

FILED JULY 17, 2012

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of)	Case No. 08-O-11040
)	
JOHN CLIFTON ELSTEAD,)	OPINION
)	
A Member of the State Bar, No. 61048.)	
_____)	

This case illustrates the importance of memorializing the scope and terms of an attorney's representation in writing. John Clifton Elstead failed to fulfill this responsibility, resulting in serious problems in two client matters. In one case, Elstead did not sufficiently document the ramifications of his contingency fee agreement, and in the other, he did not execute a written fee contract at all. The clients dispute his fees in both matters. The Office of the Chief Trial Counsel of the State Bar (State Bar) filed the Notice of Disciplinary Charges (NDC) in December 2010. This is Elstead's second discipline case in almost 40 years of practice.

The hearing judge found Elstead culpable of five of the eight counts alleged in the NDC, including failing to account to clients, committing acts of moral turpitude, failing to refund unearned fees, and accepting fees from a non-client. The hearing judge further found Elstead's misconduct was aggravated by his prior discipline, multiple acts of wrongdoing, dishonesty based on an allegation that he fabricated a document, and indifference towards rectification or atonement. The hearing judge recommended discipline including two years' actual suspension. Both Elstead and the State Bar seek review.

Elstead challenges the hearing judge's culpability findings and argues that the premature introduction of evidence in aggravation negatively affected the judge's assessment of his

credibility. He also asserts the evidence does not support the hearing judge's credibility determinations. In its appeal, the State Bar contends that Elstead is culpable of all eight counts charged in the NDC, including charging an illegal and unconscionable fee. The State Bar advocates for disbarment, arguing that more weight should be given to the hearing judge's finding that Elstead fabricated a document and to Elstead's prior discipline for misleading a superior court judge.

We have independently reviewed the record (Cal. Rules of Court, rule 9.12), considering specific factual findings raised by the parties. (Rules Proc. of State Bar, rule 5.152(C) [factual error not specifically raised on review is waived].) The record does not support some of the hearing judge's findings, most significantly that Elstead lacked candor in these proceedings by fabricating a document. We also do not find that Elstead committed acts of moral turpitude. But we find Elstead culpable of failing to account to two clients, and improperly accepting attorney fees from a third party without his client's written consent. Since Elstead is culpable of only three counts of misconduct and significantly less aggravation than the hearing judge found, case precedent guides us to recommend a six-month actual suspension rather than two years.

I. PROBLEMS WITH CANDOR AND OTHER FINDINGS

Many of the hearing judge's factual findings were based on her determinations that Elstead lacked credibility and candor, and that the State Bar witnesses were credible. Particularly damaging was her finding that Elstead fabricated a November 29, 2004 letter he said he sent to his client, Richard Kalpakoff. Although we are reluctant to differ from the hearing judge's credibility findings, based on the conflicting documentary and testimonial evidence, we conclude that there is not clear and convincing evidence to support all of her factual findings.

A. Candor

The State Bar bears the burden to prove by clear and convincing evidence that the November 29, 2004 letter was fabricated. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal.

State Bar Ct. Rptr. 269, 282 [State Bar must prove lack of candor, i.e., that respondent lied, by clear and convincing evidence].) Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind.

(*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.) And while circumstantial evidence is sufficient to support a factual finding, any inference drawn from the evidence must rest on probability, not speculative possibility or conjecture. (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585.) Ultimately, if equally reasonable inferences may be drawn from proven facts, the inference leading to a conclusion of innocence, rather than to guilt, must be accepted. (*Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794.) We find that the State Bar failed to meet its burden.

The State Bar introduced the November 29, 2004 letter to Kalpakoff, which advised him that Elstead had filed an amended complaint to add fraud claims to the pending medical malpractice action. The letter also stated that his fee “will be for a 40% contingency and will not be for the statutory limits set for cases based solely on medical malpractice cases.”¹ The State Bar argued that the document was a fake and that Elstead never mailed it to Kalpakoff. Elstead testified it was an authentic document and he mailed it. Whether he informed Kalpakoff of the MICRA limits on attorney fees is a central issue in this case.

The hearing judge found that the 2004 letter was “a fake document that [Elstead] wholly made up for these proceedings.” We disagree. After questioning Elstead about the letter, the State Bar asked him to compare it to other letters generated by his office between 2004 and 2008, several of which were from an unrelated matter and were not listed in either party’s pretrial exhibit list. The font in the letterhead on the November 29, 2004 letter was comparable to the letters from 2007 and 2008, and different than those from 2004 and 2005. This variation in font is the State Bar’s primary evidence that the letter was fabricated.

¹ As discussed below, Elstead is referring to the cap on attorney fees in medical malpractice cases under the Medical Injury Compensation Reform Act (MICRA). (See fn. 5.)

The State Bar subsequently asked Kalpakoff if he had ever received the November 29, 2004 letter, and he testified “I don’t recall this document, no.” The letters used as comparisons were admitted into evidence over Elstead’s objections during the culpability phase. Later, after the parties had rested and the hearing judge made a tentative finding of culpability, she admitted the November 29, 2004 letter over Elstead’s objections as evidence in aggravation.² Elstead testified that he rarely prepared letters and that the two staff members who drafted letters used different computers, which may explain the font differences.³ Also, the e-mail address listed in the letterhead on the November 29, 2004 letter is the same as that in other 2004 and 2005 letters, and different than that in the 2007 and 2008 letters.

We find that the documentary evidence alone creates a reasonable inference that the November 29, 2004 letter is not “fake.” Accordingly, we must adopt the inference that leads to “a conclusion of innocence rather than one leading to a conclusion of guilt . . .” (*Himmell v. State Bar, supra*, 4 Cal.3d at pp. 793-794, citations omitted.)

B. Clear and Convincing Evidence

The hearing judge concluded that the State Bar witnesses were credible and Elstead was not. However, we have reversed a critical finding on credibility, i.e., that Elstead fabricated a document. Moreover, some of the State Bar witnesses’ testimony was contradicted by other

² Elstead raises several objections to the November 29, 2004 letter and the previously undisclosed letters used for comparison, including his lack of notice and opportunity to respond, and their admission as aggravating evidence before culpability was determined. Since we reverse the hearing judge’s finding, we decline to rule on these claimed procedural irregularities.

³ It appears that the letters (including the November 29, 2004 letter) may have been drafted by different people based on variations in the formality of the salutations and signatures used. For example, the October 22, 2004 letter (exhibit 15) is addressed “Dear Rich,” and signed “John,” whereas the November 29, 2004 letter is addressed “Dear Mr. Kalpakoff” and signed “John Clifton Elstead.”

witnesses (besides Elstead), their own testimony or other documentary evidence.⁴ Upon our independent review we have reweighed the evidence in light of these contradictions and our finding that the November 29, 2004 letter was not fabricated. “Proof by clear and convincing evidence to a reasonable certainty means that irreconcilable conflicts in the testimony of the chief State Bar witness by their very nature severely undermine the State Bar’s case. [Citation.]” (*In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 149.)

Accordingly, our findings are limited to those facts proven by clear and convincing evidence and are not based on evidence that is sufficiently contradicted elsewhere in the record.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Kalpakoff Matter

Following a lengthy back surgery in September of 2003, Richard Kalpakoff developed ischemic optic neuropathy (ION), a condition that caused blindness in one eye. His surgery team had not informed him of the risk of this condition prior to surgery. Kalpakoff and his wife, Allison, consulted several attorneys about the possibility of a legal action, but none were willing to take the case. On August 16, 2004, the Kalpakoffs filed a medical malpractice action based on negligence and lack of informed consent (the medical negligence claims) to preserve the claims against the statute of limitations. The complaint was pro se, but it was prepared by Teal & Montgomery. The Kalpakoffs had consulted with the law firm, but it was unwilling to represent them.

After they filed the complaint, the Kalpakoffs consulted with Elstead and he agreed to review the medical records. Kalpakoff and Elstead knew each other because they owned neighboring houses. Elstead discovered fraud based on medical records that had been falsified to show Kalpakoff was warned of the risk of ION prior to surgery. Elstead considered the fraud

⁴ For example, although the hearing judge found that Kalpakoff credibly testified that Elstead “never explained the MICRA fee limits,” this finding is contradicted by other evidence, including the November 29, 2004 letter.

claims to be key to a recovery since he thought Kalpakoff would not prevail on the medical negligence claims due to the difficulty in proving the standard of care required for disclosure of the risk of ION.

On October 13, 2004, Elstead met with the Kalpakoffs in his office, and Kalpakoff first learned his medical records had been falsified to make it look as if he had been forewarned of the risk of ION. Elstead agreed to take the case, but explained that he needed to add the fraud claims to the complaint. Elstead told Kalpakoff that he would charge a 40% contingency fee. Kalpakoff understood his complaint needed to be amended to include fraud claims.

Before he met with Elstead, Kalpakoff was given a fee contract by Teal & Montgomery in October 2003, which was not signed but included the cap on attorney fees in medical negligence cases under MICRA.⁵ According to Kalpakoff, he read and understood that fee contract. Elstead testified that he discussed the MICRA statutory limits with Kalpakoff at their meeting. He does not remember whether he provided a copy of the statutory language after Kalpakoff referenced the previous Teal & Montgomery fee contract and said he didn't need another copy. However, Kalpakoff testified that Elstead never mentioned MICRA, and he later told the State Bar that he was unaware of the cap on attorney fees.

⁵ Business and Professions Code, section 6146, provides:

“(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

- (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered.
- (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered.
- (3) Twenty-five percent of the next five hundred thousand dollars (\$500,000) recovered.
- (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars (\$600,000).

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.”

On October 22, 2004, Elstead sent Kalpakoff his 40% contingency fee contract and requested that Kalpakoff send \$2,500 to pay the doctor he had consulted.⁶ The contract makes no reference to MICRA because, according to Elstead, he agreed to take the case based on the fraud claims, knowing he would not be able to prevail on the medical negligence claims. Kalpakoff paid Elstead the \$1,500, but did not sign the contract until February 2005.

On November 16, 2004, Elstead filed a first amended complaint that added the fraud causes of action. He did not dismiss the medical negligence claims at the time because he was worried about having to defend against the statute of limitations. Elstead did a considerable amount of work in the Kalpakoff case—over three years, he successfully defended the entire matter against a motion for stay and arbitration, and two motions for summary judgment. In September 2007, the case went to mediation. At mediation, both Elstead and the mediator discussed with Kalpakoff the risks of going to trial, including the potential \$250,000 cap on noneconomic damages under the MICRA claims if they did not prevail on the fraud claims. The case settled for \$300,000. The settlement agreements explicitly barred the Kalpakoffs from asserting future fraud claims. Although they agreed to the settlement, the Kalpakoffs were disappointed by the amount.

Shortly after the settlement, Kalpakoff orally requested an itemized bill. In response, Elstead sent him a “Disbursement Memo” on November 16, 2007, which reflected \$169,628.56 to be disbursed to the Kalpakoffs after Elstead’s fees (40% or \$120,000) and costs (\$10,371.44) that were deducted from the settlement. Elstead did not include in his calculation of deducted costs the \$1,500 Kalpakoff advanced, which he had already applied towards the doctor’s preliminary review of the case in 2004. Kalpakoff sent Elstead two certified letters requesting an itemized bill, which were returned when Elstead failed to sign for them. Elstead never provided an itemized breakdown of costs to the Kalpakoffs. But, he provided the information in response

⁶ Elstead testified that the \$2,500 was an error. The amount was only \$1,500, which is stated in the contract and is the amount Kalpakoff paid.

to a State Bar investigator's request in May 2008, which accounted for all costs billed. Shortly before trial in this proceeding, Kalpakoff initiated a fee arbitration proceeding against Elstead, which was resolved in Elstead's favor.

Counts One and Two: Illegal or Unconscionable Fee (Rules Prof. Conduct, rule 4-200(A))⁷

Counts One and Two allege, respectively, that Elstead violated rule 4-200(A) by contracting for a fee greater than that allowed by MICRA in a medical professional negligence case, and by failing to inform Kalpakoff of MICRA limits on attorney fees in the retainer contract, and at the time of the settlement and settlement distribution. The hearing judge concluded that the State Bar failed to establish culpability on these counts, and we agree.

Under MICRA, a plaintiff's recovery in cases of a medical provider's professional negligence is limited to \$250,000 in noneconomic damages. (Civ. Code, § 3333.2.) Attorney fees in cases that fall under MICRA restrictions are statutorily limited as well. (Bus. & Prof. Code, § 6146.)⁸ However, a plaintiff may pursue causes of action arising from misconduct other than medical negligence. "[W]hen a plaintiff knowingly chooses to proceed on both non-MICRA and MICRA causes of action, and obtains a recovery that may be based on a non-MICRA theory, the limitations of section 6146 should not apply." (*Waters v. Bourhis* (1985) 40 Cal.3d 424, 437, fn. omitted.)

The evidence does not support the State Bar's theory that Elstead's fees in the Kalpakoff matter were limited by MICRA. The settlement was for fraud and medical negligence claims, both of which were alleged in the first amended complaint. Elstead's contention that the fraud claims were the most viable was uncontroverted. The Kalpakoffs knew their complaint was amended to include fraud claims and knowingly signed the settlement agreement that explicitly

⁷ Rule 4-200(A) states: "A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." Unless otherwise noted, all further references to "rule(s)" are to this source.

⁸ Unless otherwise noted, all further references to "section(s)" are to this code.

applied to these claims. Under these facts, the hearing judge properly found that Elstead's 40% contingency fee following this settlement was not illegal or unconscionable. (*Waters v. Bourhis*, *supra*, 40 Cal.3d at p. 437 [MICRA attorney fee limits may not apply in "hybrid" cases]; compare *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 278 [fee in violation of MICRA limits was illegal under former rule 2-107(A)].)

Count Three: Moral Turpitude (§ 6106)

The State Bar next charges that Elstead breached his fiduciary duty and acted with moral turpitude by "failing to inform Kalpakoff of the MICRA caps on attorney fees, by informing Kalpakoff of the MICRA limits on recovery and telling Kalpakoff that due to those limits Kalpakoff would not be able to recover anything over those limits in order to convince Kalpakoff to settle, and then by nevertheless taking more than the fee allowed by MICRA." But the State Bar did not establish Elstead coerced Kalpakoff to settle the case at the mediation when he discussed the MICRA limits with them, and it was not improper to take a 40% contingency fee in this hybrid case. Thus, as charged, the only potential basis to find moral turpitude is Elstead's failure to adequately inform Kalpakoff of the MICRA cap on attorney fees.

An attorney who "seeks to collect a larger fee than that authorized by section 6146 must specifically advise the client or potential client of the pros and cons of alternative litigation strategies, including potential attorney fees, and obtain the client's consent to pursue and settle a non-MICRA action as well as a MICRA claim." (*Waters v. Bourhis*, *supra*, 40 Cal.3d at p. 438, fn. omitted.) Elstead no doubt caused the Kalpakoffs confusion and uncertainty by failing to clearly state in writing the differences in potential awards and fees under the different legal theories. Instead, he drafted an ambiguous fee agreement that stated his 40% contingency fee was for "an action for damages arising out of the medical diagnosis and treatment including back surgery." However, without minimizing Elstead's carelessness, there is insufficient evidence

that his conduct escalated to gross negligence amounting to dishonesty, corruption, or moral turpitude for purposes of discipline.

The evidence supports Elstead's position that he agreed to take the case only after discovering the fraud claims and with the understanding that his fees were not limited by MICRA. At the time he consulted with Elstead, Kalpakoff was familiar with the MICRA fee limits and was having trouble finding a lawyer to take his medical negligence case. Elstead identified the new facts that significantly changed the scope of the case. Elstead believed the fraud claims to be key to recovery. He told Kalpakoff that he was willing to take the case on a contingency fee basis and amended the complaint to include the fraud claims. Later, the limits under MICRA were discussed at the mediation by both Elstead and the mediator. As argued by Elstead, there was no reason for him to conceal the statutory limits to attorney fees under MICRA because he was proceeding on the theory of fraud.

"Some cases have said that gross negligence involves moral turpitude in that such conduct is a breach of [an attorney's] fiduciary duty, but in each instance there was misrepresentation or other improper action, and the statements must be read in the light of the additional facts. [Citations.]" (*Call v. State Bar* (1955) 45 Cal.2d 104, 109.) We find that Elstead's negligence in this case does not rise to the level of gross negligence for purposes of moral turpitude under section 6106. Accordingly, we find no culpability under count three and dismiss it with prejudice. (See *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1056 [no moral turpitude where attorney improperly acquired interest adverse to client without advising client to consult independent counsel]; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 992 [no moral turpitude despite two instances of charging unconscionable fee involving overreaching and violation of fiduciary duties]; compare *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837-838 [moral turpitude where attorney

was at least grossly negligent in demanding additional advanced fees in violation of MICRA right before client was to be deposed and leave the state for medical treatment[.]

Count Four: Failure to Render Accounts of Client Funds (rule 4-100(B)(3))⁹

We adopt the hearing judge’s finding that Elstead failed to properly account for costs. Kalpakoff needed this information to assess whether he had received his full portion of the settlement. Although Elstead did send Kalpakoff a cursory disbursement memo listing his fees and costs, an appropriate accounting would have gone further and included specific costs. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 854 [attorney who failed to disclose costs violated rule 4-100(B)(3)]; see also *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757-758 [requiring detailed summary of hourly fees and costs in hourly fee arrangement].) Elstead kept records detailing this information, which he produced at the State Bar’s request, but his failure to provide it to his client violates rule 4-100(B)(3).

Count Five: Failure to Pay Client Funds Promptly (rule 4-100(B)(4))¹⁰

The NDC charged Elstead with failing to promptly repay Kalpakoff the \$1,500 he advanced for costs and expenses in violation of rule 4-100(B)(4). Elstead used these funds in 2004 to pay a doctor to evaluate the case and, as such, Kalpakoff is not entitled to the funds. The hearing judge correctly concluded Elstead was not culpable of this violation.

B. Swain Matter

In May 2008, Theodore Swain was convicted of multiple fraud crimes. Pete Belding, a childhood friend of Elstead who was also friends with Swain, asked Elstead to review the matter to determine if there was a basis for an appeal. Elstead estimated that it would cost \$25,000 to

⁹ This rule requires an attorney to, among other things, “[m]aintain complete records of all funds, securities, and other properties of a client . . . and render appropriate accounts to the client regarding them”

¹⁰ This rule requires an attorney to: “Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.”

investigate the appeal, which Belding explained to Swain's wife, Lyn Rae Swain, and his sister, Judy Booth-Thomas. On May 18, 2008, these two relatives paid Elstead \$15,000 on Swain's behalf. Lyn Rae and Booth-Thomas believed the \$15,000 fee was to fully prosecute the appeal. Elstead did not prepare a written fee agreement for his representation, nor did he obtain Swain's written consent to accept the payment from his wife or sister.

Between June and August 2008, Elstead recorded approximately 28 hours of work investigating Swain's appeal. Through phone calls and letters, he corresponded with the prosecutor, the public defender who represented Swain for part of the trial, and Appellate Defenders, an organization that represents indigent criminal appellants. On two trips to San Diego, he reviewed court records and participated in lengthy meetings with Belding and Swain. He also preserved Swain's appeal by timely filing a notice of appeal. While Elstead was investigating the case, Lyn Rae attempted to locate independent funds to pay him, as Swain's assets were subject to a large restitution order. Elstead reported that he found a potentially viable claim to pursue on appeal. But Lyn Rae was unable to pay the additional fee Elstead estimated he would charge for pursuing the appeal, so Elstead informed the Swains he could not proceed further. He then facilitated Swain's representation by Appellate Defenders. After his involvement in the matter ended, Elstead did not send an accounting for his fees to Swain, his wife or sister.

Count Six: Failure to Render Accounts of Client Funds (rule 4-100(B)(3))

The hearing judge found that Elstead failed to render an appropriate accounting based on his disregard of requests to account for his services. We agree with Elstead that the record does not clearly establish that Lyn Rae Swain or Booth-Thomas requested an accounting. However, rule 4-100(B)(3) "does not require as a predicate that the client demand such an accounting." (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 952.) Swain and Booth-Thomas gave Elstead \$15,000, a significant sum, as an advance against future services.

Elstead's failure to provide any information about the \$15,000 violated his duty to account for his services. (*In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 757-758; § 6148, subd. (b) [describing accounting requirements in hourly fee billing arrangements].)

Count Seven: Failure to Refund Unearned Fees (rule 3-700(D)(2))¹¹

The hearing judge found that Elstead failed to refund the \$15,000, which represented unearned fees. In support of culpability on this count, the hearing judge found that Elstead performed no services of value for Swain. This finding is not supported by the record. Elstead preserved Swain's appeal by timely filing the required notice, conducted three days' worth of research including personal review of courthouse records and meetings with Swain and Belding, and identified a potential basis for appeal. It is not within our jurisdiction to determine whether Elstead properly valued the services he performed at over \$16,000. (See *Bach v. State Bar* (1991) 52 Cal.3d 1201, 1207 [administration of attorney discipline is independent of any remedy client has over fee dispute].) But based on the evidence of Elstead's work for Swain, the State Bar failed to sufficiently prove its allegation that the \$15,000 was unearned or that Elstead provided no services of value.

Count Eight: Accepting Fees from a Non-Client (rule 3-310(F))

Rule 3-310(F) provides, in relevant part, that an attorney "shall not accept compensation for representing a client from one other than the client unless: ¶ . . . ¶ [t]he [attorney] obtains the client's informed written consent" Despite his contention to the contrary, Elstead represented Theodore Swain when he investigated the viability of appellate claims, filed a notice of appeal of Swain's conviction, and met with Swain in prison as his attorney. Under these circumstances, it was improper to accept \$15,000 from Swain's wife and sister without Swain's informed written consent. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 556.) Elstead is culpable of violating rule 3-310(F).

¹¹ This rule requires an attorney to "Promptly refund any part of a fee paid in advance that has not been earned."

III. MITIGATION AND AGGRAVATION

We determine the appropriate discipline in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Elstead must establish mitigation by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)¹²), while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(b).)

A. No Factors in Mitigation

Elstead presented no evidence in mitigation. While the hearing judge gave him minimal credit for previous military service, we find no clear and convincing evidence to support this finding.

B. Two Factors in Aggravation

Although the hearing judge found four factors in aggravation, we do not adopt her findings that Elstead acted with bad faith and dishonesty, or showed indifference toward rectification. Both of these findings were based on the November 29, 2004 letter. As previously discussed, the State Bar failed to prove that Elstead fabricated the letter, and his efforts to exculpate himself do not demonstrate indifference to rectification of or atonement for consequences of his misconduct. We conclude that the State Bar has established two factors in aggravation, which are detailed below.

1. One Prior Discipline Record (Std. 1.2(b)(i))

Elstead's prior discipline is significant aggravation. In 2005, he stipulated to a public reproof based on one count of misleading a judge by an artifice or false statement of fact in violation of section 6068, subdivision (d). In 1999, Elstead secured a continuance for a trial based on his representation that he was already scheduled for trial in another matter. The superior court found that this statement was false because Elstead knew the other matter had

¹² Unless otherwise noted, all further references to "standard(s)" are to this source.

been continued. The court sanctioned Elstead. In aggravation, Elstead was indifferent towards rectification or atonement; in mitigation, he had practiced since 1974 without discipline and the State Bar waited over five years from notification of the misconduct to file an NDC.

2. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

We also agree with the hearing judge that Elstead committed multiple acts of wrongdoing. However, we afford modest weight to this factor, as Elstead's misconduct involved only three charges in two client matters. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [misappropriation, failure to pay client's funds upon request, and entering into improper business transaction with client in one matter coupled with failure to timely report court-ordered sanctions in another matter were *not* strong evidence in aggravation on account of multiple acts of misconduct].)

IV. DISCIPLINE

The purpose of discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession, to maintain high professional standards and to preserve public confidence in the legal profession. (Std. 1.3.) No fixed formula exists for determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

Our discipline analysis begins with the standards to “ ‘promote the consistent and uniform application of disciplinary measures.’ ” (*In re Morse* (1995) 11 Cal.4th 184, 206, citations omitted.) Three standards guide our discipline recommendation. Standard 2.2(a) calls for at least a three-month actual suspension for all violations of rule 4-100 that do not involve misappropriation of funds irrespective of mitigating circumstances. Standard 2.10 calls for reproof or suspension for the rule 3-310(F) violation, depending on the gravity of the offense

and harm to the victim. And standard 1.7(a) requires a respondent with one prior discipline to receive a discipline greater than in the prior proceeding unless the prior discipline was so remote in time and so minimal in severity that imposing greater discipline would be manifestly unjust. Given the potential broad range of discipline in this case, we also look to comparable case law for further guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Although the State Bar urges disbarment, its arguments are based on serious aggravation (lack of candor based on fabricating a document) and disciplinary charges (charging illegal and unconscionable fees, failure to pay client funds or return unearned fees) that it failed to prove. Instead, Elstead is culpable only of failing to account in two client matters, and accepting payment from a non-client. Even so, we are concerned with his carelessness towards proper communication with clients as required by ethical rules and his fiduciary position.

Starting with the minimum three-month suspension required under standard 2.2(a), we find that the level of discipline should be greater based on his prior record of discipline and the lack of mitigation. And although his prior record of discipline was for serious misconduct (misleading a judge), the misconduct occurred over 12 years ago and he received relatively minor discipline (public reproof). A six-month period of actual suspension constitutes significant discipline under the circumstances of this case, and will provide Elstead with adequate time to reflect on the importance of his ethical duties sufficient to protect the public, courts, and legal profession. This suspension is consistent with the standards and the decisional law. (*In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509 [three-month actual suspension for attorney with no prior discipline who was culpable of conduct related to office mismanagement including multiple instances of failing to communicate, failing to perform services, and failure to pay court-ordered sanctions; discipline significantly reduced after hearing judge's finding of lack of candor reversed]; *In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. 752 [60-day actual suspension for attorney who failed to provide accounting and obtained

adverse interest in clients' property without informed consent, and simultaneously represented clients with conflicting interests in another matter; conduct was mitigated by 25 years of practice without discipline but aggravated by uncharged misconduct]; *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354 [45-day actual suspension for attorney with one prior private reproof who was found culpable in three client matters, including commingling trust funds with personal funds, failure to supervise associates in civil matter, failure to cooperate with the State Bar, and failure to respond to correspondence from client's subsequent attorneys but presented substantial mitigation].)

V. RECOMMENDATION

For the foregoing reasons, we recommend that John Clifton Elstead be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years, subject to the following conditions:

1. John Clifton Elstead is to be suspended from the practice of law for the first six months of probation.
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct and all of the conditions of this probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar and the State Bar's Office of Probation.
4. He 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, Elstead must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.
5. Subject to the assertion of any applicable privilege, he must fully, promptly and truthfully answer all inquiries of the State Bar's Office of Probation, and any probation monitor assigned under these conditions, that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.

6. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of both the State Bar's Ethics School and the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. These requirements are separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)
7. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

We further recommend that John Clifton Elstead be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, and provide proof of passage to the Office of Probation, within one year of the effective date of the discipline herein. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

It is further recommended that John Clifton Elstead be ordered to comply with rule 9.20 of the 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. Failure to do so may result in disbarment or suspension.

It is further recommended 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 Business and Professions Code section 6140.7 and as a money judgment.

REMKE, P. J.

WE CONCUR:

EPSTEIN, J.
PURCELL, J.