

2003

# H. Delbert Welker v. Respondent : Brief of Appellant

Utah Supreme Court

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H. Delbert Welker; Appellee.

Kate A. Toomey; Counsel for Appellant.

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**IN THE UTAH SUPREME COURT**

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**In the Matter of the  
Discipline of:**

)  
)  
) **BRIEF OF APPELLANT**  
)  
)

**H. DELBERT WELKER, #3418**

) **Supreme Court No. 20030428-CV**  
) **District Court No. 020909349**  
)

**Respondent**

) **Priority No. 5**  
)

---

Appeal From the Third District Court, Salt Lake County,  
Judge Robin W. Reese

---

H. Delbert Welker  
8661 South Highland Drive, #179  
Sandy, Utah 84093  
Respondent/Appellee

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## STATEMENT SHOWING JURISDICTION OF THE UTAH SUPREME COURT

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Constitution article VIII, section 4, which provides that "The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law," and Utah Code section 78-2-2(3)(c), which provides that the Court has appellate jurisdiction over "discipline of lawyers."

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

**Issue 1:** Whether the District Court erred in concluding that an attorney disciplined pursuant to Utah's reciprocal discipline rule can receive a sanction no greater than that imposed in the jurisdiction in which the first sanction was imposed. The applicable standard of review is a correctness standard. See In re Babilis, 951 P.2d 207 (Utah 1997). The issue was preserved in the District Court by legal memorandum and the oral argument of counsel. (Brief in Support of Discipline, R. 56-65; Transcript, R. 104 at 6)

**Issue 2:** Whether the District Court erred in imposing upon the respondent the sanction of suspension rather than the sanction of disbarment for his professional misconduct in California. The applicable standard of review is a correctness standard. See In re Babilis, 951 P.2d 207 (Utah 1997). The issue was preserved in the District Court by legal memorandum and the oral argument of counsel. (R. Brief in Support of Discipline, R. 56-65; Transcript, R. 104 at 37)



**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND  
REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE  
APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL**

**Rule 22. Reciprocal discipline. Rules of Lawyer Discipline and Disability.**

(a) *Duty to notify OPC counsel of discipline.* Upon being publicly disciplined by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction, a lawyer admitted to practice in this state shall within thirty (30) days inform the OPC of the discipline. Upon notification from any source that a lawyer within the jurisdiction of the Supreme Court has been publicly disciplined by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction, OPC counsel shall obtain a certified copy of the disciplinary order.

(b) *Notice served upon lawyer.* Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in this state has been publicly disciplined by another court, another jurisdiction, of a regulatory body having disciplinary jurisdiction, OPC counsel shall forthwith issue a notice directed to the lawyer containing:

(b)(1) a copy of the order from the other court, jurisdiction or regulatory body; and

(b)(2) a notice giving the lawyer the right to inform OPC counsel, within thirty (30) days from service of the notice, of any claim by the lawyer predicated upon the grounds set forth in paragraph (d), that the imposition of the equivalent discipline in this state would be unwarranted, and stating the reasons for that claim.

(c) *Effect of stay of discipline in other jurisdiction.* In the event the discipline imposed in the other court, jurisdiction or regulatory body has been stayed, any reciprocal discipline imposed in this state shall be deferred until the stay expires.

(d) *Discipline to be imposed.* Upon the expiration of thirty (30) days from service of the notice pursuant to paragraph (b), the district court shall take such action as may be appropriate to cause the equivalent discipline to be imposed in this jurisdiction, unless it clearly appears upon the face of the record from which the discipline is predicated that:

(d)(1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(d)(2) the imposition of equivalent discipline would result in grave injustice; or

(d)(3) the misconduct warrants substantially different discipline in this state or is not misconduct in this jurisdiction.

If the district court determines that any of these elements exist, it shall enter such other order as it deems appropriate. The burden is on the respondent to demonstrate that the imposition of equivalent discipline is not appropriate.

(e) *Conclusiveness of adjudication in other jurisdictions.* Except as provided in paragraphs (c) and (d) above, a final adjudication of the other court, jurisdiction or regulatory body that a respondent has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state.

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an attorney discipline proceeding.

**Course of the Proceedings:** The Supreme Court of California imposed discipline against H. Delbert Welker on January 4, 2002, predicated upon a Stipulation re Facts, Conclusions of Law and Disposition and Order Approving Actual Suspension ("Stipulation") entered by Welker and the State Bar Court of the State Bar of California ("California State Bar Court"). (California Order, R. 6; Stipulation, R. 8-31) The OPC filed a Petition for Reciprocal Discipline in the Third Judicial District Court on September 16, 2002 seeking reciprocal discipline against Welker for the same misconduct. (Petition, R. 1-36)

**Disposition in the District Court:** On April 22, 2003, Utah's Third Judicial District Court entered Findings of Fact and Conclusions of Law, and an Order of Reciprocal Discipline. (Findings and Conclusions, R. 88-94; Order, 95-97) This appeal ensued. (Notice of Appeal, R. 98-99)

### **Statement of the Facts Relevant to the Issues Presented for Review:**

The following facts, incorporated by reference into the District Court's findings (Findings and Conclusions, R. 89), are derived from the Stipulation re Facts, Conclusions of Law and Disposition and Order Approving Actual Suspension and the Attachment thereto. (Stipulation, R. 8-31; Stipulation Attachment, R. 14-21) Welker and counsel for the California State Bar signed

the Stipulation, and it was approved by a judge of the California State Bar Court, which recommended discipline to the Supreme Court of California. (Stipulation, R. 28)

**The Baugh Matter (Stipulation Attachment; R. 16-18)**

Gregory Baugh retained Welker on a contingency basis to represent Baugh in a third-party personal injury claim arising from a vehicle accident while Baugh was driving a truck for his employer. (Stipulation Attachment, R. 14) Welker knew that Baugh had separate counsel, John W. Johanson, to represent him in a Workers' Compensation claim against his employer. (Stipulation Attachment, R. 14)

Welker filed a complaint on Baugh's behalf but did not conduct discovery, nor did he arrange for Baugh to have a qualified medical examination. (Stipulation Attachment, R. 14) Johanson had arranged for psychological and physical examinations of Baugh, but before these were performed, Welker allowed mediation to proceed. (Stipulation Attachment, R. 14)

The workers' compensation carrier for Baugh's employer intervened in the action to recover from the defendant the benefits the carrier had paid Baugh. (Stipulation Attachment, R. 14) During mediation, counsel for the workers' compensation carrier asked Welker to get Johanson's permission to enter into a global settlement by having Johanson execute a third-party compromise and release. (Stipulation Attachment, R. 14-15)

Welker, Johanson, the counsel for the workers' compensation carrier, and the defendant's counsel purportedly settled the case as part of a global

settlement of Baugh's claims arising from the accident. (Stipulation Attachment, R. 15) But Baugh refused the global settlement, despite Welker's repeated attempts to persuade him to accept. (Stipulation Attachment, R. 15)

Although Baugh had not accepted the settlement, Welker signed a request for dismissal of the case prepared by the defendant's counsel. (Stipulation Attachment, R. 15) Welker received a settlement draft from the defendant's counsel and repeatedly attempted to convince Baugh to sign the release and accept the draft. (Stipulation Attachment, R. 15)

The defendant's counsel filed requests for dismissal with prejudice, including dismissal of the complaint in intervention filed by the workers' compensation carrier. (Stipulation Attachment, R. 16) Neither Baugh nor Johanson had signed a release, but the dismissal was entered. (Stipulation Attachment, R. 16) As its share of the settlement, the workers' compensation carrier received the lien amount disputed by Baugh. (Stipulation Attachment, R. 16)

Later, Welker sent Baugh an advance copy of a motion for attorney's fees and costs, and for permission to endorse the settlement draft. (Stipulation Attachment, R. 16) Baugh told Welker to withdraw the request for dismissal that Baugh had not authorized, to return the settlement draft, and to withdraw from the case. (Stipulation Attachment, R. 16)

Instead, Welker filed the motion for attorney's fees and costs, and to be allowed to endorse the settlement drafts. (Stipulation Attachment, R. 16) In support of the motion, Welker declared under penalty of perjury that the

mediation session had resulted in a settlement. (Stipulation Attachment, R. 16) Baugh retained substitute counsel, and the court denied Welker's motion to permit him to endorse the drafts, but it also denied a motion from Baugh to vacate the dismissals. (Stipulation Attachment, R. 16)

Welker eventually "endorsed, or caused to be endorsed, Baugh's name on the settlement drafted and deposited it into his trust account." (Stipulation Attachment, R. 16) He mailed Baugh a trust account check with a letter stating that it was Baugh's share of the settlement. (Stipulation Attachment, R. 17)

The court issued an order of contempt against Welker, ordering him to pay a fine and serve five days in jail; it also issued a bench warrant with a \$25,000 bond, stayed until the following September. (Stipulation Attachment, R. 17)

Baugh died in October 2000. (Stipulation Attachment, R. 17) The day Baugh died, the court ordered Welker to return "all monies . . . for the purported and disputed settlement in this matter . . . to the Insurance Carrier or Carriers who issued the instrument or instruments forthwith." (Stipulation Attachment, R. 17)

The Stipulation Attachment's conclusions of law concerning the Baugh matter were as follows:

By failing to conduct any formal discovery, arrange for a qualified medical examination of Baugh, and allowing mediation to proceed before the psychological and physical examinations arranged by his client's Workers' Compensation attorney had taken place, Respondent recklessly failed to perform legal services with competence in wil[l]ful violation of rule 3-110(A), Rules of Professional Conduct.

By signing the request for dismissal and allowing defense counsel to file it, Respondent corruptly and without authority

appeared as attorney for Baugh in willful violation of Business & Professions Code section 6104.

By filing a declaration under penalty of perjury with a court which misrepresented the basis for a motion as a client's repudiation of an authorized settlement, as opposed to the attorney entering into a purported settlement without authority to do so from his client, Respondent committed an act involving moral turpitude, dishonesty or corruption in willful violation of Business & Professions Code section 6106.

By stating in his declaration to the court, made under penalty of perjury, that a settlement had been achieved through mediation, Respondent sought to mislead the judge by making false statements of fact and law because no settlement in fact occurred because settlement requires some form of client consent thereto. Respondent willfully violated Business & Professions Code section 6068(d).

(Stipulation Attachment, R. 17)

**The Fox Matter (Stipulation Attachment, R. 18-19)**

Wayne Fox retained Welker on a contingency basis to represent him in a personal injury claim. (Stipulation Attachment, R. 18) Welker signed an acknowledgment of lien by one of Fox's medical service providers. (Stipulation Attachment, R. 18) Beginning in April 1997, the provider regularly requested payment from Welker. (Stipulation Attachment, R. 18)

That August, Welker settled Fox's claim and received a \$25,000 insurance draft payable to Welker and Fox. (Stipulation Attachment, R. 18) Welker deposited it in his trust account. (Stipulation Attachment, R. 18) Fox approved disbursement, allocating portions for attorney's fees and for medical service providers with the remainder going to himself. (Stipulation Attachment, R. 18) In September 1997, the balance of Welker's trust account dropped below what Welker owed Fox's medical service providers. (Stipulation Attachment, R. 18) By late January 1998, the balance was negative. (Stipulation Attachment, R. 18)

Welker did not pay the medical service provider until April 27, 2000 – more than one year after Fox had filed a California Bar complaint against Welker, and after Welker had been contacted by the California State Bar. (Stipulation Attachment, R. 18)

The Stipulation Attachment's conclusions as to the Fox matter were as follows:

By not paying Fox's funds held in the client trust account to the medical service providers as requested by Fox, Respondent failed to pay client funds as requested by his client in wil[ ]ful violation of rule 4-100(B)(4).

By not maintaining at least \$5,738.00 received on behalf of Fox in the client trust account until payment to the medical service providers, Respondent failed to maintain client funds in trust in wil[ ]ful violation of rule 4-100(A).

By misappropriating at least \$5,738.00 of Fox's funds, respondent committed an act involving moral turpitude, dishonesty or corruption in wil[ ]ful violation of Business & Professions Code section 6106.

(Stipulation Attachment, R. 19)

### **The Commingling Matter (Stipulation Attachment, R. 19)**

Between February and October 1997, Welker wrote numerous trust account checks for things that were not client-related; he "routinely" issued such checks "to family members, clothing and other stores, restaurants, utilities, and travel agencies." (Stipulation Attachment, R. 19) The Stipulation Attachment concluded that "By writing personal checks on his client trust account,

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<sup>1</sup> The Stipulation Attachment further concluded that "Respondent with gross negligence misappropriated Fox's funds in wil[ ]ful violation of rule 4-100(B)(4)." (Stipulation Attachment; R. 19) The California State Bar Court's Modifications to Stipulated Facts, Conclusions of Law and Discipline deleted this provision. (R. 29)

Respondent commingled funds in wil[l]ful violation of rule 4-100(A)." (Stipulation Attachment, R. 19)

**The Matter of Discipline Imposed By Another Jurisdiction (Stipulation Attachment, R. 19)**

Welker was suspended from the practice of law in Utah on January 29, 2001.<sup>2</sup> (Stipulation Attachment, R. 19) The Stipulation Attachment concluded that "the professional misconduct of which Respondent was found culpable in Utah warrants discipline in the State of California." (Stipulation Attachment, R. 20)

**The Matter of Welker's Failure to Report Imposition of Discipline By Another Jurisdiction (Stipulation Attachment, R. 20)**

Welker failed to report to the California State Bar that he had been disciplined in Utah; the California State Bar discovered this information by contacting the Utah State Bar. (Stipulation Attachment, R. 20) The Stipulation Attachment concluded that "By failing to report to the State Bar in writing within 30 days of the time he had knowledge of the imposition of discipline against him [by] the Third Judicial District Court in and for Salt Lake County, State of Utah, and the Utah State Bar, Respondent wil[l]fully violated Business and Professions Code section 6068(o)(6)." (Stipulation Attachment, R. 20)

**Aggravating Circumstances**

The Stipulation identified several aggravating circumstances. These were: trust violations, significant harm to the public or the administration of justice, and

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<sup>2</sup> The Third Judicial District Court's Findings of Fact, Conclusions of Law, and Order of Suspension in this prior matter are at R. 22-27, attached to the Stipulation. The suspension was for thirty days.



multiple acts of misconduct.<sup>3</sup> (Stipulation, R. 9) The Stipulation Attachment identified the "Facts Supporting Aggravating Circumstances." (Stipulation Attachment, R. 20-21)

The facts supporting the aggravating circumstance of "Trust Violations" were Welker's misappropriation of Fox's settlement proceeds, which were subject to a lien, and "the repeated and routine payment of personal expenses from a client trust account." (Stipulation Attachment, R. 20) Likewise, Welker's failure to maintain a client trust account in Utah was a trust violation. (Stipulation Attachment, R. 20)

The facts supporting the aggravating circumstance of multiple acts of misconduct were multiple trust account violations in California and Utah. (Stipulation Attachment, R. 20)

The facts supporting the aggravating circumstance of "harm," were Welker's acceptance without client authorization of a settlement that was not acceptable to the client, with the delays in setting aside the dismissal being such that the client died without knowing his case had been reactivated. (Stipulation Attachment, R. 20) Because of this, "it is reasonable to assume that the value of the cause of action has been diminished, to the detriment of his widow." (Stipulation Attachment, R. 20-21)

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<sup>3</sup> Although the Stipulation also identified "pattern of misconduct" as an aggravating circumstance, the State Bar Court's Modifications to Stipulated Facts, Conclusions of Law and Disposition state that "while there is clear and convincing evidence of multiple acts of misconduct, the facts do not support a pattern of misconduct." (R. 29)

## **Mitigating Circumstances**

The Stipulation identified a single mitigating factor: Welker had no prior record of discipline. (Stipulation, R. 10)

## **The Discipline Imposed on Welker By the Supreme Court of California**

The Supreme Court of California, sitting en banc, disciplined Welker on January 4, 2002, by suspending him from the practice of law for three years. (California Order, R. 6) The suspension was stayed and Welker placed on probation for four years on condition that he be actually suspended for eighteen months. (California Order, R. 6)

## **The Reciprocal Discipline Proceedings in Utah**

Based upon Welker's discipline in California, the OPC filed a Petition for Reciprocal Discipline in September 2002. (Petition, R. 1-36) The District Court heard the matter on March 14, 2002. (Findings and Conclusions, R. 88)

The District Court's Findings of Fact and Conclusions of Law incorporated by reference the findings and conclusions from the Stipulation. (Findings and Conclusions, R. 89) The relevant portions are set forth verbatim here:

Baugh[:] Welker failed to conduct formal discovery or arrange for a qualified medical exam in person injury/workers' compensation litigation, and allowed mediation to proceed before medical information was available. Welker signed a request for dismissal and allowed defense counsel to file it without authority. Welker misrepresented the client's authorization to settle a claim in a sworn declaration filed with a court. Welker sought to mislead the court as to the client's authorizing a settlement.

Fox[:] Welker failed to pay medical service provider liens as directed by his client, the funds for which having been deposited in his client trust account for this purpose. Welker's client trust account was overdrawn as to the amount to be paid the medical service providers. Welker misappropriated the client's funds.

Trust Account[:] Welker wrote checks out of his client trust account for items not client related including personal and family expenses.

Reciprocal discipline[:] A January 29, 2001 order of the Third Judicial District Court, Salt Lake County, Utah suspended Welker from the practice of law in the state of Utah, for conduct warranting discipline in the state of California. Welker did not report this discipline to the State Bar of California.

(Findings and Conclusions, R. 90)

The District Court correctly concluded that the order of the California Supreme Court "is a final adjudication that Welker is guilty of professional misconduct and conclusively establishes the misconduct for purposes of this proceeding." (Findings and Conclusions, R. 92) The court also correctly concluded that it must impose "discipline equivalent to that imposed in California unless one of three exceptions stated in Rule 22(d)(1), (2), or (3) clearly appear upon the face of the record of the California Proceedings." (Findings and Conclusions, R. 92-93)

The District Court also concluded that "[a] finding that an exception to equivalent discipline provided in Rule 22(d)(1), (2) or (3) is appropriate can by the terms of the exception benefit only the Respondent." (Findings and Conclusions, R. 93) The OPC contends that this conclusion is in error.

Finally, the District Court concluded that equivalent discipline would be appropriate, and credited Welker with six of the eighteen months of actual suspension imposed in California. (Findings and Conclusions; R. 93) The Order of Reciprocal Discipline suspended Welker for one year. (Order of Reciprocal Discipline, R. 95-96) The OPC contends that this, too, is error.

## SUMMARY OF ARGUMENTS

The District Court incorrectly concluded that in reciprocal discipline proceedings, any departure from discipline equivalent to that which was imposed by the original disciplining jurisdiction can only be less harsh. The District Court's interpretation goes against the plain language of the reciprocal discipline rule and eviscerates the OPC's role in reciprocal discipline cases. Moreover, it permits inconsistent results for similar misconduct, thereby impeding the objective of substantial justice and fairness in disciplinary matters. Welker's misconduct warrants disbarment in Utah, and fairness requires that this be imposed rather than the year-long suspension ordered by the District Court.

## ARUGMENT

**I. The District Court Incorrectly Concluded That the Degree of Reciprocal Discipline Imposed in Utah Can Only Be the Same or Less Than the Degree of Discipline Originally Imposed in the Other Jurisdiction**

The District Court concluded that the reciprocal discipline rule permits a downward departure from the degree of discipline imposed, but that it neither contemplates nor permits a possible increase in the level of discipline. (Findings and Conclusions, R. 93; Transcript, R. 104:37) This is incorrect.

**A. The Rule Plainly Allows Departure from the Equivalent Discipline, and Does Not Limit the Departure to Discipline Less Severe**

The reciprocal discipline rule is found among the Rules of Lawyer Discipline and Disability ("RLDD"). See Rule 22, RLDD. For purposes of disciplinary proceedings in Utah, "a final adjudication of the other court . . . that a

respondent has been guilty of misconduct shall establish conclusively the misconduct." Rule 22(e), RLDD.

The rule provides that "equivalent discipline shall be imposed" unless the record in the other jurisdiction's case plainly shows (1) that the respondent was deprived of due process; (2) "the imposition of equivalent discipline would result in grave injustice;" or (3) "the misconduct established warrants substantially different discipline in this state or is not misconduct in this jurisdiction." Rule 22(d), RLDD. This subsection further provides that "If the district court determines that any of these elements exist, it shall enter such other order as it deems appropriate. The burden is on the respondent to demonstrate that the imposition of equivalent discipline is not appropriate." *Id.*

The District Court interpreted this portion of the subsection incorrectly, concluding that although it has the authority to lessen the severity of the sanction, it cannot increase the sanction even if the application of Utah's Standards for Imposing Lawyer Sanctions ("Standards") and recent case law interpreting the Standards would result in a more severe sanction in Utah had the disciplinary case been brought here first. (R. 93) In other words, the upper limit of possible sanctions is set by what was imposed in the original disciplinary jurisdiction, regardless of what is imposed in Utah for the same misconduct.

This runs contrary to a plain reading of the rule. Equivalent discipline must be imposed with few exceptions, but one of those exceptions is when the respondent's misconduct "warrants substantially different discipline" in Utah. The word "different" simply means "unlike." The phrase "different discipline"

encompasses discipline of either greater or lesser severity; it is not limited to one or the other.

**B. The OPC's Reading of the Rule Makes Sense In the Context of the RLDD and the Standards as a Dynamic Whole**

The RLDD require the OPC to "perform all prosecutorial functions." Rule 4(b), RLDD. This includes the duty to "[s]eek reciprocal discipline where appropriate when informed of any disbarment or suspension or public discipline imposed by another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction." *Id.* at 4(b)(9). Significantly, the rule does not say "seek identical or lesser reciprocal discipline." *See id.* The procedures for seeking reciprocal discipline are set forth elsewhere in the RLDD. *See* Rule 22, RLDD.

The reciprocal discipline rule provides that upon notification that a Utah-licensed attorney has been disciplined elsewhere, the OPC shall obtain a copy of the disciplinary order. *See* Rule 22(a). Thereafter, "OPC counsel shall forthwith issue a notice to the lawyer . . . ." *Id.* at 22(b). The notice gives the attorney "the right to inform OPC counsel . . . of any claim by the lawyer predicated upon the grounds set forth in paragraph (d), that the imposition of the equivalent discipline in this state would be unwarranted and stating the reasons for that claim." *Id.* at 22(b)(2).

The rule articulates no explicit direction concerning the procedure for moving the case forward. That it is the OPC's duty to do so is set forth as described in Rule 4; that the forum for doing so is the District Court is implicit in Rule 22, which provides that with some exceptions, "[u]pon the expiration of 30 days from service of the notice [upon the attorney], the district court shall take

such action as may be appropriate to cause the equivalent discipline to be imposed in this jurisdiction . . . .” Rule 22(d), RLDD.

There is no procedure for seeking separate Utah discipline of a Utah-licensed attorney who has been disciplined in another state. In other words, the OPC cannot initiate an independent investigation and proceeding based upon the same facts, present it to a Screening Panel, and file a formal complaint in District Court. Instead, it brings a reciprocal discipline action in which “a final adjudication of the other court, jurisdiction or regulatory body that a respondent has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state.” Rule 22(e), RLDD. This is consistent with the RLDD’s statement that “These rules shall be construed so as to achieve substantial justness and fairness in disciplinary matters with dispatch and at the least expense to all concerned parties.” Rule 1(c), RLDD.

Although the respondent and the OPC are limited to the other court’s adjudication of the misconduct except for purposes of establishing one of the exceptions identified in subsection (d), neither side is limited to the sanction imposed in the other court. This is why the rule provides that equivalent discipline shall be imposed “unless it clearly appears upon the face of the record from which the discipline is predicated that: . . . the misconduct established warrants substantially different discipline in the state or is not misconduct in this jurisdiction.” Rule 22(d)(3). Put another way, although judicial determinations of misconduct are given conclusive effect, the District Court may independently

evaluate the facts and determine the appropriate disciplinary action to be taken in Utah.

Although the District Court makes its determination concerning what discipline to impose based upon “the face of the record,” if it determines that “any of these elements exist, it shall enter such other order as it deems appropriate.” Rule 22(d) and (e), RLDD. The court is thus free to depart from strictly equivalent discipline.

Grounds for discipline include a lawyer “be[ing] publicly disciplined in another jurisdiction.” Rule 9(c), RLDD. The RLDD further provide that imposition of sanctions is governed by the Standards. See Rule 12, RLDD. They do not provide that for purposes of reciprocal discipline, the imposition of sanctions is governed or limited by the sanction imposed in the other jurisdiction.

Turning to the Standards, “[r]eciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another court, another jurisdiction, or a regulatory body having disciplinary jurisdiction.” Rule 2.10, Standards. The rule does not limit reciprocal discipline to equivalent or lesser discipline; instead, it encompasses identical discipline or discipline imposed upon the basis of the foreign discipline but with a different sanction—either more or less severe. See id.

Limiting reciprocal discipline to the same or less severe sanction imposed in the other jurisdiction would result in manifest unfairness to respondents disciplined in Utah for similar conduct. Indeed, the Standards were designed to promote “consistency in the imposition of disciplinary sanctions for the same or



similar offenses within and among jurisdictions.” Rule 1.3, Standards. Permitting the District Court to depart from the equivalent sanction only to reduce the degree of sanction is tantamount to saying that a lawyer can avoid the sanction ordinarily imposed on his or her colleagues for identical misconduct so long as the lawyer is disciplined elsewhere first. This is unfair, and inconsistent with construction of the RLDD “so as to achieve substantial justice and fairness in disciplinary matters with dispatch and at the least expense to all concerned parties.” Rule 1(c), RLDD.

Moreover, the OPC’s prosecutorial role would be rendered meaningless in reciprocal discipline cases if it could not offer its perspective and guidance to the District Court concerning whether the lawyer’s misconduct “warrants substantially different discipline in Utah or is not misconduct in this jurisdiction.” Rule 22(d)(3). If that were the drafters’ or this Court’s intent, the OPC’s role would have been expressly limited.

**C. Other Jurisdictions Interpret Their Reciprocal Discipline Rules to Permit an Increase in Discipline**

Courts in other jurisdictions interpreting reciprocal discipline rules have concluded that courts may increase the sanction imposed in the first jurisdiction if a more severe sanction is warranted in the second jurisdiction. Although other examples will be noted later, this Brief focuses on the District of Columbia because it is a jurisdiction where reciprocal discipline is imposed more frequently than in any other. See In re Zdravkovich, 2003 D.C. LEXIS 548 at 7 (Sept. 11, 2003) (reciprocal discipline cases are significant percentage of disciplinary actions in the District of Columbia; the total number “dwarfs” the number in other

jurisdictions). Accordingly, the body of case law interpreting the District of Columbia's reciprocal discipline rules is well developed and may be of some use here notwithstanding that the disciplinary structure and the applicable rules differ in the respects noted herein. In the District of Columbia, disciplinary cases are conducted by the Board on Professional Responsibility, which makes findings and conclusions and recommendations of discipline to the Court of Appeals of the District of Columbia. Participants in the proceedings are the respondent and the Office of Bar Counsel.

The predecessor of the current reciprocal discipline rule provided that the Board on Professional Responsibility could recommend to the Court of Appeals that reciprocal discipline should be imposed, or that it wished to pursue the matter de novo.<sup>4</sup> See In re Reid, 540 A.2d 754, 757 (D.C. 1988) (interpreting D.C. Bar R. XI, section 18). If the Board recommended reciprocal discipline, the court was required to impose identical discipline unless "Bar Counsel or the attorney demonstrates, or the Court finds upon the face of the record upon which the discipline is predicated, that clearly: . . . [t]he imposition of the same discipline by the Court would result in grave injustice; or . . . [t]he misconduct established warrants substantially different discipline in this jurisdiction . . . ." Id. The District of Columbia rule governing the conclusiveness of adjudication in the jurisdiction where discipline was originally imposed is similar to that of Utah's rule. Id.

The rule was revised in 1989, however. See In re Drury, 638 A.2d 60, 62-63 (D.C. 1994). The revised rule continues to permit the Board to elect to proceed de novo, but provides that identical discipline must be imposed "unless

the attorney demonstrates, or the Court finds on the face of the record, by clear and convincing evidence, that one or more grounds set forth in subsection (b) [sic] exists." Id. Significantly, the role of Bar Counsel, which was explicitly identified in the prior rule, has now been eliminated. Nevertheless, the court noted that:

We do not think, however, that this precludes Bar Counsel from playing any part in the resolution of reciprocal discipline matters. The general powers and duties of Bar Counsel encompasses the investigation and prosecution of all matters involving attorney misconduct complaints. . . . Both the Board and this Court are entitled to hear the views of Bar Counsel in carrying out their respective functions in all aspects of the operation of the disciplinary system.

Id. at 63. Moreover, a more recent case noted, "While the plain language of [the reciprocal discipline rule] places the burden on the disciplined attorney to establish by clear and convincing evidence that a lesser sanction is warranted, the Office of Bar Counsel also has standing to object to the imposition of identical discipline . . . and may recommend a different sanction when it believes an exception applies." In re Zdravkovich, 2003 D.C. LEXIS 548 at 8-9 (Sept. 11, 2003).

Further, the Board on Professional Responsibility can recommend, and the Court of Appeals can impose, a sanction that is either more harsh or less severe. Id. at 62 (rejecting the respondent's contention that the respondent is the only person who can challenge the imposition of identical discipline); see also In re Gardner, 650 A.2d 693, 696 (D.C. 1994); In re Berger, 737 A.2d 1033, 1039-1040 (D.C. Ct. App. 1999). Thus, an attorney suspended in New York was

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<sup>4</sup> As noted above, Utah's reciprocal discipline rule does not provide this option.

disbarred in the District of Columbia for misappropriation of client funds because “[i]n virtually all cases of intentional or reckless misappropriation, disbarment is the appropriate sanction.” See In re Ladas, 798 A.2d 1067, 1068 (D.C. 2002).

Colorado offers similar examples, although its structure also differs from Utah’s, and pursuant to its reciprocal discipline rule, the regulatory body must give the respondent notice of any claim that substantially different discipline is warranted, and with notice, it may present additional evidence. See e.g. People v. Apker, 2003 Colo. Disc. LEXIS 24 (Colo. Apr. 7, 2003) (respondent suspended for six months in Arizona for trust fund violations and theft; Colorado disbarred him, noting that “[t]he knowing conversion of client property almost invariably results in disbarment under Colorado law.”); People v. Costa, 56 P.3d 130 (Colo. 2002) (respondent was publicly reprimanded in New Mexico for making material misrepresentation to the court, but disbarred in Colorado for the same conduct).

**D. The Reciprocal Discipline Rule Allocating the Burden to the Respondent Is Not Relevant to the Analysis of Whether a District Court May Impose a Sanction Greater Than What Was Imposed in the Other Jurisdiction**

Equivalent reciprocal discipline is not appropriate when “the procedure [in the other jurisdiction] was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.” This must “clearly appear[ ] upon the face of the record from which the discipline was imposed.” Rule 22(d)(1), RLDD. Likewise, reciprocal discipline is not appropriate when “the imposition of equivalent discipline would result in grave injustice” but this, too, must “clearly appear[ ] upon the face of the record.” Rule 22(d)(2), RLDD. Finally, reciprocal discipline is not appropriate when it “clearly appears upon the face of the record”

that “the misconduct established warrants substantially different discipline in this state or is no misconduct in this jurisdiction.” Rule 22(d)(3), RLDD.

The reciprocal discipline rule specifies that “[t]he burden is on the respondent to demonstrate that the imposition of equivalent discipline is not appropriate.” Rule 22(d), RLDD. This is not a burden of proof as to the facts—those having been established by the original disciplinary proceeding—but it *is* a burden of persuasion as to the application of Utah’s Standards to Utah’s Rules of Professional Conduct.

The District Court concluded that this language, coupled with the absence of corresponding language assigning a burden to the OPC, signifies that the reciprocal discipline rule does not permit an increase in the level of sanction. (Transcript, R. 104: 38) This is incorrect because the OPC’s burden<sup>5</sup> is already assigned elsewhere in the RLDD, and apply to all “proceedings seeking discipline or transfer to disability status.” Rule 17(c), RLDD. The OPC’s global burden of proof is only shifted to the respondent where explicitly assigned in the RLDD. See Rule 17(c), RLDD (shifting the burden to the respondent in seeking reversals of screening panel recommendations, and in reinstatement, readmission, or transfers from disability status); Rule 10(c), RLDD (burden is on respondent in challenging reversal of screening panel recommendation); Rule 25 (burden is on respondent to demonstrate criteria for readmission or

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<sup>5</sup> Ordinarily, the burden of proof is on the OPC “in proceedings seeking discipline . . . .” Rule 17(c), RLDD. Obviously, a reciprocal discipline proceeding is such a proceeding, but inasmuch as the misconduct is “establish[ed] conclusively,” its usual burden is relieved as to establishing the facts. It nevertheless has a burden of persuasion in all disciplinary matters.

reinstatement). The mere absence of an assignment of burden to the OPC in the reciprocal discipline rule signifies only that it must meet its usual burden of persuasion when it comes to demonstrating the appropriate sanction.

## **II. Welker's Misconduct in California Warrants Substantially Different Discipline in Utah, and the Appropriate Discipline In Utah Is Disbarment**

In determining whether "the misconduct warrants substantially different discipline," the District of Columbia Court of Appeals conducts a two-step inquiry: first, whether the misconduct would not have resulted in the same sanction as it did in the originally disciplining jurisdiction, and second, whether the difference is substantial. See Berger, 737 at 1040. This is a useful analysis here.

Welker's misconduct included filing in court under penalty of perjury a declaration that made a material misrepresentation concerning the basis for a motion. (Stipulation Attachment, R. 17) In California, this was termed "an act involving moral turpitude, dishonesty or corruption." (Stipulation Attachment, R. 17) Welker thereby "sought to mislead the judge by making false statements of fact and law." (Stipulation Attachment, R. 18) Welker's actions were in "wil[l]ful" violation of the applicable rules. (Stipulation Attachment, R. 17-18) The District Court's Findings and Conclusions paralleled these stipulated findings and conclusions. (Findings and Conclusions, R. 90)

Welker's misconduct also included failing to maintain client funds in trust, and "misappropriating" client money. (Stipulation Attachment, R. 19) The latter was "an act involving moral turpitude, dishonesty or corruption," and was a willful violation. (Stipulation Attachment, R. 19) Again, the District Court's Findings and Conclusions mirrored that of the Stipulation: Welker's trust account was

overdrawn as to the amount to be paid the medical service providers. "Welker misappropriated the client's funds." (Findings and Conclusions, R. 90)

Less serious, but still noteworthy, were Welker's reckless failure to competently perform legal services (Stipulation Attachment, R. 18; Findings and Conclusions, R. 90), his signing an unauthorized request for dismissal (Stipulation Attachment, R. 18; Findings and Conclusions, R. 90), his failure to pay funds as requested by his client (Stipulation Attachment, R. 19; Findings and Conclusions, R. 90), his use of his trust account for personal purposes (Stipulation Attachment, R. 19; Findings and Conclusions, R. 90), and his failure to report discipline in another jurisdiction in willful violation of California rules (Stipulation Attachment, R. 20; Findings and Conclusions, R. 90)

In Utah, disbarment is the appropriate presumptive sanction for the types of misconduct in which Welker engaged. Welker sought to mislead a court. Disbarment is the appropriate presumptive sanction for violating the Rules of Professional Conduct "with the intent . . . to deceive the court." Rule 4.2(a), Standards. Welker made false statements of material fact to a court under penalty of perjury and misappropriated client money. Disbarment is the appropriate presumptive sanction for "engag[ing] in serious criminal conduct, a necessary element of which includes . . . false swearing . . . misappropriation, or theft . . . ." Rule 4.2(b), Standards. The same conduct also falls within the portion of the rule providing that disbarment is the appropriate presumptive sanction when a lawyer "engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects

on the lawyer's fitness to practice." Rule 4.2(c), Standards. Although each of these subsections appears to apply to Welker's misconduct, one is sufficient to reach the presumptive sanction of disbarment. See In re Babilis, 951 P.2d 207 (Utah 1997)

Welker's misappropriation of client money was the subject of some dispute at the District Court. Welker contends that the misappropriation was not intentional, but the record establishes (1) that the medical service provider to whom he owed the money "regularly contacted" him "requesting payment" beginning in April 1997; (2) that he deposited Fox's settlement money into his trust account in August 1997 and disbursed some to himself, some to Fox, and some to other medical service providers; (3) that by September 1997 (a period during which he was writing checks for personal purposes on the trust account), the trust account balance was less than what was owed the remaining medical service providers; (4) that by January 1998, the trust account had a negative balance; (5) that Fox demanded that Welker pay the medical service providers, but he failed to do so; (6) that Fox filed a Bar complaint against Welker in March 1999; and (7) that Welker did not pay the medical service providers to whom the money was owed until late April 2000—after the Bar contacted him. (Stipulation Attachment, R. 19). All of this demonstrates that Welker's conduct was more than merely negligent, and at some point became intentional within the meaning of Rule 4.2 of the Standards.

Utah case law applying the Standards to misconduct similar to that of Welker's misconduct supports the conclusion that Welker's misconduct would



have resulted in a presumption of disbarment here. See e.g. In re Babilis, 951 P.2d 207 (Utah 1997) (disbarment is appropriate presumptive sanction for intentional misappropriation of client funds); In re Ennenga, 2001 UT 111 (single instance of misappropriation warranted disbarment); In re Tanner, 960 P.2d 399 (Utah 1998) (disbarment warranted for forging power of attorney to settle case without client's consent, keeping settlement, lying to investigator warranted disbarment).

Moreover, taking into account the factors to consider in imposing a sanction - the duty violated, the lawyer's mental state, the potential or actual injury caused by the misconduct, and the existence of aggravating and mitigating circumstances - all support a conclusion that Welker would be disbarred for his misconduct. See Rule 3, Standards. He violated duties to the court, his clients, and the profession. He acted willfully in violation of his responsibilities. His actions injured his clients, the administration of justice, and the integrity of the profession. Finally, there were several serious aggravating circumstances, and but a single and insubstantial mitigating factor. Disbarment was the appropriate sanction in Utah for Welker's misconduct.

This is obviously different than the suspension Welker received in California. Moreover, the difference is substantial, inasmuch as suspension is "the removal of a lawyer from the practice of law for a specified minimum period of time," whereas disbarment "terminates the individual's status as a lawyer." Compare Rule 2.3, Standards with Rule 2.2, Standards. The substantial nature of these differences is further highlighted by what a respondent must do to gain

reinstatement after a suspension, contrasted with what a respondent must do to gain readmission after disbarment, which are identical except that a respondent seeking readmission must pass the Bar exam—a significant undertaking even for seasoned attorneys. See Rule 25(e)(7), RLDD.

If Welker's misconduct "warrants substantially different discipline in this state," the District Court should enter an order imposing an "appropriate sanction." Rule 22(d), RLDD. Disbarment is the appropriate sanction, and the District Court erred in failing to impose it.

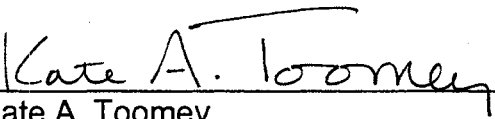
### **CONCLUSION**

Welker's professional misconduct would have resulted in his disbarment in Utah. The fact that he was suspended first in California should not insulate him from receiving the appropriate sanction in Utah. Any other result is inherently unfair to Utah respondents who have engaged in similar misconduct and received the harsher penalty dictated by the Standards. The District Court erred in its interpretation of what the reciprocal discipline rule permits, and as a consequence failed to impose the appropriate discipline. The OPC therefore

respectfully requests that this Court remand the case with directions to enter an order disbarring Welker from the practice of law.

DATED: October 28, 2003.

OFFICE OF PROFESSIONAL CONDUCT

  
Kate A. Toomey  
Deputy Counsel

## ADDENDUM

Findings of Fact and Conclusions of Law

Stipulation re Facts, Conclusions of Law and Disposition and Order Approving Actual Suspension

Order of Reciprocal Discipline

**SALT LAKE COUNTY**

1

Supreme Court has the constitutional authority to regulate the practice of law in Utah including the discipline of those admitted to practice law in Utah's State Courts. Utah Const. Art. VIII, Sec. 4. The Utah Supreme Court has delegated to the OPC the investigation and prosecution of violations of the Rules of Professional Conduct.

2. H. Delbert Welker is a member of the Utah State Bar, State Bar No. 3418. According to the records of the Utah State Bar, Welker's address for purposes of communication and notices is 8661 South Highland Drive, #179, Sandy, Salt Lake County, Utah. Following a period of inactive status, Welker activated his license in August 2002.

3. Welker is also a member of the California State Bar, State Bar No. 156867, whose current status is suspended on discipline for three years, which period is stayed on condition of four years probation and that he be actually suspended for 18 months from 30 days after January 4, 2002. The California Supreme Court Order, *In Re Harry Delbert Welker On Discipline*, Case No. S101662, as attached and incorporated into the Petition is incorporated into these findings.

4. The California Supreme Court Order arises from discipline in the State Bar Court, State Bar of California, *In the Matter of Harry Delbert Welker*, State Bar No. 156867, Case Nos. 99-0-12194, 99-0-12580, and 01-J-02752. The State Bar Court Stipulation re Facts, Conclusions of Law and Disposition as attached and incorporated into the Petition is incorporated into these findings.

5. On June 24, 2002, Welker accepted service of a Notice of Reciprocal Discipline filed and served pursuant to Rule 22(b).

6. The discipline imposed upon Welker by the California Supreme Court is based upon the Facts and Conclusions of Law entered in California State Bar Court case numbers 99-0-12194, 99-0-12580 and 01-J-02752. The facts and conclusions, as admitted by Respondent, are summarized as follows:

a. Baugh, Case No. 99-0-12580: Welker failed to conduct formal discovery or arrange for a qualified medical exam in personal injury/workers' compensation litigation, and allowed mediation to proceed before medical information was available. Welker signed a request for dismissal and allowed defense counsel to file it without authority. Welker misrepresented the client's authorization to settle a claim in a sworn declaration filed with a court. Welker sought to mislead the court as to the client's authorizing a settlement.

b. Fox, Case No. 99-0-12194: Welker failed to pay medical service provider liens as directed by his client, the funds for which having been deposited in his client trust account for this purpose. Welker's client trust account was overdrawn as to the amount to be paid the medical service providers. Welker misappropriated the client's funds.

c. Trust account, Case No. 99-0-12194: Welker wrote checks out of his client trust account for items not client related including personal and family expenses.

d. Reciprocal discipline, Case No. 01-J-02752: A January 29, 2001 order of the Third Judicial District Court, Salt Lake County, Utah suspended Welker from the practice of law in the state of Utah, for conduct warranting discipline in the state of California. Welker did not report this discipline to the State Bar of California.

7. The Office of Professional Counsel contends that under Rule 22(d)(3) the Court may impose discipline that is greater or more severe than the equivalent discipline imposed in California as the misconduct established warrants substantially different discipline in Utah. The Office contends that for the established misconduct, disbarment is appropriate under the Standards for Imposing Lawyer Sanctions adopted by the Utah Supreme Court effective July 1, 1993, and in particular Rule 4.2 of the Standards. The Office acknowledges that it bears the burden to demonstrate that the imposition of discipline greater or more severe than discipline equivalent to California is appropriate.

8. Respondent contends that under Rule 22(d)(2) the imposition of discipline in Utah equivalent to discipline in California will result in a grave injustice. Respondent acknowledges that he bears the burden to demonstrate that the imposition of equivalent discipline is not appropriate. In particular, Respondent contends:

a. He voluntarily discontinued practicing law in June 2001 and did not practice law in either California or Utah until activating his Utah license in August 2002.

b. He notified the Utah Bar of his California suspension in February 2002, but the Bar did not contact him respecting reciprocal discipline until June 2002.

c. Since activating his Utah license he has represented only one client.

d. He entered the mortgage business but has not generated a cash flow. He and his family have not had an income since June 2002. The financial hardship from not being able to practice law has been and is severe.



e. The additional six-month California suspension that he understood would not be imposed and the Utah Bar's delay in commencing a reciprocal petition has led to his financial ruin.

9. Respondent also contends that Rule 22(d)(3) does not allow for the imposition of discipline greater or more severe than that ordered by the California Supreme Court. Respondent contends that Rule 22(d) refers only to the Respondent's burden of proof and does not explicitly refer to greater or more severe discipline. He further contends that the phrase "substantially different in this state" appearing in the same sentence as "not misconduct in this jurisdiction" precludes the Court from ordering greater or more severe discipline.

Having entered Findings of Fact, the Court enters the following Conclusions of Law:

1. The District Court has jurisdiction over Respondent and this matter pursuant to Rule 6(a), 11(a) and 22 of the Rules of Lawyer Discipline and Disability, as adopted by the Utah Supreme Court, effective July 1, 1993 and amended January 1, 2003.

2. Under Rule 22(e) of the Rules of Lawyer Discipline and Disability, the California Supreme Court Order is a final adjudication that Welker is guilty of professional misconduct and conclusively establishes the misconduct for purposes of this proceeding.

3. Rule 22(d) requires the Court to impose in this jurisdiction, discipline equivalent to that imposed in California unless one of three exceptions stated in Rule

22(d)(1), (2) or (3) clearly appear upon the face of the record of the California proceedings.

4. A finding that an exception to equivalent discipline provided in Rule 22(d)(1), (2) or (3) is appropriate can by the terms of the exception benefit only the Respondent.

5. The burden to demonstrate the existence of one of the exceptions to equivalent discipline is on the Respondent.

6. Rule 22(d) intentionally omits reference to a burden upon the Office of Professional Conduct to demonstrate that under Rule 22(d)(3) substantially different discipline in the form of greater or more severe discipline is warranted in this state.

7. If the Court determines that upon the face of the record from which the discipline is predicated that either Rule 22(d)(1), (2) or (3) apply, the discipline imposed in this state may vary from equivalent discipline only to impose a lesser penalty.

8. Respondent has failed to demonstrate that imposition of equivalent discipline would result in grave injustice.

9. It is appropriate to impose in Utah discipline equivalent to the discipline imposed by the California Supreme Court *In Re Harry Delbert Welker On Discipline*, Case No. S101662 arising from the State Bar Court, State Bar of California, *In the Matter of Harry Delbert Welker*, State Bar No. 156867, Case Nos. 99-0-12194; 99-0-12580; and 01-J-02752.

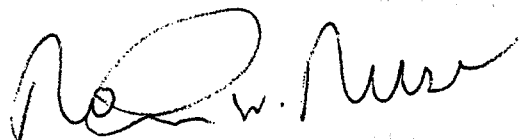
10. For the purpose of reciprocal discipline in Utah, Respondent has served six of the eighteen months actual suspension imposed in California between the

February 2002 effective date of the suspension in California and the activation of his Utah license in August 2002.

11. For the purpose of a wind-up period, as to all but one matter, Respondent requested two weeks to conclude his practice of law within Utah. As to one personal injury case, an auto/pedestrian accident, wherein Respondent's client is a minor, Respondent requests approximately 30 days within which to complete a conservatorship for the minor to conclude a settlement of her claims.

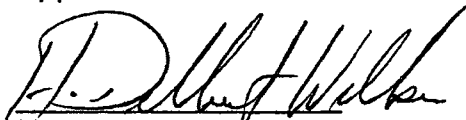
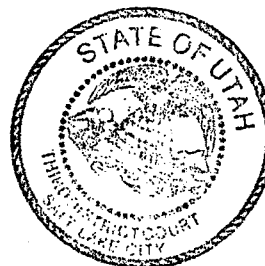
DATED this 22 day of April 2003.

BY THE COURT:



Robin W. Reese  
District Judge

Approved at to form:

  
H. Delbert Welker

Counsel for the State Bar Sherrie B. McLechie Bar # 85447 180 Howard, 7th Floor San Francisco CA 94105 (415) 538-2297	Case number(s) 99-0-12194; 99-0-12580; 01-3-02752  <b>PUBLIC MATTER</b>	(for Court's use)   <b>FILED</b> SEP 4 2001 STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO
Counsel for Respondent Harry Delbert Welker 8661 S. Highland Dr, # 179 Sandy Utah 84093 In Propria Persona (801) 942-7177		
In the Matter of Harry Delbert Welker Bar # 156867 A Member of the State Bar of California (Respondent)		

Submitted to ☐ assigned judge ☐ settlement judge  
 STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION  
 AND ORDER APPROVING  
 ACTUAL SUSPENSION  
☐ PREVIOUS STIPULATION REJECTED

A. Parties' Acknowledgments:

- (1) Respondent is a member of the State Bar of California, admitted October 8, 1991  
(date)
- (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 and order consist of 21 pages.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."
- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law."
- (6) 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.
- (7) 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 284, Rules of Procedure.
  - ☐ costs to be paid in equal amounts prior to February 1 for the following membership years:  
 (hardship, special circumstances or other good cause per rule 284, Rules of Procedure)
  - ☐ costs waived in part as set forth under "Partial Waiver of Costs"
  - ☐ costs entirely waived

Aggravating Circumstances [for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b).] Facts supporting aggravating circumstances are required.

☐ Prior record of discipline [see standard 1.2(f)]

(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 or under "Prior Discipline".

☐ Dishonesty: Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.

☒ 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.

☒ Harm: Respondent's misconduct harmed significantly a client, the public or the administration of justice.

☐ Indifference: Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.

☐ 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.

☒ Multiple/Pattern of Misconduct: Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.

☐ No aggravating circumstances are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [see Standard 1.2(e).] 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. *SBM*
- (2) ☐ No Harm: Respondent did not harm the client or person who was the object of the misconduct.
- (3) ☐ Candor/Cooperation: Respondent displayed spontaneous candor and cooperation to 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 in good faith.
- (8) ☐ Emotional/Physical Difficulties: At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical 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 Respondent no longer suffers from such difficulties or disabilities.
- (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 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.
- (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:

## 1. Stayed Suspension.

A. Respondent shall be suspended from the practice of law for a period of three (3) 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 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct
- ☐ ii. and until Respondent pays restitution to \_\_\_\_\_ [payee(s)] (or the Client Security Fund, if appropriate), in the amount of \_\_\_\_\_, plus 10% per annum accruing from \_\_\_\_\_, and provides proof thereof to the Probation Unit, Office of the Chief Trial Counsel
- ☐ iii. and until Respondent does the following: \_\_\_\_\_.

B. The above-referenced suspension shall be stayed.

## 2. Probation.

Respondent shall be placed on probation for a period of four (4) years, which shall commence upon the effective date of the Supreme Court order herein. (See rule 953, California Rules of Court.)

## 3. Actual Suspension.

A. Respondent shall be actually suspended from the practice of law in the State of California for a period of eighteen (18) 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 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct
- ☐ ii. and until Respondent pays restitution to \_\_\_\_\_ [payee(s)] (or the Client Security Fund, if appropriate), in the amount of \_\_\_\_\_, plus 10% per annum accruing from \_\_\_\_\_, and provides proof thereof to the Probation Unit, Office of the Chief Trial Counsel
- ☐ iii. and until Respondent does the following: \_\_\_\_\_.

## Additional Conditions of Probation:

- ☐ If Respondent is actually suspended for two years or more, he/she shall remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and learning and ability in general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.
- ☒ During the probation period, Respondent shall comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- ☒ Within ten (10) days of any change, Respondent shall report to the Membership Records Office of the State Bar and to the Probation Unit, 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.
- ☒ Respondent shall submit written quarterly reports to the Probation Unit on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent shall state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all



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conditions of probation during the preceding calendar quarter. If the first report would cover less than 30 days, that report shall 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.

(5) ☐ Respondent shall be assigned a probation monitor. Respondent shall 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 shall furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Probation Unit. Respondent shall cooperate fully with the probation monitor.

(6) ☒ Subject to assertion of applicable privileges, Respondent shall answer fully, promptly and truthfully any inquiries of the Probation Unit of the Office of the Chief Trial Counsel 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.

(7) ☒ Within one <sup>18 months HDW SBM</sup> ~~(1) year~~ of the effective date of the discipline herein, respondent shall provide to the Probation Unit 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.

(8) ☐ Respondent shall comply with all conditions of probation imposed in the underlying criminal matter and shall so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Probation Unit.

9) ☒ The following conditions are attached hereto and incorporated:

☐ Substance Abuse Conditions

☐ Law Office Management Conditions

☐ Medical Conditions

☒ Financial Conditions

10) ☐ Other conditions negotiated by the parties:

{ Multistate Professional Responsibility Examination: Respondent shall provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Probation Unit of the Office of the Chief Trial Counsel 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 951(b), California Rules of Court, and rule 321(a)(1) & (c), Rules of Procedure.

☐ No MPRE recommended.

Rule 955, California Rules of Court: Respondent shall comply with the provisions of subdivisions (a) and (c) of rule 955, California Rules of Court, within 30 and 40 days, respectively, from the effective date of the Supreme Court order herein.

Conditional Rule 955, California Rules of Court: If Respondent remains actually suspended for 90 days or more, he/she shall comply with the provisions of subdivisions (a) and (c) of rule 955, California Rules of Court, within 120 and 130 days, respectively, from the effective date of the Supreme Court order herein.

Credit for Interim Suspension [conviction referral cases only]: Respondent shall be credited for the period of his/her interim suspension toward the stipulated period of actual suspension.



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In the Matter of

Case Number(s):

Harry Delbert Welker  
A Member of the State Bar

99-0-12194; 99-0-12580; 01-S-02752

Financial Conditions

- a. ☐ Respondent shall pay restitution to \_\_\_\_\_ [payee(s)] (or the Client Security Fund, if appropriate), in the amount(s) of \_\_\_\_\_, plus 10% interest per annum accruing from \_\_\_\_\_, and provide proof thereof to the Probation Unit, Office of the Chief Trial Counsel,
- ☐ no later than \_\_\_\_\_
- or
- ☐ on the payment schedule set forth on the attachment under "Financial Conditions, Restitution."
- b. ☒ 1. If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent shall file with each required report a certificate from respondent and/or a certified public accountant or other financial professional approved by the Probation Unit, 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 Probation Unit 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.
- c. ☒ Within ~~one (1) year~~ <sup>18 months HDW SBM</sup> of the effective date of the discipline herein, respondent shall supply to the Probation Unit 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.

**ATTACHMENT TO**  
**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION**

IN THE MATTER OF: Harry Delbert Welker

CASE NUMBER(S): 99-O-12194; 99-O-12580; 01-J-02752

**FACTS AND CONCLUSIONS OF LAW**

**99-O-12580**

[Baugh Complaint]

On April 9, 1997, Gregory Baugh ("Baugh") hired Respondent on a contingency basis to represent him in pursuing a third-party personal injury claim arising out of a vehicle accident which occurred on May 7, 1996, while Baugh was driving a truck for his employer. At or soon after the time Baugh hired Respondent, Respondent was aware that Baugh was pursuing a Workers' Compensation claim against his employer through another counsel, John W. Johanson ("Johanson").

On or about April 30, 1997, Respondent filed the complaint in Gregory Baugh v. Theodore J. Balesteri, Santa Clara County Superior Court, case number CV 765847 ("Baugh v. Balesteri").

At no time did Respondent conduct any formal discovery or arrange for a qualified medical examination of Baugh. Respondent allowed mediation to proceed before psychological and physical examinations arranged by Johanson had taken place.

On or about December 10, 1997, Zenith Insurance Company ("Zenith"), the Workers' Compensation carrier for Baugh's employer, filed a complaint in intervention in Baugh v. Balesteri in order to recover from Balesteri the benefits paid Baugh.

On or about February 10, 1999, a mediation session was held in Baugh v.

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Balesteri. By letter dated February 10, 1999, Norm Beegun ("Beegun"), counsel for Zenith requested that Respondent obtain Johanson's permission to enter into a global settlement by having Johanson execute a third party compromise and release ("release"). Otherwise, according to Beegun's letter, Zenith would claim a credit in the Workers' Compensation case.

Thereafter Respondent, Paul Yee ("Yee"), counsel for Balesteri's insurance company, and Beegun, purported to settle Baugh v. Balesteri for \$85,000 as part of a global settlement of Baugh's claims arising from the vehicle accident. However, Baugh refused to accept the global settlement offered by Yee.

By letter dated February 17, 1999, Respondent urged Baugh to accept the global settlement.

By letter dated March 1, 1999, Respondent advised Yee that he did not have Johanson's permission to enter into a global settlement.

In mid-March 1999, in response to a letter from Respondent dated March 16, 1999, Johanson telephoned Respondent and reiterated and confirmed that Baugh did not agree to the purported settlement.

By letter dated March 29, 1999, Respondent sent Baugh the release and asked him to return it signed. Respondent further stated that he would not receive the settlement draft from Yee until he had the signed release back from Baugh.

Respondent sent Baugh two letters dated April 6, 1999. In one letter Respondent set forth his analysis of the advantages of Baugh accepting the global settlement. With the other letter Respondent enclosed another copy of the release and advised Baugh that upon receipt of the signed release Respondent would send him his share of the settlement. Also on April 6, 1999, without having gained Baugh's acceptance of the settlement offer, Respondent signed a request for dismissal of Baugh v. Balesteri prepared by Yee.

On April 10, 1999, Respondent received the settlement draft from Yee. Thereafter on numerous occasions Respondent attempted to convince Baugh to sign the release and, ultimately, the settlement draft.

On April 26, 1999, Yee filed the requests for dismissal with prejudice of Baugh v. Balesteri, including Zenith's complaint in intervention. The request for dismissal was signed by counsel for Zenith on April 8, 1999. No release was signed by Baugh or Johanson. The dismissal was entered on April 26, 1999. As its share of the settlement, Zenith received the lien amount disputed by Baugh from Yee.

On September 9, 1999, Baugh received from Respondent an advance copy of a motion for attorney's fees and costs in the amount of \$28,615.00, and for permission to endorse settlement drafts in Baugh v. Balesteri. By letter dated September 15, 1999, Baugh directed Respondent to withdraw the unauthorized request for dismissal, return the settlement draft, and withdraw from the case.

On September 17, 1999, Baugh filed a complaint with the State Bar alleging that Respondent failed to represent him competently and had entered into a settlement which Baugh had not authorized. On September 28, 1999, a State Bar investigator mailed Respondent a letter regarding Baugh's complaint and requesting Respondent's response.

On September 30, 1999, Respondent filed a motion for attorney's fees and costs and to be permitted to endorse settlement drafts in Baugh v. Balesteri. In support of the motion Respondent declared under penalty of perjury that a settlement had been achieved at the mediation session.

On November 15, 1999, Baugh substituted Thomas Casazza ("Casazza") for Respondent as his attorney of record in Baugh v. Balesteri.

On March 2, 2000, Respondent's motion to permit him to endorse Baugh's name to settlement drafts received from Yee was denied. Thereafter Respondent filed a motion for an attorney's fee lien against Baugh's settlement. On March 21, 2000, this motion was denied.

On April 4, 2000, Baugh's motion to vacate the dismissal of Baugh v. Balesteri, filed by Casazza, was denied.

On April 21, 2000, Respondent endorsed, or caused to be endorsed, Baugh's name on the settlement draft and deposited it into his Wells Fargo client trust

account, account number 1221011911074 0047 220892 ("client trust account"). On May 26, 2000, Respondent mailed Baugh client trust account check number 1074, in the amount of \$27,385 with a letter explaining that it represented Baugh's share of the settlement in Baugh v. Balesteri.

On August 15, 2000, an order re contempt was issued against Respondent in connection with Baugh v. Balesteri. The court ordered that Respondent pay a \$1,000 fine, serve five days in jail, and issued a bench warrant with a \$25,000 bond, stayed until September 22, 2000.

On October 17, 2000, Baugh died.

By order filed October 17, 2000, the court ordered that Respondent return "all monies . . . for the purported and disputed settlement in this matter . . . to the Insurance Carrier or Carriers who issued the instrument or instruments forthwith." and provide proof thereof. On October 18, 2000, Respondent declared under penalty of perjury that he had sent Yee a trust account check in the amount of \$56,000.

By failing to conduct any formal discovery, arrange for a qualified medical examination of Baugh, and allowing mediation to proceed before the psychological and physical examinations arranged by his client's Workers' Compensation attorney had taken place, Respondent recklessly failed to perform legal services with competence in wilful violation of rule 3-110(A), Rules of Professional Conduct.

By signing the request for dismissal and allowing defense counsel to file it, Respondent corruptly and without authority appeared as attorney for Baugh in wilful violation of Business & Professions Code section 6104.

\* By filing a declaration under penalty of perjury with a court which misrepresented the basis for a motion as a client's repudiation of an authorized settlement, as opposed to the attorney entering into a purported settlement without authority to do so from his client, Respondent committed an act involving moral turpitude, dishonesty or corruption in wilful violation of Business & Professions Code section 6106.

verified  
motion

By stating in his declaration to the court, made under penalty of perjury,

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that a settlement had been achieved through mediation, Respondent sought to mislead the judge by making false statements of fact and law because no settlement in fact occurred because settlement requires some form of client consent thereto. Respondent wilfully violated Business & Professions Code section 6068(d).

**99-O-12194**

**[Fox Complaint]**

In January 1997 Wayne Fox ("Fox") hired Respondent on a contingency basis to represent him in pursuing a personal injury claim. Respondent signed an acknowledgment of lien by a medical service provider who had provided services to Fox. Beginning in April 1997, one of Fox's medical service providers, Fritter and Schultz, regularly contacted Respondent by telephone requesting payment.

On August 13, 1997, Respondent settled Fox's personal injury claim and received an insurance draft from USAA Insurance Company payable to Fox and Respondent in the amount of \$25,000.00. On August 14, 1997, Respondent deposited the draft into his client trust account.

Thereafter, Fox approved a disbursement of the \$25,000.00 settlement which authorized Respondent to take \$8,325 as his fees, to pay \$5,738 to various medical service providers, and to pay the remaining \$11,192.01 to Fox. On August 22, 1997, Respondent by client trust account check number 642, paid \$11,192.01 to Fox. On September 17, 1997, the balance of Respondent's client trust account dropped to \$5,375 - less than Respondent owed Fox's medical service providers.

On January 28, 1998, the balance in the client trust account was a negative \$85.10.

No payment having been made by Respondent to Fritter and Schultz, they contacted Fox, who demanded that Respondent pay Fritter and Schultz. When Respondent failed to do so, Fox filed a complaint with the State Bar on March 5, 1999. Respondent did not pay any of Fox's funds held in Respondent's client trust account to the medical service providers as requested by Fox until April 27, 2000, after contact by the State Bar, when Respondent paid Fritter and Schultz the sum of \$5,700.38.

*used  
money  
for  
other  
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did not  
pay  
medical  
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paid  
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complaint*



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By not paying Fox's funds held in the client trust account to the medical service providers as requested by Fox, Respondent failed to pay client funds as requested by his client in wilful violation of rule 4-100(B)(4).

By not maintaining at least \$5,738.00 received on behalf of Fox in the client trust account until payment to the medical service providers, Respondent failed to maintain client funds in trust in wilful violation of rule 4-100(A).

Respondent with gross negligence misappropriated Fox's funds in wilful violation of rule 4-100(B)(4).

By misappropriating at least \$5,738.00 of Fox's funds, Respondent committed an act involving moral turpitude, dishonesty or corruption in wilful violation of Business & Professions Code section 6106. \*

**99-O-12194**

[Commingling]

Between February 10, 1997, and October 28, 1997, Respondent wrote numerous checks out of his client trust account for items which were not client-related. Respondent routinely issued checks from his client trust account to family members, clothing and other stores, restaurants, utilities, and travel agencies.

By writing personal checks on his client trust account, Respondent commingled funds in wilful violation of rule 4-100(A).

**01-J-02752**

(Discipline Imposed by Another Jurisdiction)

By order filed January 29, 2001, the Third Judicial District Court in and for Salt Lake County, State of Utah, suspended Respondent from the practice of law in the State of Utah based on a Stipulation for Discipline By Consent entered into between Respondent and the Utah State Bar. A certified copy of said order is attached hereto as Exhibit 1. Respondent was found culpable of professional misconduct in a proceeding in another jurisdiction as provided in California Business and Professions Code section 6049.1.

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As matters of law: 1) the professional misconduct of which Respondent was found culpable in Utah warrants discipline in the State of California; and 2) Respondent was not deprived of any constitutional protection during the Utah proceedings.

**01-J-02752**

(Failure to Report Imposition of Discipline by Another Jurisdiction)

Respondent did not report to the State Bar of California that he had been disciplined by the Third Judicial District Court in and for Salt Lake County, State of Utah, and the Utah State Bar. Rather, the State Bar of California contacted the Utah State Bar and determined that Respondent had been disciplined.

By failing to report to the State Bar in writing within 30 days of the time he had knowledge of the imposition of discipline against him the Third Judicial District Court in and for Salt Lake County, State of Utah, and the Utah State Bar, Respondent wilfully violated Business and Professions Code section 6068(o)(6).

**FACTS SUPPORTING AGGRAVATING CIRCUMSTANCES**

**Trust Violations**

The misappropriation of Fox's settlement proceeds, which were subject to a medical service provider lien, and the repeated and routine payment of personal expenses from a client trust account, as set forth above in "Facts and Conclusions of Law," were trust violations. Respondent's failure to maintain a client trust account in Utah was a trust violation in that jurisdiction.

**Multiple Acts/Pattern of Misconduct**

The trust account violations in California and Utah were multiple and similar, establishing a pattern of misconduct.

**Harm**

Respondent accepted, without Baugh's authorization, a settlement which was unacceptable to Baugh. Because of Respondent's two motions to allow him to endorse the settlement check, subsequent's counsel's attempts to set aside the dismissal were so delayed that Baugh died without knowing that his cause of action had been reactivated. Because Baugh died before Baugh v. Balesteri was legitimately settled or tried, it is reasonable to assume that the value of the



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cause of action has been diminished, to the detriment of his widow.

**PENDING PROCEEDINGS.**

The disclosure date referred to on page one, paragraph A.(6), was July 30, 2001.


**COSTS OF DISCIPLINARY PROCEEDINGS.**

Respondent acknowledges that the Office of the Chief Trial Counsel has informed Respondent that as of July 30, 2001, the estimated prosecution costs in this matter are approximately \$2,595.30. Respondent acknowledges that this figure is an estimate only and that it does not include State Bar Court costs which will be included in any final cost assessment. 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.

Charles A. Gruber #7391  
Assistant Counsel  
OFFICE OF PROFESSIONAL CONDUCT  
Utah State Bar  
645 South 200 East  
Salt Lake City, Utah 84111-3834  
801-531-9110

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**FILED DISTRICT COURT**  
Third Judicial District

JAN 29 2001

By   
SALT LAKE COUNTY  
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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In the Matter of the

Discipline of:

H. Delbert Welker, #3418

Respondent.

)  
) FINDINGS OF FACT,  
) CONCLUSIONS OF LAW, AND  
) ORDER OF SUSPENSION  
)  
)  
) Civil No. 000902065  
)  
) Judge: Leslie A. Lewis

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The Court, having reviewed all pleadings and papers filed in this matter including the Complaint, the Stipulation for Discipline By Consent signed by the parties, the Affidavit of the Respondent, H. Delbert Welker and otherwise being fully advised in the premises the Court makes the following findings of fact and conclusions of law and order of suspension:

**FINDINGS OF FACT**

1. Mr. Welker represented Ms. Rosa Lee Crowley and Ms. Lindsey Welker in personal injury matters in Utah.

2. Mr. Welker signed a written "Medical Reports and Doctor's Lien" ("medical provider lien") with a chiropractic clinic for medical services provided to Ms. Crowley and



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Ms. Welker in both Ms. Crowley and Ms. Welker's personal injury matters. Both Ms. Crowley and Ms. Welker signed the medical liens.

3. Pursuant to the written medical provider liens Mr. Welker was directed by Ms. Crowley and Ms. Welker "to pay directly" to the chiropractic clinic "such sums as may be due and owing" for "medical service rendered" to Ms. Crowley and Ms. Welker and "to withhold such sums from any settlement, judgement or verdict as may be necessary to adequately protect said clinic".

4. In addition to Ms. Crowley and Ms. Welker's personal injury matters and medical provider liens, Mr. Welker also represented a Phetnkhonsy Bouapha. There also was a medical provider lien with the chiropractic clinic for medical services provided to Ms. Bouapha, and the terms of that medical lien were essentially the same as the medical provider lien in Ms. Crowley's and Ms. Welker's personal injury matters.

5. For approximately six months in 1996 (approximately February 1996 through June 1996) Mr. Welker did not have a trust account in Utah for the purpose of holding client and third party funds as required by Rule 1.15 of the Rules of Professional Conduct. Prior to that time he did have a trust account in Utah.

6. In early 1996, Mr. Welker moved his law practice to California, but kept his family and his residence in Salt Lake County, Utah. In or around 1996, Mr. Welker did set up a trust account in California.

7. In early to mid-1996, Mr. Welker was able to settle the personal injury matters in Ms. Crowley's, Ms. Welker's and Ms. Bouapha's personal injury matters.

8. Mr. Welker distributed the settlement funds in Ms. Crowley's, Ms. Welker's and Ms. Bouapha's personal injury matters by paying himself attorney's fees



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contingency percentage basis and by distributing to his clients their portion of the settlement funds.

9. When Mr. Welker distributed the settlement funds to himself and to Ms. Crowley, Ms. Welker, and Ms. Bouapha, Mr. Welker did not promptly pay the amount owed to the chiropractic clinic for medical services provided to his clients.

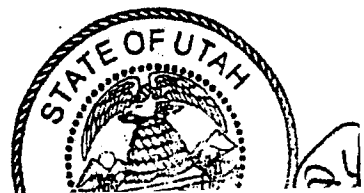
10. When Mr. Welker settled these personal injury matters and distributed the settlement funds to himself and to his clients, Mr. Welker did not promptly notify or account to the chiropractic clinic regarding the funds he was holding for the chiropractic clinic pursuant to the medical provider lien.

11. Mr. Welker did not keep the complete records of his trust account concerning the settlement funds for Ms. Crowley, Ms. Welker, and Ms. Bouapha regarding the settlement of their personal injury matters for the required time period of five years after the termination of the representation of these clients.

12. On or about October 15, 1996, the chiropractic clinic began sending letters to Mr. Welker demanding that he pay the funds owed to the chiropractic clinic by Ms. Crowley, Ms. Welker, and Ms. Bouapha and which were to be paid to the chiropractic clinic pursuant to the medical provider lien at the time the settlement funds were distributed.

13. On October 23, 1996, Mr. Welker wrote to the chiropractic clinic and stated that it "never has been my intention to not take care of the obligations on the cases that we had together" and stated that he would "take care of the problem".

14. Mr. Welker suggested in his October 23, 1996, letter that Ms. Welker's expenses could be covered by health insurance.



15. On October 29, 1996, the chiropractic clinic wrote to Mr. Welker and gave an accounting of the money owed to the clinic for medical services provided in the Crowley, Welker and Bouapha matters.

16. The amount claimed by the chiropractic clinic was not disputed by Mr. Welker.

17. The amount claimed by the chiropractic clinic was not disputed by Mr. Welker's clients.

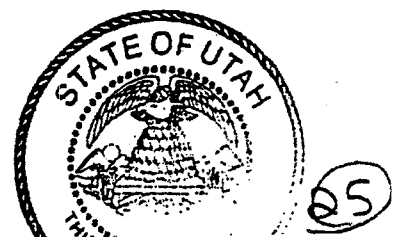
18. On or about April 7, 1997, the chiropractic clinic wrote to Mr. Welker and again demanded payment for the services provided by the chiropractic clinic in the Crowley, Welker and Bouapha matters.

19. On or about April 17, 1997, Mr. Welker sent a letter to the chiropractic clinic acknowledging that he had an "outstanding balance" in the Crowley, Welker, and Bouapha matters. Mr. Welker stated in the letter that he had paid a portion of the outstanding balance and offered to make further monthly payments of the funds.

20. On April 15, 1998, the chiropractic clinic sent another letter to Mr. Welker regarding Ms. Crowley's and Ms. Welker's matters.

21. Prior to January 20, 2000, Mr. Welker paid all money due on the Crowley and Welker accounts at the chiropractic clinic. The Bouapha account was paid previous to January 2000.

22. Mr. Welker did not receive any additional funds in the three client matters other than the funds due him for his fees and costs. Any funds that were to be paid over to the chiropractic clinic were paid over to the clients. At no time did the chiropractic clinic seek repayment from the three clients.



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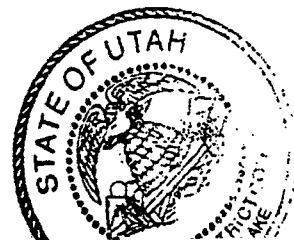
### CONCLUSIONS OF LAW

23. In Mr. Welker's representation of Ms. Crowley, Ms. Welker, and Ms. Bouapha, Mr. Welker he failed promptly to notify the third person and failed promptly to deliver to the third person funds or other property that the third person was entitled to receive in violation of Rule 1.15(b) (Safekeeping Property) of the Rules of Professional Conduct.

24. In Mr. Welker's representation of Ms. Crowley, Ms. Welker, and Ms. Bouapha, Mr. Welker failed to keep complete records of third party funds and other property kept by Mr. Welker and failed to preserve for a period of five years after termination of the representation those records, in violation of Rule 1.15(a) (Safekeeping Property) of the Rules of Professional Conduct.

### ORDER OF SUSPENSION

IT IS HEREBY ORDERED that, pursuant to Rule 20, Rules of Lawyer Discipline and Disability, Mr. Welker is hereby suspended from the practice of law for thirty days. The effective date of that thirty (30) day suspension shall be the date that the Court has signed this Order. Mr. Welker will be enjoined and prohibited from practicing law in the State of Utah, holding himself out as an attorney at law, performing any legal services for others, giving legal advice to others, accepting any fee directly or indirectly for rendering legal services as an attorney, appearing as counsel or in any representative capacity in any proceeding in any Utah court or before any Utah administrative body as an attorney (whether state, county, municipal, or other), or holding himself out to others or using her name in any manner in conjunction with the words "Attorney at Law", "Counselor at Law", or "Lawyer"



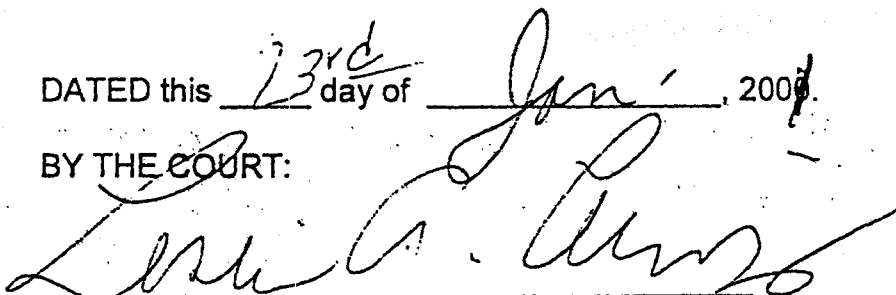
HOW  
504

IT IS HEREBY FURTHER ORDERED that Mr. Welker shall comply with all requirements of Rules 24 Rules of Lawyer Discipline and Disability. Mr. Welker shall file with the Court and serve on the OPC an affidavit showing compliance with the terms of this Order as required by Rule 24. Currently, Mr. Welker is on inactive status with the Utah State Bar, and if he wishes to practice law in the State of Utah he must obtain active status as well as file the affidavit as required by Rule 24 to be fully reinstated to the practice of law in the State of Utah.

IT IS HEREBY FURTHER ORDERED that this Court will retain jurisdiction in this matter.

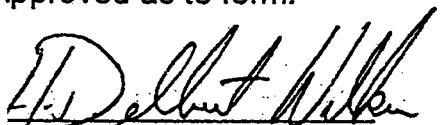
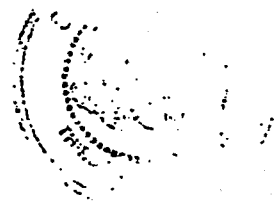
DATED this 23<sup>rd</sup> day of Jan, 2008.

BY THE COURT:



Leslie A. Lewis  
District Court Judge

Approved as to form:

  
Delbert Welker, Respondent

I CERTIFY THAT THIS IS A TRUE COPY OF  
AN ORIGINAL DOCUMENT ON FILE IN THE  
THIRD DISTRICT COURT, SALT LAKE  
COUNTY, STATE OF UTAH



Date 8/10/01

Harry D. Welker  
Respondent's signature

Harry Delbert Welker  
print name

Date \_\_\_\_\_

Respondent's Counsel's signature \_\_\_\_\_

print name \_\_\_\_\_

Date 8-13-01

Sherrie B. McLeitchie  
Deputy Trial Counsel's signature

Sherrie B. McLeitchie  
print name

### 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.

*See attached Modifications.*

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 135(b), 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 953(a), California Rules of Court.)

Date 8/30/01

John M. Runkle  
Judge of the State Bar Court



**IN THE MATTER OF HARRY D. WELKER**  
**Case Numbers 99-O-12194; 99-O-12580; 01-J-02752**

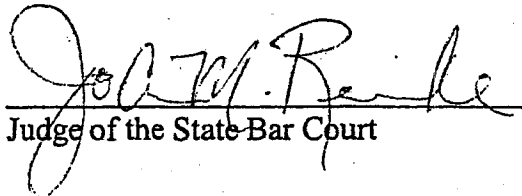
**COURT'S MODIFICATIONS TO STIPULATED FACTS,**  
**CONCLUSIONS OF LAW AND DISPOSITION**

1. In the caption on page 1, an "x" shall be inserted in the box indicating that the stipulation is submitted to the assigned judge.
2. Under the conclusions of law in Case No. 99-O-12194, the third full paragraph on page 12 stating, "Respondent with gross negligence misappropriated Fox's funds in wilful violation of rule 4-100(B)(4)," shall be deleted. The stated facts support a violation of section 6106 of the Business and Professions Code, which is also set forth in the Stipulation.
3. On page 13, under "Multiple Acts/Pattern of Misconduct" as a factor in aggravation, while there is clear and convincing evidence of multiple acts of misconduct, the facts do not support a pattern of misconduct. (See, *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 157.)

Dated

8/30/01

Judge of the State Bar Court



**CERTIFICATE OF SERVICE**  
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 September 4, 2001, 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:

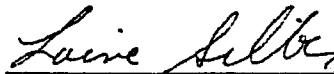
- [X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

**HARRY D. WELKER  
8661 S HIGHLAND DR #179  
SANDY UT 84093**

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

**SHERRIE MCLETCHIE , Enforcement, San Francisco**

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on September 4, 2001.



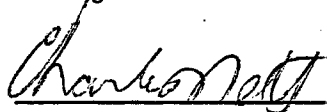
**Laine Silber  
Case Administrator  
State Bar Court**



The document to which this certificate is affixed is a full, true and correct copy of the original on file and of record in the State Bar Court.

ATTEST      June 4, 2002  
State Bar Court, State Bar of California,  
Los Angeles

By

  
\_\_\_\_\_

Clerk

**FILED DISTRICT COURT**  
Third Judicial District

APR 23 2003

Paul H. Proctor, #2657  
Assistant Counsel  
Utah State Bar  
OFFICE OF PROFESSIONAL CONDUCT  
645 South 200 East  
Salt Lake City, Utah 84111  
(801) 531-9110

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the  
Discipline of:

H. Delbert Welker, #3418

Respondent.

ORDER OF RECIPROCAL  
DISCIPLINE

Civil No. 020909349

Judge Robin W. Reese

On March 14, 2002 a hearing was held upon the Office of Professional Conduct's Petition for Reciprocal Discipline under Rule 22 of the Rules of Lawyer Discipline and Disability. Paul H. Proctor appeared and argued on behalf of the Office of Professional Conduct. Respondent H. Delbert Welker appeared and argued on his own behalf.

Having read the Petition and Brief in Support of Discipline, and Respondent's Answer to the Petition, Memorandum and Affidavit in response to the Petition and Memorandum and Affidavit in reply to the Brief, having heard the arguments, and having entered Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED:

1. H. Delbert Welker, Utah State Bar No. 3418 is suspended from the practice of law in the state of Utah for one year effective March 28, 2003. Except as

provided in Paragraph 2 of this Order, he shall not from and after March 28, 2003, practice or assume to act or hold himself out to the public as a person licensed or qualified to practice law or to carry on the calling of an attorney at law in Utah.

2. With respect to a personal injury matter, an auto/pedestrian accident, in which Welker represents a minor, he may continue with this representation by filing for a conservatorship necessary to conclude the personal injury claim of the minor. Should the case not be concluded within 30 days of March 28, 2003, Welker is directed to report the status of the case to this Court and provide a date by which it is believed the matter can be concluded.


3. All other terms and conditions of discipline imposed by the California Supreme Court *In Re Harry Delbert Welker On Discipline*, Case No. S101662 arising from the State Bar Court, State Bar of California, *In the Matter of Harry Delbert Welker*, State Bar No. 156867, Case Nos. 99-0-12194; 99-0-12580; and 01-J-02752 are imposed herein.

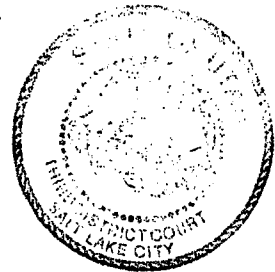
3. H. Delbert Welker may be reinstated to the practice of law in Utah in accordance with Rule 26(j) of the Rules of Lawyer Discipline and Disability.

4. No costs or attorneys fees are awarded.

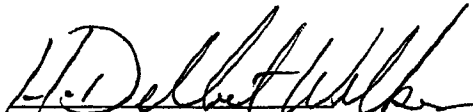
DATED this 22 day of April 2003

BY THE COURT:

  
Robin W. Reese  
District Judge



Approved at to form:

  
H. Delbert Welker

CERTIFICATE OF MAILING

I hereby certify that on this 28 day of October, 2003, I caused to be mailed via United States mail, first-class postage pre-paid, two copies of the foregoing Brief of Appellant to the Respondent/Appellee, H. Delbert Welker, 8661 South Highland Drive, #179, Sandy, UT 84093.

Kate A. Toomey