respondent's 21 years of discipline free practice is "highly significant" mitigation. (*Friedman v. State Bar* (1990) 5 Cal.3d 235, 245.)

**Pro Bono Work:** Respondent has provided information that he has done extensive legal pro bono work through his temple to provide assistance to youth struggling to obtain legal status in this country and acted as a volunteer for Public Counsel representing children with special needs in education hearings. In addition, Respondent is engaged in such non-legal community work as: sponsoring a summer program for unprivileged kids, volunteer coaching kids soccer, and volunteering at his own kids elementary school. Civic service and charitable work can be mitigation as evidence of good character. (*In the Matter Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 359. *Porter v. State Bar* (1990) 52 Cal.3d 518, 529.)

**Remedial Measures:** As soon as Respondent learned from the State Bar that Mandalia had not been paid he immediately remitted all funds owed to Mandalia. Since then, Respondent provided a letter from MT Services, a professional accounting and bookkeeping service, that Respondent has engaged on a monthly and on-going basis to set up and maintain bookkeeping procedures and records in full accordance with the Rules of Professional Conduct. In addition, Respondent attended Client Trust Accounting School on May 2, 2014. Remedial measures taken by an attorney to come into compliance with ethical duties may be deemed mitigating. (See *In the Matter of Sullivan* (1997) 3 Cal. State Bar Ct. Rptr. 608, 613; see also *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 416-417.)

**Pretrial Stipulation:** Respondent is entitled to some mitigation for entering into this stipulation. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079 [where mitigative credit was given for entering into a stipulation as to facts and culpability].)

## AUTHORITIES SUPPORTING DISCIPLINE.

The Standards for Attorney Sanctions for Professional Misconduct "set forth a means for determining the appropriate disciplinary sanction in a particular case and to ensure consistency across cases dealing with similar misconduct and surrounding circumstances." (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.1. All further references to Standards are to this source.) The Standards help fulfill the primary purposes of discipline, which include: protection of

the public, the courts and the legal profession; maintenance of the highest professional standards; and preservation of public confidence in the legal profession. (See std. 1.1; *In re Morse* (1995) 11 Cal.4th 184, 205.)

Although not binding, the standards are entitled to “great weight” and should be followed “whenever possible” in determining level of discipline. (*In re Silvertown* (2005) 36 Cal.4th 81, 92, quoting *In re Brown* (1995) 12 Cal.4th 205, 220 and *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Adherence to the standards in the great majority of cases serves the valuable purpose of eliminating disparity and assuring consistency, that is, the imposition of similar attorney discipline for instances of similar attorney misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 190.) If a recommendation is at the high end or low end of a Standard, an explanation must be given as to how the recommendation was reached. (Std. 1.1.) “Any disciplinary recommendation that deviates from the Standards must include clear reasons for the departure.” (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

In determining whether to impose a sanction greater or less than that specified in a given Standard, in addition to the factors set forth in the specific Standard, consideration is to be given to the primary purposes of discipline; the balancing of all aggravating and mitigating circumstances; the type of misconduct at issue; whether the client, public, legal system or profession was harmed; and the member’s willingness and ability to conform to ethical responsibilities in the future. (Stds. 1.7(b) and (c).)

In this matter, Respondent admits to committing two acts of professional misconduct. Standard 1.7(a) requires that where a Respondent “commits two or more acts of misconduct and the Standards specify different sanctions for each act, the most severe sanction must be imposed.”

The most severe sanction applicable to Respondent’s misconduct is found in Standard 2.1(b) which applies to Respondent’s violation of Business and Professions Code section 6106. Standard 2.1(b) provides that disbarment or actual suspension is appropriate for misappropriation involving gross negligence. Respondent misappropriated Mandalia’s money when the balance in his client trust account fell below the amount he was required to maintain on behalf of Mandalia, as a result of Respondent’s gross negligence in maintaining his client trust account. Through an oversight, Mandalia was not paid along with the other six plaintiffs, and Respondent’s poor accounting practices resulted in this oversight not being discovered.

To properly assess appropriate discipline under Standard 2.1(b) one must also consider mitigation and aggravation. Standard 1.7(c) offers guidance. Standard 1.7(c) states, in pertinent part, “If mitigating circumstances are found, they should be considered alone and in balance with any aggravating circumstances, and if the net effect demonstrates that a lesser sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a lesser sanction that what is otherwise specified in a given standard.” In the present case, there is significant mitigation present and no aggravation. Respondent’s conduct in this case is an aberration in his 21 years of discipline-free practice and the evidence supports that conclusion. There is no evidence that the misappropriation in this case involved dishonesty or an intent to misappropriate on the part of Respondent. Respondent provided documents demonstrating that all other parties to the litigation were paid in a timely manner, strongly indicating that this was the result of gross negligence on the part of Respondent when he failed to maintain accurate client ledgers and perform monthly reconciliations. Respondent timely paid out over \$100,000 to seven other plaintiffs, out of a total settlement of \$217,000. In addition, Respondent immediately provided all Mandalia’s funds to Mandalia after receiving notice from the State Bar.

Respondent hired an accountant, has completed Client Trust Accounting School and has clearly demonstrated an ability and willingness to conform to ethical standards.

In *Edwards v. State Bar* (1990) 52 Cal.3d 28, 38, the Court discussed the effect that lack of dishonesty has on assessing a level of discipline:

An attorney who deliberately take a client's funds, intending to keep them permanently, and answers the client's 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. Although lack of evil intent does not immunize an attorney's conduct from discipline [citations omitted], the attorney's good faith is an important consideration in determining the degree of discipline to be imposed.

Respondent in the present case did not act with an evil intent or with lies and evasion. The nature of the misconduct and strong mitigation demonstrate that disbarment is not necessary and due to Respondent's lack of prior discipline, there is no evidence to indicate that a period of actual suspension of less than a year would be inadequate to protect the public. In fact, Respondent's conduct has already demonstrated that the mere involvement of the State Bar has been sufficient for him to correct his practices and install safeguards. Therefore, a six month period of actual suspension is well within the standards and is sufficient to achieve the purposes of attorney discipline.

Case law also supports the level of discipline in this case. There are numerous cases disbaring the respondent attorney for misappropriating client funds even when the respondent has no prior discipline. See *Kelly v. State Bar*, (1988) 45 Cal.3d 649 [\$19,597 misappropriated with no prior discipline and attorney was disbarred], see *Kaplan v. State Bar* (1991) 52 Cal.3d 1067 [\$29,000 misappropriated from attorney's firm with no prior discipline and attorney disbarred], see *Chang v. State Bar* (1989) 49 Cal. 3d 114 [\$8,000 misappropriated from client funds with no prior discipline and attorney disbarred]. Aside from the other distinguishing features discussed below, Respondent in this case has entered into a stipulation thereby negating the need for litigation. All of the cases discussed in this stipulation were a result of decisions rendered after trial.

However, in the majority of those cases which impose either disbarment or actual suspension of two years, there are either additional acts of misconduct or acts of deceit and dishonesty surrounding the misappropriation. For example, in *Kelly v. State Bar*, *supra*, 45 Cal.3d 649, Kelly misappropriated client funds, failed to account, contacted a represented party, and committed moral turpitude. In addition, the court noted that the amount was clearly significant and Kelly had no mitigating factors. The Court said the "most obvious" candidates for disbarment are those who have been found culpable of misappropriating large sums from several clients or who have misappropriated funds from a small number of clients committed along with "other misdeeds." *Id.* at 656-657. Kelly was disbarred.

In addition in *Kaplan v. State Bar*, *supra*, 52 Cal.3d 1067, even though Kaplan reported himself to the State Bar after admitting to his employer he had intentionally stolen money from the firm, he then made subsequent misrepresentations to the bar during the investigation. Ultimately Kaplan's "purposeful design to defraud his partners" warranted disbarment. *Id.* at 1071.

In *Chang v. State Bar*, *supra*, 49 Cal. 3d 114, Chang was disbarred in part because he never acknowledged his misconduct and made no effort to reimburse his client. The Court noted that this increased the likelihood he would commit misconduct again.

In *Lipson v. State Bar*, (1991) 53 Cal.3d 1010, Lipson misappropriated \$8,400 and received loans from two clients without complying with the Rules of Professional Conduct. At the time of trial Lipson had still failed to repay the loans and refund the misappropriated funds which the Court calculated to be \$26,400 in owed restitution. In imposing two years of actual suspension on Lipson, the Court stated, "Although [Lipson's] misconduct did not involve the deliberate intent and deceit that would require disbarment, his misconduct went beyond a single act of misappropriation." *Id.* at 1012-1013.

In *Edwards v. State Bar, supra*, 52 Cal.3d 28, Edwards was suspended for one year after he intentionally misappropriated \$3,000 from his client trust account to pay his mortgage. Edwards also said he kept a "mental idea" of the balance in his client trust account and would not promptly withdraw funds as he earned them. *Id.* at 33. In mitigation, the Court found that Edwards' client was not harmed, he was candid with the State Bar and made full restitution prior to being notified about the State Bar complaint. In aggravation, the Court found that Edwards engaged in multiple acts of inappropriate record keeping and use of funds for personal matter (uncharged commingling), a lack of appreciation of the seriousness of his misconduct, and a lack of understanding of the significance of trust property. Although the amount misappropriated in this case is less than in the present matter, the present matter lacks any factors in aggravation.

Although the dollar amount misappropriated by Respondent in the present case is greater than many of the cases cited above, it is only one factor to be considered and it should not be overshadowed by the facts and circumstances surrounding the misappropriation.

Finally, there is case law on point with the present matter which indicate that six months actual suspension is an appropriate and sufficient level of discipline.

In *Howard v. State Bar* (1990) 51 Cal.3d 215, the Supreme Court imposed six months actual suspension when Howard misappropriated \$1,300 in client funds by directly depositing the settlement check into her personal account and thereafter spending the money for personal use. The only mitigation found by the Court was Howard's struggle with and rehabilitation from alcohol and cocaine addiction and excessive delay in prosecution by the State Bar. The present case involves substantially more money than *Howard* but where Howard intentionally misappropriated the money, Respondent misappropriated the money due to gross negligence. In addition, Respondent in the case at hand has significantly more mitigation than was present in *Howard*.

In *Waysman v. State Bar*, (1986) 41 Cal.3d 452, Waysman was out of town for a multi-week trial when he received a settlement draft on behalf of a client. He remotely instructed his secretary to deposit the settlement check in his general account because it would clear faster. When Waysman returned from trial he found his secretary had paid herself from the general account and quit. Waysman had also used the general account for various expenses while out of town and the entire settlement amount, \$24,000 had been spent. Waysman immediately informed the client and began making restitution payments approximately five months later. Waysman had no prior discipline over 14 years of practicing law and was suffering from alcoholism, from which he has since rehabilitated, at the time of the misconduct. Waysman received mitigation for informing his client himself of the misappropriation and beginning restitution payments. The Court stated, "...we note that while [Waysman's] conduct certainly cannot be condoned, he appears to have acted without any intent to defraud his client. Although he 'misappropriated' the client funds in the sense that he wrongfully misused the money for his own office expenses, the stipulation and facts strongly suggest that it is likely that [Waysman] was simply negligent

in supervising his office and financial affairs.” *Id.* at 458. The Court stated that this was clearly an aberration in Waysman’s career and imposed six months of stayed suspension with one year of probation.

The case at hand involves less funds than *Waysman* but has very similar factors in mitigation. Waysman’s self-report to the client about the misappropriation is a significant factor which is absent in the present case. Absent that spontaneous act and in keeping with current standards, a higher level of discipline of six months actual suspension is appropriate in this case.

**COSTS OF DISCIPLINARY PROCEEDINGS.**

Respondent acknowledges that the Office of the Chief Trial Counsel has informed Respondent that as of April 15, 2014, the prosecution costs in this matter are approximately \$3,419. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the cost of further proceedings.

**DISMISSALS.**

The parties respectfully request the Court to dismiss the following alleged violations in the interest of justice:

<u>Case No.</u>	<u>Count</u>	<u>Alleged Violation</u>
13-O-12261	THREE	4-100(B)(4) [Failure to Pay Client Funds Promptly]
13-O-12261	FOUR	6068(m) [Failure to Respond to Client Inquiries]

**EXCLUSION FROM MCLE CREDIT.**

Pursuant to rule 3201, Respondent may not receive MCLE credit for completion of both State Bar Ethics School and State Bar Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

(Do not write above this line.)

In the Matter of: JOSEPH S. FOGEL	Case number(s): 13-O-12261 - PEM
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**SIGNATURE OF THE PARTIES**

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Facts, Conclusions of Law, and Disposition.

<u>8/5/14</u> Date	<u>Joseph S Fogel</u> Respondent's Signature	<u>Joseph S. Fogel</u> Print Name
<u>8/5/14</u> Date	<u>Arthur L. Margolis</u> Respondent's Counsel Signature	<u>Arthur Margolis</u> Print Name
<u>8/10/14</u> Date	<u>[Signature]</u> Deputy Trial Counsel's Signature	<u>Kim Kasrelievich</u> Print Name

(Do not write above this line.)

In the Matter of: JOSEPH S. FOGEL	Case Number(s): 13-O-12261
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### ACTUAL SUSPENSION ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- The stipulated facts and disposition are APPROVED and the DISCIPLINE RECOMMENDED to the Supreme Court.
- The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.
- All Hearing dates are vacated.

1. On page 4 of the Stipulation, paragraph D.(2), the period of probation is increased to three years;
2. On page 6 of the Stipulation, paragraph F.(5) is DELETED.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See rule 5.58(E) & (F), Rules of Procedure.) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 9.18(a), California Rules of Court.)**

August 22, 2014  
Date

  
GEORGE E. SCOTT, JUDGE PRO TEM  
Judge of the State Bar Court



## CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, On August 25, 2014, I deposited a true copy of the following document(s):

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING

in a sealed envelope for collection and mailing on that date as follows:


- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

ARTHUR LEWIS MARGOLIS  
MARGOLIS & MARGOLIS LLP  
2000 RIVERSIDE DR  
LOS ANGELES, CA 90039

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Kimberly G. Kasreliovich, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on August 25, 2014.

  
Laurretta Cramer  
Case Administrator  
State Bar Court