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STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RAYMOND E. MAPPS

A Member of the State Bar

[Nos. 87-O-12533, 87-O-11669]

Filed March 27, 1990

Reconsideration denied, May 22, 1990 (see separate opinion, *post*, p. 19)

SUMMARY

Respondent was found culpable of two instances of misappropriation of a total of approximately $5,700 held to pay medical liens. Respondent acknowledged both misappropriations shortly after they occurred and repaid both complaining witnesses prior to the institution of disciplinary proceedings. The hearing referee recommended disbarment, and respondent was enrolled on inactive status following such recommendation. (Hon. William A. Munnell (retired), Hearing Referee.)

The review department concluded that the facts found by the hearing referee were supported by the record, but modified the referee's conclusions of law. It also made more limited findings of aggravation and found some factors in mitigation, which the referee had not found. Analyzing Supreme Court precedent in cases involving misappropriation of client funds, the review department concluded that the public would be sufficiently protected by respondent being suspended from practice, including two years actual suspension, and being required to make a showing of rehabilitation, fitness to practice, and learning and ability in the law prior to returning to practice.

The review department also pointed out that if respondent's inactive enrollment was predicated solely on the disbarment recommendation of the hearing referee, which created a rebuttable presumption that the factors justifying inactive enrollment were met, the presumption no longer existed since the review department had recommended suspension rather than disbarment. The review department recommended that the period of involuntary inactive enrollment already served, as well as any additional, stipulated period of inactive enrollment, be credited towards the period of actual suspension ordered.

COUNSEL FOR PARTIES

For Office of Trials: Russell Weiner

For Respondent: No appearance (default)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **107 Procedure—Default/Relief from Default**
108 Procedure—Failure to Appear at Trial
162.19 Quantum of Proof Required
165 Adequacy of Hearing Decision
204.90 Culpability—General Substantive Issues
Where entry of attorney's default for failure to appear at disciplinary hearing resulted in the admission of all allegations in the notice to show cause, but certain of those allegations were in conflict with evidence adduced at hearing, examiner properly requested reconsideration of hearing decision to delete findings contrary to evidence adduced at hearing, and hearing referee properly deleted such findings from the decision, based on their conflict with the evidence.

[2] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Pursuant to rule 453 of the Transitional Rules of Procedure, the review department independently reviews the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department. Its decisions are in turn subject to review by the Supreme Court which likewise conducts independent review of the record below and is not bound by the factual findings of the State Bar Court.

[3] **802.30 Standards—Purposes of Sanctions**
1099 Substantive Issues re Discipline—Miscellaneous
The Supreme Court's principal concern in the area of attorney discipline is protection of the public and preservation of confidence in the legal profession, interests served by maintaining the highest possible professional standards for attorneys. That same concern is therefore the principal concern of the review department.

[4] **213.10 State Bar Act—Section 6068(a)**
The duty to support the Constitution and laws of the United States and of this state is not violated in every case in which a violation of any provision of the Business and Professions Code has occurred.

[5] **220.10 State Bar Act—Section 6103, clause 2**
Business and Professions Code section 6103 does not define a duty or obligation of an attorney, but provides only that violation of an attorney's oath or duties defined elsewhere is a ground for discipline.

[6 a, b] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
An attorney's misappropriations of funds from his client trust account and other client funds constituted acts of dishonesty or moral turpitude. Misappropriation of funds is a serious offense involving moral turpitude.

[7] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Even though the Rule of Professional Conduct requiring payment of client funds upon demand refers only to an attorney's obligation to pay clients, not to any obligation to pay third parties out of funds held in trust, the rule also applies in instances where the attorney is in possession of funds to be paid to a client's medical provider. Accordingly, where an attorney failed to honor a medical

lien and failed to make agreed-upon payments to the doctor, the attorney could properly be found culpable of violating that rule.

[8] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
430.00 Breach of Fiduciary Duty
When an attorney agrees to hold client funds in trust for the benefit of a non-client, the nature of that agreement creates a fiduciary duty to the non-client, as well as the client. As a fiduciary, the attorney's obligation to account for the funds extends to both parties claiming an interest in the funds. Accordingly, the rules governing handling and payment of client trust funds apply to a non-client's funds as well.

[9] **280.00 Rule 4-100(A) [former 8-101(A)]**
An attorney's failure to deposit into his trust account settlement funds received for the benefit of a client is a direct violation of the Rules of Professional Conduct governing client trust funds.

[10 a, b] **543.10 Aggravation—Bad Faith, Dishonesty—Found but Discounted**
543.90 Aggravation—Bad Faith, Dishonesty—Found but Discounted
Where an attorney was charged with, and found culpable of, embezzling client funds, and this conduct was found to constitute moral turpitude, it was not appropriate to consider such conduct also as an aggravating factor based on dishonesty. However, it was appropriate to consider the attorney's subsequent conduct in writing bad checks as reimbursement for the embezzled funds as an aggravating factor, where the evidence showed that the attorney knew or should have known that one of the checks was drawn on insufficient funds. The weight of such aggravation was not great, however, since the bad check was closely tied to the underlying misconduct and was repaid within a few months.

[11] **221.00 State Bar Act—Section 6106**
490.00 Miscellaneous Misconduct
Writing checks when one knows or should know that there are not sufficient funds to cover them manifests a disregard for ethics and fundamental honesty, at least if such conduct occurs repeatedly. Writing bad checks may, by itself under some circumstances, constitute moral turpitude.

[12] **162.11 Proof—State Bar's Burden—Clear and Convincing**
801.90 Standards—General Issues
The State Bar must prove aggravating factors by clear and convincing evidence.

[13 a, b] **545 Aggravation—Bad Faith, Dishonesty—Declined to Find**
605 Aggravation—Lack of Candor—Victim—Declined to Find
Where evidence showed that attorney was candid about mishandling of trust funds, but failed to keep promises to repay the money, this did not constitute clear and convincing evidence that the attorney made misrepresentations, because failure to keep a promise of future action, without more, is not proof of fraudulent intent.

[14] **613.90 Aggravation—Lack of Candor—Bar—Found but Discounted**
Respondent's failure to cooperate in disciplinary proceeding was an aggravating factor, but respondent was not deemed entirely uncooperative since he did meet with investigator on one occasion and attended oral argument on review despite entry of default.

[15] **760.12 Mitigation—Personal/Financial Problems—Found**
791 Mitigation—Other—Found
Where attorney's two instances of misconduct took place during the same short period of time, and attorney attributed them to the same problem of financial difficulty, this factor could properly be considered in mitigation.

[16] **822.34 Standards—Misappropriation—One Year Minimum**
Some cases of misappropriation have resulted in lengthy suspensions rather than disbarment where restitution was made.

[17] **745.10 Mitigation—Remorse/Restitution—Found**
Restitution made voluntarily and before the commencement of disciplinary proceedings is entitled to consideration as a mitigating factor.

[18] **745.10 Mitigation—Remorse/Restitution—Found**
Where respondent took a year to complete restitution, but never disavowed his debt; where respondent made partial payment before client complained, and had paid in full before disciplinary proceeding commenced; and where there was no evidence in the record tending to show whether respondent had the financial wherewithal to have made restitution any faster or sooner than he did, respondent's restitution was a mitigating factor.

[19] **801.30 Standards—Effect as Guidelines**
The Supreme Court has instructed the State Bar Court to use the Standards for Attorney Sanctions for Professional Misconduct as guidelines in determining discipline.

[20] **802.62 Standards—Appropriate Sanction—Effect of Aggravation**
802.63 Standards—Appropriate Sanction—Effect of Mitigation
1091 Substantive Issues re Discipline—Proportionality
In determining the appropriate sanction, the court must balance the aggravating circumstances with the mitigating circumstances and also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts.

[21] **176 Discipline—Standard 1.4(c)(ii)**
While standard 1.4(c)(ii) hearings are not appropriate in all cases where a two-year suspension is ordered, such a hearing appears particularly appropriate where lengthy suspension is recommended in a default proceeding. A defaulting attorney has called into question the propriety of the attorney's automatic return to practice by failing to appear in defense of the serious charges levied against the attorney. Public protection requires that after a lengthy suspension, the attorney not resume practice without demonstrating rehabilitation, fitness to practice, and learning and ability in the general law.

[22] **135 Procedure—Rules of Procedure**
176 Discipline—Standard 1.4(c)(ii)
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
2403 Standard 1.4(c)(ii) Proceedings—Expedited
Procedural rules proposed by State Bar which would permit attorney in standard 1.4(c)(ii) hearing to make required showing by preponderance of evidence; would allow stipulation that attorney meets conditions; would guarantee opportunity to make required showing before expiration of

two-year actual suspension; and would provide for expedited review, appeared to answer Supreme Court's concerns regarding conduct of such hearings.

[23] **174 Discipline—Office Management/Trust Account Auditing**
Trust account auditing was required as condition of probation in order to ensure against recurrence of respondent's misconduct, i.e., misappropriation of funds held to pay medical liens.

[24] **1099 Substantive Issues re Discipline—Miscellaneous**
2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
Where attorney had been placed on involuntary inactive enrollment following disbarment recommendation by hearing department, but on review, discipline recommendation was decreased to suspension and probation, review department recommended that period of involuntary inactive enrollment already served by attorney, and any additional period served thereafter, be credited towards period of actual suspension.

[25] **1099 Substantive Issues re Discipline—Miscellaneous**
2319 Section 6007—Inactive Enrollment After Disbarment—Miscellaneous
If order placing attorney on inactive enrollment was predicated solely on hearing department's disbarment recommendation, which was later superseded by review department's recommendation of suspension, parties could stipulate, pursuant to rule 799 of the Rules of Procedure, to permit attorney's retransfer to active status pending the finality of disciplinary proceedings. Attorney also retained option of stipulating to continued inactive enrollment, in which case review department recommended that such inactive enrollment be credited toward period of actual suspension.

ADDITIONAL ANALYSIS

Culpability
Found
221.11 Section 6106—Deliberate Dishonesty/Fraud
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.11 Misappropriation—Deliberate Theft/Dishonesty
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
280.45 Rule 4-100(B)(3) [former 8-101(B)(3)]

Mitigation
Declined to Find
710.54 No Prior Record

Discipline
1013.11 Stayed Suspension—5 Years
1015.08 Actual Suspension—2 Years
1017.11 Probation—5 Years
Probation Conditions
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing
1030 Standard 1.4(c)(ii)

Other
2311 Section 6007—Inactive Enrollment After Disbarment—Imposed

OPINION

PEARLMAN, P.J.:

Respondent, Raymond E. Mapps, was admitted to the practice of law in this state in 1983. He has no prior record of discipline. This case involves review of a recommendation of disbarment for two instances of misappropriation of a total of approximately $5,700 held to pay medical liens. Respondent acknowledged both misappropriations shortly after they occurred and repaid both complaining witnesses prior to the institution of formal proceedings. We set this case for hearing on our own motion[1] primarily to consider whether the degree of discipline recommended by the hearing panel is excessive in light of recent Supreme Court decisions on similar facts.[2]

Analysis of Supreme Court precedent leads us to conclude that the public would be sufficiently protected by respondent being suspended from the practice of law for five years with the suspension stayed and respondent placed on probation for five years on several conditions including two years actual suspension, coupled with a requirement that respondent make a showing in compliance with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (hereinafter "standard" or "std.") before being permitted to resume the practice of law.[3]

PROCEDURAL HISTORY

This case arose out of two consolidated proceedings tried before the Honorable William A. Munnell, retired judge, on June 8, 1989.[4] At the time of the events in question respondent was a solo practitioner. By the time the formal proceedings were instituted, respondent had notified the State Bar that he had changed his address to the Los Angeles Public Defender's Office and the notices to show cause (formal charges) were served on him there. Respondent met with the State Bar investigator and explained to the investigator that he had been having financial problems at the time of the incidents. He admitted that he had used money from his trust account in order "to make ends meet" (R.T. p. 48), and offered to complete restitution which he had already voluntarily begun. Respondent did complete repayment to both complainants but failed to file an answer in one of the two proceedings and failed to appear at the pretrial and at the formal hearing.

In formal proceeding No. 87-O-12533 filed December 1, 1988, respondent was charged with one count of misappropriation of $2,271 in funds held for medical expenses after settlement of a personal injury action brought by respondent on behalf of a client named Leron Tidwell. The count included charges of knowingly issuing a trust account check drawn against insufficient funds, failing to honor a medical lien and failing to make agreed-upon payments in a subsequent

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1. No request for review was filed by the examiner. The respondent had no right to file a request for review without first moving to set aside his default, which he did not seek to do. As part of the transition to the new State Bar Court system, the decision of a referee is automatically subject to review by this review department pursuant to rules 109 and 452 of the Transitional Rules of Procedure of the State Bar (hereinafter "Rules of Procedure" or "Rules Proc. of State Bar") adopted by the State Bar Board of Governors, effective September 1, 1989. This automatic review is not accorded decisions of full-time judges appointed by the Supreme Court under Business and Professions Code section 6079.1, effective July 1, 1989.

2. In setting the case for oral argument pursuant to rule 452(b) of the Rules of Procedure, we requested the examiner to address two issues: 1. Whether respondent was properly charged and found culpable of a violation of (former) rule 8-101(B)(4) of the Rules of Professional Conduct in case no. 87-O-12533; and 2. Whether the degree of discipline recommended by the hearing panel is excessive in light of *Weller* v. *State Bar* (1989) 49 Cal.3d 670; *Boehme* v. *State Bar* (1988) 47 Cal.3d 448 and *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357.

3. Proposed rules governing standard 1.4(c)(ii) hearings recommended by the Executive Committee of the State Bar Court and the State Bar Board Committee on Discipline in compliance with *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071, 1080, fn. 6 are scheduled to be on the agenda of the State Bar Board of Governors for approval at its next meeting on April 7, 1990.

4. Judge Munnell tried this matter under legislation predating the trial of attorney disciplinary matters before full-time judges of the State Bar Court appointed by the Supreme Court. (Bus. & Prof. Code, § 6079.1, eff. prior to July 1, 1989.)

promissory note to Tidwell's doctor, Dr. Alexander. These acts were alleged to be in wilful violation of Business and Professions Code sections 6068 (a), 6103 and 6106 and (former) Rule of Professional Conduct 8-101(B)(4).[5] Respondent answered admitting that he represented Tidwell and held back $2,271 of settlement funds in that action to pay medical expenses, and admitting that he failed to make the agreed-upon payments in the promissory note to Dr. Alexander.

Respondent's answer to the notice to show cause denied that he knowingly issued a check for insufficient funds, failed to honor Dr. Alexander's medical lien or misappropriated funds held for medical expenses. He further denied any wilful violation of Business and Professions Code sections 6068 (a), 6103 or 6106 or rule 8-101(B)(4) of the Rules of Professional Conduct. Respondent was subsequently served with a notice to appear at the hearing and failed to appear. Accordingly, respondent's default was entered and the allegations of the notice to show cause were deemed admitted despite the denials made in respondent's answer. (Rule 555(c), Rules Proc. of State Bar.)

In formal proceeding No. 87-O-11669 filed March 22, 1989, respondent was again charged in a single count with misappropriating funds held to pay a client's medical expenses, failing to promptly pay funds due his client and issuing a check when he knew or should have known he did not have sufficient funds available to cover the check. The notice to show cause specifically alleged in relevant part that he was hired by Tracy Walker to represent her in a personal injury matter; that he settled her case for $10,500; that he withheld $3,515 of the settlement funds to pay her treating physician; that he misappropriated the funds held to pay his client's medical expenses; that he misappropriated and failed to account for an additional $522 of settlement proceeds and that he failed to pay his client promptly the amount withheld to pay her medical bills when she informed him that the treating physician's bill had been paid by a collateral source. It further alleged that respondent issued a $200 trust account check in partial payment to his client when he knew or should have known that he did not have sufficient funds available to cover the check. All of the respondent's acts were alleged to be in wilful violation of Business and Professions Code sections 6068 (a), 6103 and 6106 and Rules of Professional Conduct 8-101(A), 8-101(B)(3) and 8-101(B)(4). Respondent failed to answer this notice to show cause and his default was entered at the hearing. (Rule 555(c), Rules Proc. of State Bar.) As a consequence, the allegations of the notice to show cause were deemed admitted.

On count one,[6] the *Tidwell* matter, the referee found that the State Bar examiner proved the truth of the allegations by clear and convincing written and oral evidence and concluded that respondent committed the acts complained of in violation of Business and Professions Code sections 6068 (a), 6103, and 6106 and Rules of Professional Conduct 8-101(d)(4) [sic]. On count two, the *Walker* matter, the referee found that the examiner likewise proved the truth of the allegations by clear and convincing oral and documentary evidence and concluded that respondent committed the acts complained of in violation of Business and Professions Code sections 6068 (a), 6103 and 6106 and Rules of Professional Conduct 8-101(A) and 8-101(B)(3) and 8-101(B)(4).

The referee's original decision was filed on July 12, 1989. Thereafter, the examiner, by written motion, requested reconsideration of two findings which were then deleted from the amended decision filed by the referee on August 24, 1989. These findings related to the charge in the *Walker* matter that an additional $522 of the settlement was unaccounted for and misappropriated. The evidence

5. New Rules of Professional Conduct became operative on May 27, 1989. As part of the general revision of the Rules of Professional Conduct, former rule 8-101(B)(4) of the Rules of Professional Conduct was readopted as rule 4-100(B)(4) without substantial modification. All further references to the Rules of Professional Conduct herein are to the rules in effect during the period January 1, 1975, through May 26, 1989.

6. The referee referred to the two consolidated proceedings against respondent as if they were two "counts" in a single proceeding rather than two separate original proceedings. For convenience, we have adopted this terminology.

produced at the hearing showed to the contrary, and the examiner so noted for the record. (R.T. p. 54.) **[1a]** After receiving the original decision, including findings against the respondent on this issue, the examiner commendably moved for reconsideration and the referee deleted these findings in his amended decision.[7] **[1b - see fn. 7]**

The referee concluded that both offenses involved moral turpitude. He found no mitigating factors and found numerous aggravating factors, including misleading clients and failing to cooperate with the State Bar by failing to appear. In addition to recommending disbarment, the referee also recommended the initiation of an involuntary inactive enrollment proceeding pursuant to Business and Professions Code section 6007 (c) which the examiner subsequently commenced. The hearing on the section 6007 (c) proceeding took place before Hearing Judge JoAnne Earls Robbins on October 19, 1989, and she subsequently ordered respondent inactively enrolled, effective October 27, 1989. The effect of our decision on such order is discussed *post*.

FACTS

We agree with the referee's essential findings of fact on both counts as set forth in his amended decision at pages 1 through 3 and restate the facts here.[8]

Count One—The Tidwell Matter

In formal proceeding No. 87-O-12533, the respondent had been retained by Leron Tidwell on or about November of 1986 to represent him in a personal injury action. The case was settled for $7,500 in January of 1987—within two months of respondent being retained. The settlement check was deposited in respondent's trust account; respondent disbursed to Tidwell the appropriate funds and retained $2,271 to cover the medical lien of Dr. Alexander, the complaining witness in the subsequent State Bar proceedings. Respondent timely issued a trust account check for the full amount of Dr. Alexander's lien; however, this check was returned for insufficient funds. (R.T. pp. 15-16; exh. 4.)

After many unreturned telephone calls from Dr. Alexander over the next two months, respondent came to the doctor's office in early April 1987, gave him a valid check for $500, and signed a promissory note for the balance due. (R.T. pp. 17-19; exh. 5.) Respondent then failed to make the payments called for by the note. (R.T. p. 20.) After many more unreturned telephone calls from the doctor, and after the State Bar had contacted respondent concerning its investigation of both cases, respondent paid the remaining balance due on March 9, 1988.[9] (R.T. pp. 20-21; see exhs. 13, 14, & 15.)

Count Two—The Walker Matter

In formal proceeding No. 87-O-11669, the complaining witness was the client, Tracy Walker. Respondent was retained by Walker on or about January 10, 1986, to represent her in a personal injury matter. On or about November 4, 1986, the case was settled for $10,000. He promptly paid Walker her share of the proceeds[10] and retained approximately $3,500 to pay medical bills. Respondent cashed the settlement draft without depositing the draft in his trust account. In December 1986, about a month after

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7. **[1b]**The entry of respondent's default in the *Walker* matter resulted in the admission of misappropriation and failure to account for the $522 as alleged in the notice to show cause. Nonetheless, the taking of evidence negating such allegations permitted the referee to reject the allegations based on a conflict between the admission and the evidence adduced at trial. (See *Riddle* v. *Fiano* (1961) 194 Cal.App.2d 684 [refusing to reverse a trial court's ruling that evidence adduced by the plaintiff in proving a default negated the admitted allegations of the complaint].)

8. As noted *ante*, the factual allegations of both notices to show cause must be deemed admitted by virtue of respondent's default. The introduction of evidence at the hearing on both counts was essentially cumulative.

9. There is no evidence that the doctor ever requested interest on the overdue balance. The total payment called for by the promissory note exceeds the amount due to the doctor by $8.00; however, there is no evidence as to whether this excess was supposed to represent interest or simply resulted from a computational error.

10. Nothing in the record indicates that Walker had any complaints about the way respondent handled the underlying case or about the amount of the settlement he obtained.

the underlying personal injury case had settled, Walker informed respondent that her treating physician had been paid by other insurance and that she was therefore entitled to the part of the settlement proceeds withheld for that purpose. (R.T. pp. 29-30.) Respondent said he would verify this information and get back to her, but he did not do so. (R.T. p. 31.) When she reached him the following month after a number of unreturned telephone calls, he acknowledged her right to the money, but he informed her he did not have all of the money and would give her what he could. (R.T. pp. 32-33.)

In late January, a month or so after Walker's first request for the money, respondent sent Walker a check for $438, followed by a second check for $250 in late February. (Exh. 10.) A third check for $200 followed in mid-March, but it was returned for insufficient funds. (R.T. pp. 35-36; exh. 11.) About five times, Walker was told to come to respondent's office to pick up payments, only to find upon her arrival that respondent was gone, and no payment was waiting. (R.T. pp. 38-39.) Walker testified that she contacted respondent "over a hundred times" (R.T. p. 41), and also filed worthless document charges against respondent with the local police in regard to respondent's returned check (R.T. p. 37). It took approximately eight months from the time the third installment check was returned for Walker to receive everything she was owed, in the form of some small cash payments and a check for $2,500 in October of 1987. (R.T. pp. 39-40; exh. 12.) Respondent had already made full restitution by the time formal proceedings were instituted.

DISCUSSION

We note at the outset that this is the first opinion after oral argument issued by the new Review Department of the State Bar Court created by Business and Professions Code section 6086.5. This review department is a panel of three judges appointed by the Supreme Court to sit in review of referee and hearing department decisions on and after September 1, 1989. (Bus. & Prof. Code, §§ 6079.1, 6086.65.) [2] One feature that remains the same from the predecessor system is that we "independently review the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department." (Rules Proc. of State Bar, rule 453; cf. *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.) Our decisions are in turn subject to review by the Supreme Court which likewise conducts independent review of the record below and is not bound by the factual findings of the State Bar Court. (See, e.g., *In re Young* (1989) 49 Cal.3d 257, 264.)

[3] The Supreme Court's principal concern in the area of attorney discipline is "protection of the public and preservation of confidence in the legal profession, interests served by maintaining the highest possible professional standards for attorneys." (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111.) That same concern must therefore be the principal concern of our review department as we examine each case that comes before us.

Upon our independent review of the record below we have determined that the facts found by the referee with regard to culpability (amended decision, pp. 1-3) are amply supported by the record, and we have essentially adopted them as our own in describing the facts of these two consolidated matters, *ante*. However, in accordance with controlling law, we reject the referee's conclusions as to the adequacy of those facts to support two of the statutory violations charged in each of the notices to show cause. In light of our independent review of the record and the case law, we also substitute our own findings with respect to aggravating and mitigating factors and adopt our own recommendation of discipline.

The referee concluded with respect to count one, the *Tidwell* matter, that respondent had violated Business and Professions Code sections 6068 (a), 6103 and 6106 as well as rule 8-101(B)(4) of the Rules of Professional Conduct. [4] We find no violation of section 6068 (a). That section refers to the duty of an attorney "To support the Constitution and laws of the United States and of this state." Arguably, a violation of such provision could be found in every case in which a violation of any provision of the Business and Professions Code has occurred. The Supreme Court has declined to interpret section 6068 (a) in this broad manner. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814.) As in *Baker* we find no violation of section 6068 (a) on the facts adduced below.

[5] Similarly, the Supreme Court held in *Baker* that Business and Professions Code section 6103 "does not define a duty or obligation of an attorney, but provides only that violation of his oath or duties defined elsewhere is a ground for discipline."[11] (*Id.* at p. 815.) We therefore find no violation of section 6103 under count one.

[6a] The referee did properly conclude that respondent's admitted misappropriation of funds from his client trust account as alleged in paragraphs 3 and 4 of the notice to show cause in the *Tidwell* matter violated Business and Professions Code section 6106. "Misappropriation of funds is a serious offense involving moral turpitude." (*Morales* v. *State Bar* (1988) 44 Cal.3d 1037, 1045 [unauthorized withdrawal from former firm's pension fund, and misappropriation of check made payable to former firm, were acts of moral turpitude]; see also *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 850-851, 858-859 [failure to keep sufficient funds in trust account to pay undisputed portion of treating doctor's medical lien violated former rule 9; gross negligence in record keeping and handling funds, affecting non-clients, constituted moral turpitude; public reproval imposed]; *Johnstone* v. *State Bar* (1966) 64 Cal.2d 153, 155-156 [attorney who misappropriated amount owed to client's workers' compensation carrier for its lien on personal injury recovery committed act of moral turpitude].)

[7] Respondent was also properly found culpable of a violation of rule 8-101(B)(4)[12] in the *Tidwell* matter as charged in paragraphs 4 and 5 of the notice to show cause, even though the rule refers only to meeting obligations to pay *clients*, not to meeting obligations to pay *third parties* out of funds held in trust. Respondent's failure to honor the medical lien of Dr. Alexander and failure to make agreed upon payments to Dr. Alexander may be treated as a failure to "[p]romptly pay or deliver to the client as requested by a client the funds . . . in the possession of the member of the State Bar which the client is entitled to receive." (Rule 8-101(B)(4), Rules of Professional Conduct.)

[8] In *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, the injured party was likewise not a client, but the Court nonetheless interpreted rule 8-101(B)(4) to apply: "We reject petitioner's claim that he had no obligation to account to or pay funds to Camila, however. As the review department concluded, the nature of the agreement pursuant to which the proceeds from the sale of the restaurant were deposited in petitioner's trust account created a duty to Camila as well as to petitioner's client. As a fiduciary his obligation to account for the funds extended to both parties claiming an interest in them. Having assumed the responsibility to hold and disburse the funds as directed by the court or stipulated by both parties, petitioner owed an obligation to Camila as a 'client' to maintain complete records, 'render appropriate accounts,' and '[p]romptly pay or deliver to the client' on request the funds he held in trust." (*Id.* at p. 979.)

With respect to count two, the *Walker* matter, the referee's findings of fact are also clearly supported by the record, but the conclusions of law must be modified in light of the recent decision of the Supreme Court in *Baker* v. *State Bar*, *supra*. As with the *Tidwell* matter, we find neither a violation of section 6068 (a) nor of section 6103 on the factual record adduced here. [6b] We do conclude that by admittedly misappropriating his client's funds as alleged in paragraph 1 of the notice to show cause in the *Walker* matter, the respondent committed an act of moral turpitude within the meaning of section 6106. (See, e.g., *Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815 [misappropriation of funds advanced for

11. Business and Professions Code section 6103 provides as follows: "Sanctions for Violation of Oath or Attorney's Duties. A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

12. The relevant portion of the referee's amended decision refers to a violation of rule "8-101(*d*)(4)"; as there is no such subsection, this is presumably a typographical error for rule 8-101(*B*)(4), which was the rule violation charged in the notice to show cause.

filing fees and costs and issuance of a check without sufficient funds to cover it]; *Fitzsimmons* v. *State Bar* (1983) 34 Cal.3d 327 [attorney's failure to deposit client's cash in trust account, to keep proper records concerning client's funds, and to obtain receipts constituted gross negligence amounting to moral turpitude; public reproval imposed].)

[9] We further conclude that in the *Walker* matter respondent violated Rules of Professional Conduct 8-101(A) and 8-101(B)(4). Respondent admittedly failed to deposit the settlement funds in his trust account as alleged in paragraph 1 of the notice to show cause in direct violation of rule 8-101(A). By admittedly failing to honor promptly his client's request for payment as alleged in paragraph 2 of the notice to show cause, respondent also did not "promptly pay or deliver to the client" funds due her in violation of rule 8-101(B)(4). However, we do not find that respondent violated rule 8-101(B)(3) since failure to account was alleged only with respect to the $522 of settlement proceeds which charge was disproved at the hearing. See discussion *ante*.

In short, the referee's findings of fact as to count one (amended decision, pp. 1-2) and count two (amended decision, p. 3) support the conclusion that respondent violated section 6106 of the Business and Professions Code and rule 8-101(B)(4) of the Rules of Professional Conduct as to both counts, and also rule 8-101(A) as to count two only.

Aggravating Factors

In aggravation, the referee found that: (1) respondent's embezzlement of clients'[13] funds and issuance of bad checks constituted moral turpitude; (2) respondent consistently misled and lied to his clients[14]; (3) respondent failed to respond to his clients'[15] repeated requests for information; (4) respondent failed to cooperate with the State Bar examiner and investigator; (5) respondent failed to appear at the pretrial, and (6) respondent failed to appear at the hearing. (Amended decision, p. 4.)

On independent review of the record we make more limited findings in aggravation. [10a] The embezzlement clearly constitutes moral turpitude with respect to both counts. We have already so concluded as part of the basic charges proved at trial. We do not count it again as a separate aggravating factor. However, it is appropriate to consider whether respondent's subsequent conduct in writing bad checks is an aggravating factor.

[11] Writing checks when one knows or should know that there are not sufficient funds to cover them manifests a disregard of ethics and fundamental honesty, at least if such conduct occurs repeatedly. Writing bad checks may, by itself under some circumstances, constitute moral turpitude. (See *Segal* v. *State Bar* (1988) 44 Cal.3d 1077, 1088; *Bambic* v. *State Bar* (1985) 40 Cal.3d 314, 324.) In the present case, respondent is deemed to have admitted the allegations in paragraph 4 of the *Tidwell* matter and paragraph 3 of the *Walker* matter that he issued a check to each of the complainants when he "knew or should have known" that he did not have the funds available to cover the check. However, the examiner introduced evidence at the hearing from bank records[16] showing only that respondent knew or should have known that the bad check he wrote to Walker would not clear his account. The referee proceeded to make a specific finding that "said check was issued by respondent when he knew or should have known that he had insufficient funds in his trust account to cover the $200 check." (Decision, p. 3.) The referee made no similar finding with respect to the $2,271 bad check issued to Dr. Alexander. [12] (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 933 [State Bar must prove aggravating factors by clear and convincing evidence]; see also std. 1.2(b).) [10b] We need not reach the question of scienter in issuing the check to Dr. Alexander since the finding of scienter in

13. Technically, only one client was involved. The other complainant was not a client, but was a third party to whom respondent owed a fiduciary obligation on his client's behalf. (See discussion *ante*.)

14. See *ante*, fn. 13.

15. See *ante*, fn. 13.

16. The bank records (exh. 17) show that respondent had a check returned to him in February for insufficient funds and without making an additional deposit in March he wrote another $200 check which was returned for insufficient funds.

issuing the check to Walker itself supports a finding that respondent's misconduct in misappropriating funds was followed by an act of bad faith which constitutes an aggravating factor under standard 1.2(b)(iii). As an aggravating factor, however, it is not of great weight given the fact that the *Walker* bad check and, indeed, both bad checks were so closely tied to the basic misconduct and both were replaced with good checks within a few months, a mitigating factor discussed *post*.

[13a] As to the second finding in aggravation, the referee's finding that respondent "consistently misled and lied to his clients", we disagree.[17] The record shows that respondent was candid in admitting to both complaining witnesses that the money belonged to them and that he had not maintained all of their funds in his trust account. The referee ignored this evidence and looked solely to evidence of promises of payment which respondent made and later failed to keep in a timely manner. The referee apparently felt that such broken promises on the timing of payment gave rise to the inference that *at the time* respondent made these promises, *he already had the intent not to keep them*. This by itself is not proof of fraudulent intent. (Cf. *Tenzer* v. *Superscope, Inc.* (1985) 39 Cal.3d 18, 31 [cause of action for fraud will not survive a motion for nonsuit "if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise"].)

If respondent had failed even to attempt performance after continued assurances that he would make good on returned checks, the situation would be different. (Cf. *Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 109.) However, the record here discloses that at the time he made such promises he had already made good on some promised partial payments to both complainants. He also subsequently made good on the entire debt within the year. **[13b]** While the complainants were understandably angered by the delay in repayment we do not have proof by clear and convincing evidence that respondent aggravated his original misappropriation by thereafter making repeated misrepresentations to the complaining witnesses.

[14] However, like the referee below we do find respondent's noncooperation in failing to answer one notice to show cause and in failing to cooperate in discovery and to appear for pretrial and trial in the other proceeding an appropriate aggravating factor.[18] (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 933 [failure to appear demonstrates lack of concern for disciplinary process and failure to appreciate seriousness of charges].) Nonetheless, we find that respondent did not evince an entirely uncooperative or unremorseful attitude. He did meet with the investigator on one occasion, during which he acknowledged and explained his misconduct, and offered to make restitution which, indeed, he had already begun to do and which he thereafter completed. He also attended oral argument on review of the disbarment recommendation although he had not moved to set aside his default and therefore acknowledged for the record that he had no right to address the review department on the merits of the case.

Mitigating Factors

The referee found no mitigating factors. (Amended Decision, p. 4.) We disagree. Although respondent's short prior period of practice without any disciplinary offenses does not constitute a mitigating factor, the case law establishes that the facts disclosed by the record in this case include two mitigating factors which should be considered in determining the appropriate degree of discipline to be imposed.

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17. We note that neither notice to show cause charged respondent with misrepresentations to his client or Dr. Alexander. While not all aggravating factors need be charged, a question may arise in a default proceeding on the fairness of notice of uncharged aggravating factors. Because we conclude that the evidence adduced at the hearing failed to prove this factor, we do not address the issue of fair notice in this case.

18. The record shows that service of the notices to show cause and other papers, including notices of the pretrial and hearing dates, was properly made on respondent at the address shown for him in the State Bar's official records. (Bus. & Prof. Code, § 6002.1.) In addition, there is some evidence that mail sent to this address actually did reach respondent, because he filed an answer to the notice to show cause in one of the proceedings, which was served on him at this address. It also appears from the record that respondent did not respond to the investigator's requests for information about his trust account records, so that the examiner was required to subpoena the trust account records directly from the bank.

Single Period of Misconduct

[15] Respondent's two instances of misconduct took place during the same short period of time and respondent attributed them to the same problem of financial difficulty. This is a factor which can properly be considered in mitigation. (See, e.g., *Segal* v. *State Bar* (1988) 44 Cal.3d 1077, 1089; *Frazer* v. *State Bar* (1987) 43 Cal.3d 584, 578; *Doyle* v. *State Bar* (1976) 15 Cal.3d 973, 979-980.)

Assumption of Full Respansibility and Restitution

In *Waysman* v. *State Bar* (1986) 41 Cal.3d 452, the respondent had misappropriated $24,000 in client funds. The Supreme Court refused to impose any actual suspension. In *Snyder* v. *State Bar, supra,* 49 Cal.3d at p. 1310, the Court described two of the factors involved in reaching the decision in *Waysman*: (1) the attorney's immediate assumption of full responsibility and (2) the attorney's voluntary commencement of restitution within five months of the misappropriation. **[16]** Other cases of misappropriation have resulted in lengthy suspensions rather than disbarment where restitution was made. (*Weller* v. *State Bar, supra,* 49 Cal.3d at p. 676 [restitution to one client made prior to complaint to State Bar; restitution to second client made after complaint made, but before issuance of notice to show cause]; see also *Segal* v. *State Bar* (1988) 44 Cal.3d 1077, 1089 [full restitution, made in installments beginning before complainant contacted State Bar, constituted mitigating factor].)

[17] In *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, the Supreme Court explained the role of restitution in assessing the appropriate degree of discipline: "Restitution does not absolve [the attorney] of the original misappropriation [citation], but it is not entirely accurate . . . to characterize the restitution as having been made 'merely as a matter of expediency and under pressure' and on that ground to accord it little weight. Our decisions declining to give credit for restitution on such reasoning have generally involved restitution made after disciplinary proceedings had commenced. [Citations.] Restitution made voluntarily and before the commencement of disciplinary proceedings is entitled to consideration as a mitigating factor. [Citation.] [This case] is somewhere between these two extremes." (*Id.* at pp. 1366-1367.)

The same is true here. **[18]** While respondent took a year to complete payments, he never disavowed his debt to either complainant. The referee below focused on the repeated efforts Walker made to get complete restitution. However, the record reflects that respondent acknowledged the misappropriation and paid Walker two installments before she ever complained about him to anyone. He had repaid her in full, and begun to pay the doctor, before the State Bar first contacted him. He had paid both complainants in full before the first notice to show cause was filed. There is no evidence in the record tending to show whether respondent had the financial wherewithal to have made restitution any faster or sooner than he actually did. Thus, "petitioner's actions with regard to restitution reflect a recognition of his misconduct and an attempt to atone in some manner for his actions, [and] they properly constitute mitigating circumstances." (*Weller* v. *State Bar, supra,* 49 Cal.3d at p. 676.)

Recommended Discipline

[19] In determining the appropriate recommended discipline we start with the Standards for Attorney Sanctions for Professional Misconduct which the Supreme Court has instructed us to treat as guidelines. (*In re Young* (1989) 49 Cal.3d 257, 268, fn. 11.) Standard 2.2(a) provides that: "Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances."

As discussed above, the referee found some aggravating factors which are not supported by clear and convincing evidence and failed to consider any mitigating factors which we have found to exist. He therefore recommended disbarment.

[20] In determining the appropriate sanction, as guided by standard 1.6(b), we balance the aggravating

circumstances with the mitigating circumstances. We also must consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts. (*Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) The Court in *Snyder, supra,* noted that "we have repeatedly held that misappropriation is a serious offense warranting severe discipline in the absence of 'clearly extenuating circumstances.'" It analyzed the factors in *Snyder* and concluded that disbarment was not warranted, but two years suspension was. (*Id.* at pp. 1308-1309.)

We likewise conclude that respondent has committed breaches of trust warranting severe discipline, but the circumstances of this case do not require that the discipline imposed be disbarment in order to protect the public, the courts and the legal profession. (See, e.g., *Lawhorn* v. *State Bar, supra,* 43 Cal.3d at p. 1367; see also *Snyder* v. *State Bar, supra,* 49 Cal.3d at p. 1308.)

In *Lawhorn*, the discipline imposed consisted of a five-year suspension, stayed, with five years probation, including actual suspension for two years, and the standard probation conditions.[19] *Snyder* likewise imposed a two-year actual suspension. In *Weller* the court imposed three years actual suspension. There, the misconduct was not only substantially worse than that in this case (misappropriations totalling $14,000), the respondent also had a prior record of misappropriation. (See *Weller* v. *State Bar, supra,* 49 Cal.3d at p. 672.) Also, in *Weller* the client was subjected to the embarrassment of having his wages repeatedly garnished to pay the hospital bill that the attorney had been instructed to pay out of settlement funds.

Taking into account all of the factors of this case, the public would appear adequately protected by five years suspension, stayed, with actual suspension for two years and until respondent satisfies the showing required by standard 1.4(c)(ii), and five years probation. Respondent should also be required to comply with rule 955 notice requirements (rule 955, California Rules of Court) and to pass the Professional Responsibility Examination prior to the expiration of actual suspension. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 892.)

In recommending that a standard 1.4(c)(ii) hearing be ordered, we note that the Supreme Court has declined to impose standard 1.4(c)(ii) in its recent decisions in *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071 and *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302. We do not believe the problems perceived by the Court with regard to imposing the standard 1.4(c)(ii) requirement in those cases are present here. Standard 1.4(c)(ii) provides that: "Normally, actual suspensions imposed for a two (2) year or greater period shall require proof satisfactory to the State Bar Court of the member's rehabilitation, present fitness to practice and present learning and ability in the general law before the member shall be relieved of the actual suspension." **[21]** While standard 1.4(c)(ii) hearings are not appropriate in all cases where a two-year suspension is ordered (see, e.g., *Snyder* v. *State Bar, supra,* 49 Cal.3d at p. 1312), such a hearing appears particularly appropriate where, as here, lengthy suspension is recommended in a default proceeding.

Respondent has called into question the propriety of his automatic return to practice by failing to appear in defense of the serious charges levied against him. Public protection would appear to require that after imposition of a lengthy suspension, respondent not resume practice until he demonstrates his rehabilitation, fitness to practice and learning and ability in the general law.

[22] We note that the proposed new rules for standard 1.4(c)(ii) hearings, if adopted by the State Bar Board of Governors, would permit respondent to make the requisite showing by a preponderance of the evidence. They also permit the Office of Trial Counsel to stipulate that the respondent meets conditions which are not in doubt. (Cf. *Snyder* v. *State Bar,*

19. The conditions were that the respondent comply with the State Bar Act and the Rules of Professional Conduct; certify this compliance quarterly to the State Bar Court; maintain current office address with State Bar Court; respond to State Bar Court inquiries concerning compliance with conditions of probation; cooperate with and report to probation monitor; take and pass the Professional Responsibility Examination during actual suspension; and comply with rule 955 of the California Rules of Court.

supra, 49 Cal.3d at p. 1312 [respondent's general learning in the law not placed in issue].) We also note that the proposed new rules would guarantee respondent an opportunity, well in advance of the end of the two-year period of actual suspension, to initiate the proceeding in order to obtain a decision of the hearing department before the two years expire. The proposed rules further provide for expedited review of the hearing judge's decision by this review department. These proposed new rules for the conduct of standard 1.4(c)(ii) hearings appear to answer the concerns raised by the Supreme Court in *Silva-Vidor* v. *State Bar*, *supra*, 49 Cal.3d at p. 1080, fn. 6 and will presumably be in effect prior to the time the Supreme Court makes its order in this case.

Even if respondent makes a satisfactory showing at the standard 1.4(c)(ii) hearing, we still recommend that the term of probation extend three years beyond the termination of two years actual suspension. [23] In the probation conditions, we have included a specific safeguard against the recurrence of the particular problem that occurred in the two matters now before us. Since we cannot rely on respondent's change in employment from private to public as permanent,[20] we recommend an additional State Bar Court standard condition of probation requiring that if respondent does come into possession or control of client trust funds, that he submit certificates from an accountant with respect to the proper maintenance of his trust account. (See Bus. & Prof. Code, § 6093 (a) [State Bar Court may impose any probation condition reasonably serving purposes of probation]; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 668 [imposing probation condition requiring attorney to submit semiannual audits of his client trust fund compiled by an accountant].)

Effect on Business and Professions Code Section 6007 (c) Order of Inactive Enrollment

[24] Finally, we address the fact that in an ancillary proceeding below respondent was placed on involuntary inactive enrollment following upon the referee's disbarment recommendation. We recommend that the period of involuntary inactive enrollment already served by respondent since October 27, 1989, and any additional period served hereafter be credited towards the period of actual suspension ordered in this case. (Cf. *In re Lamb* (1989) 49 Cal.3d 239, 248-249 [attorney stipulated to involuntary inactive enrollment following initial recommendation of disbarment, and ultimately was disbarred; period of inactive enrollment credited towards waiting period to apply for reinstatement].)

Another issue arises as a consequence of our decision herein that must also be addressed. The record supporting the order of involuntary inactive enrollment is not before us. However, since the section 6007 (c) proceeding was instituted at the referee's request it may well have been predicated solely on the referee's recommendation of disbarment which is now superseded by our recommendation of suspension. The disbarment recommendation of the referee created a rebuttable presumption under Business and Professions Code section 6007 (c)(4) that the factors justifying an order of inactive enrollment were met. That presumption, affecting the burden of proof, no longer exists.[21]

The State Bar Court has power to issue an order of inactive enrollment pending final adjudication of the merits of the underlying proceeding by the Supreme Court, if the requisite elements of section

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20. As we have noted above, respondent is now inactively enrolled. However, subsequent to the charged misconduct and until his inactive enrollment in October of 1989, respondent apparently terminated his private practice and notified the State Bar that he had joined the Los Angeles Public Defender's office. (R.T. p. 22; exh. 7.) As a public defender, at least temporarily, respondent presumably removed himself from the responsibility for handling of any client trust funds.

21. The referee, in the section of his amended decision entitled Recommendation, followed the disbarment recommendation with a paragraph noting that "Evidence exists that substantial risk of harm exists to Respondent's clients and the general public and, therefore, immediate action is recommended to be taken to enroll Respondent in inactive status as an attorney." (Amended decision, p. 5.) Since this statement does not appear in the findings of fact and no evidence was adduced regarding any current clients at the Public Defender's office, we construe the statement as merely a recitation of the effect of the rebuttable presumption created by the disbarment recommendation.

6007 (c) are met. (*Conway* v. *State Bar* (1989) 47 Cal.3d 1107.) The State Bar Court also has the power to retransfer the respondent to active status if the conditions on which the order was premised no longer exist. (Rules Proc. of State Bar, rule 799.) Although the respondent may petition for such an order, a petition is not the only means of achieving retransfer to active status.

Pursuant to rule 799 of the Rules of Procedure of the State Bar, "the Office of Trial Counsel, through its examiners, may stipulate to the termination of a member's inactive enrollment upon a showing that the attorney's conduct no longer poses a threat of substantial harm to clients or the public. Such a stipulation shall include statements of fact sufficient to warrant a termination . . . . Such a stipulation shall be reviewed by the assigned referee . . . ."

We express no opinion on the propriety of the order of inactive enrollment if predicated on evidence other than the presumption flowing from the superseded disbarment recommendation. **[25]** On the other hand, if the order of inactive enrollment was predicated solely on the disbarment recommendation, a stipulation under the provision quoted above may be entered into to permit respondent's retransfer to active status pending the finality of these proceedings. Respondent also retains the option of stipulating to his continued inactive enrollment. We recommend that any such stipulated period of inactive enrollment be included in any credit given towards the period of actual suspension ordered in this case. (*In re Lamb*, *supra*, 49 Cal.3d 239 at pp. 248-249.)

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law for five years; that execution of such order be stayed; and that respondent be placed on probation for five years on the following conditions:

1. That during the first two years of said period of probation and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fituess to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, he shall be suspended from the practice of law in the State of California;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

4. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) that respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) money received for the account of a client and money received for the attorney's own account;

(2) money paid to or on behalf of a client and money paid for the attorney's own account;

(3) the amount of money held in trust for each client;

(b) that respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

(c) that respondent has maintained a permanent record showing:

(1) a statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(2) monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(3) monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) that respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

5. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

6. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

7. That, except to the extent prohibited by the attorney client privilege and the privilege against self incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

8. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective; but that the period of time between the effective date of respondent's inactive enrollment under Business and Professions Code section 6007 (c) and the earlier of either an order terminating that enrollment or the effective date of the Supreme Court's order shall be credited towards the period of actual suspension prescribed in condition 1; and

9. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of five years shall be satisfied and the suspension shall be terminated.

We further recommend that respondent be directed to comply with the requirements of rule 955 of the California Rules of Court within thirty (30) calendar days of the effective date of the Supreme Court order herein, and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the order showing his compliance with said order.

Finally, we recommend that respondent be required to take and pass the Professional Responsibility Examination prior to the expiration of his actual suspension and furnish proof of such to the Probation Department of the State Bar Court.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RAYMOND E. MAPPS

A Member of the State Bar

[Nos. 87-O-12533, 87-O-11669]

Opinion on Motion for Reconsideration—Filed May 22, 1990

SUMMARY

The State Bar examiner requested that the review department reconsider its conclusion that no violation of Business and Professions Code sections 6068 (a) or 6103 was proved in connection with the respondent's misappropriation. The request for reconsideration was denied.

The examiner asserted for the first time in his request for reconsideration that the misappropriation constituted embezzlement pursuant to Penal Code section 506 and, therefore, amounted to a violation of the attorney's oath and duty to support the law. However, no violation of the Penal Code had been alleged in the notice to show cause, and the review department concluded that discipline could not be imposed for any violation not alleged in the notice.

The examiner also contended that the Office of Trial Counsel was not given notice of the review department's intention to delete the findings of violations of the subject statutes, and cited Government Code 68081 as requiring that the parties be afforded an opportunity to brief the issues. The review department concluded that the Office of Trial Counsel was bound by recent Supreme Court precedent rejecting findings of violations of the subject statutes in connection with other alleged statutory or rule violations. The review department further concluded that reliance on Government Code section 68081 was misplaced as that statute does not apply to the review department of the State Bar Court, and that, in any event, the State Bar Court's rules of procedure provide the parties with opportunities for supplemental briefing parallel to those afforded by section 68081.

COUNSEL FOR PARTIES

For Office of Trials: Russell Weiner

For Respondent: No appearance (default)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
Where the examiner asserted for the first time in his request for reconsideration of the review department's decision that the respondent's misappropriation of client trust funds constituted an act of embezzlement within the meaning of Penal Code section 506, and, as such, constituted a wilful violation of the attorney's oath and duty to support the laws of this state, the review department concluded that the belated attempt to prove culpability through an uncharged violation of another statute was improper. The State Bar cannot impose discipline for any violation not alleged in the notice to show cause.

[2] **106.20 Procedure—Pleadings—Notice of Charges**
213.10 State Bar Act—Section 6068(a)
220.10 State Bar Act—Section 6103, clause 2
Where the notice to show cause did not allege a violation of the Penal Code, the alleged violations of sections 6068 (a) and 6103 could not be construed as putting the attorney on notice of a possible Penal Code violation.

[3] **130 Procedure—Procedure on Review**
191 Effect/Relationship of Other Proceedings
199 General Issues—Miscellaneous
The State Bar Office of Trial Counsel was bound by the ruling of the Supreme Court in a matter in which its counsel, the State Bar Office of General Counsel, did not request a rehearing before the Supreme Court.

[4] **220.10 State Bar Act—Section 6103, clause 2**
The Supreme Court has unequivocally rejected section 6103 as a basis for culpability.

[5] **213.10 State Bar Act—Section 6068(a)**
The Supreme Court has held that section 6068 (a) is inapplicable to alleged violations of the State Bar Act or the Rules of Professional Conduct.

[6 a, b] **130 Procedure—Procedure on Review**
166 Independent Review of Record
194 Statutes Outside State Bar Act
Government Code section 68081 does not apply to the review department of the State Bar Court, which has a different standard of review than that of a court of appeal. However, opportunities are afforded to the parties under State Bar Court procedure which parallel those provided by Government Code section 68081.

[7] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record
Proceedings before the review department are governed by rule 453 of the [Transitional] Rules of Procedure, which provides that the review department shall independently review the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department and may take action as to an issue whether or not that issue was raised in the request for review or briefs of any party.

[8] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
While the review department is not required to afford the parties an opportunity to brief additional issues raised by it on review, it is the preference of the review department to have issues thoroughly briefed, and rule 1311(a) of the [Provisional] Rules of Practice expressly allows for deferral of submission of cases after oral argument to permit supplementary briefs when considered appropriate.

[9] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
Where the review department addresses an issue in its opinion which was not previously addressed by the parties in their briefs or at oral argument, rule 455 of the [Transitional] Rules of Procedure permits a motion for reconsideration affording the parties an opportunity to brief such issues.

ADDITIONAL ANALYSIS

Culpability
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2

OPINION AND ORDER DENYING REQUEST FOR RECONSIDERATION

PEARLMAN, P.J.:

In accordance with rule 455 of the Transitional Rules of Procedure of the State Bar ("Rules of Procedure"), the examiner requests reconsideration of the review department's decision filed March 27, 1990 in this matter.[1]

The only aspect of the decision which the examiner asks us to reconsider is the review department's conclusion that no violation of Business and Professions Code sections 6068 (a)[2] and 6103[3] was proved in the misappropriation of trust fund charges brought against respondent Mapps. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1.)[4] Such conclusion was reached based on the controlling Supreme Court decision in *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815, rejecting charged violations of 6068 (a) and 6103 in upholding violations of section 6106 and former rule 8-101 in a trust fund misappropriation case.

[1a] The examiner asserts for the first time in his request for reconsideration that "Respondent's misappropriation of trust funds as found in this case would constitute an embezzlement within the meaning of Penal Code section 506 and, as such, constitutes a wilful violation of Respondent's oath and duty to support the laws of this state."[5] No violation of Penal Code section 506 was alleged in either notice to show cause involved in this proceeding and no offer of proof of such was ever made. **[2]** The allegation of violations of sections 6068 (a) and 6103 cannot be construed as putting respondent on notice of a possible Penal Code violation. The belated attempt to prove culpability through an uncharged violation of another statute is improper. **[1b]** The State Bar cannot impose discipline for any violation not alleged in the original notice to show cause. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929.) Rather, the charged violations must stand, or, in this case, fall on their own merits.

The examiner also contends that "the Office of Trial Counsel was not given any indication of the Review Department's intention to alter the findings of the Hearing Panel in regard to sections 6068 (a) and 6103 and was not given the opportunity to argue the Office of Trial Counsel's position on these issues." (Request for Reconsideration, p. 3.) He cites Government Code section 68081 as requiring the court to afford the parties an opportunity to present their views on the matter through supplemental briefing. The examiner's claim of lack of notice is untenable and his reliance on Government Code section 68081 is misplaced.

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1. The request for reconsideration was not required to be served on the respondent due to the prior entry of his default. (Rule 552.1(d)(i), Rules Proc. of State Bar.)

2. Section 6068 provides, in pertinent part: "It is the duty of an attorney to do all of the following: [¶] (a) To support the Constitution and laws of the United States and of this state."

3. Section 6103 provides as follows: "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

4. Mapps was charged in 87-O-12533 (count one) with a single count of misappropriation, failure to honor a medical lien and failure to make payments agreed upon in a promissory note. Mapps was charged in 87-O-11669 (count two) with a single count of misappropriation, failure to pay funds promptly and issuance of a check drawn on insufficient funds. Both counts alleged that his conduct was "in wilful violation of your oath and duties as an attorney and in particular, California Business and Professions Code Sections 6068(a), 6103 and 6106." In count one he was also charged with a violation of Rules of Professional Conduct, rule 8-101(B)(4), and in count two with a violation of Rules of Professional Conduct, rules 8-101(A), 8-101(B)(3) and 8-101(B)(4). He was found culpable only of violating section 6106 of the Business and Professions Code and rule 8-101(B)(4) of the Rules of Professional Conduct as to both counts, and rule 8-101(A) as to count two only. (*In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 11.)

5. The examiner does not contend that if the court were to find a violation of section 6068 (a) or 6103 in this case that any different discipline should result than recommended in the decision, nor do we consider these statutes to play an integral role in the charges brought against the respondent herein or the discipline recommended to be imposed.

First, on the question of lack of notice to the Office of Trial Counsel, the Supreme Court issued its decision in *Baker* on November 20, 1989, and denied Baker's request for rehearing on January 18, 1990. The Office of Trial Counsel was represented in that proceeding by the General Counsel of the State Bar. *Baker* involved, among other alleged misconduct, alleged misappropriation of trust funds, similar to the misappropriation charges brought against respondent Mapps in the instant case. The Supreme Court held that none of the misconduct charged against Baker constituted a violation of either section 6103 or any provision of section 6068 including section 6068 (a). It expressly held with respect to section 6103 that "Since this section does not define a duty or obligation of an attorney, but provides only that violation of his oath or duties defined elsewhere is a ground for discipline, petitioner did not violate this section." (*Baker, supra*, 49 Cal.3d at p. 815.) **[3]** The Office of General Counsel did not request a rehearing before the Supreme Court in *Baker*, leaving its client, the Office of Trial Counsel, bound by such ruling.

In early January, the review department received a brief from an examiner in the Office of Trial Counsel inviting us to strike a section 6103 violation in a referee's decision in another default matter under our review as erroneous in light of the *Baker* ruling. (Examiner's Review Department "Statement" in *In the Matter of Conroy* (No. 87-O-15117) filed January 2, 1990, p. 20, fn. 5.) This review department thereafter issued a number of decisions on ex parte review[6] prior to *Mapps*, in matters in which the Office of Trial Counsel represented the State Bar, where *Baker* was construed to preclude culpability for charged violations of section 6068 (a), section 6103, or both. (See, e.g, *In the Matter of Behrendt* (No. 86-O-10031) Notice of Intent to Reject Stipulation filed January 10, 1990; *In the Matter of Warheit* (No. 88-O-12186) Decision On Review filed January 12, 1990; *In the Matter of Jennings* (No. 86-O-16216) Decision on Review filed February 20, 1990; *In the Matter of Dolard* (No. 86-O-11758) Decision on Review filed February 2, 1990; *In the Matter of Babero* (No. 86-O-12763) Decision on Review filed February 27, 1990.) No request for reconsideration was filed by the Office of Trial Counsel with respect to any of these decisions.

Indeed, since *Baker* was issued, the Office of Trial Counsel was represented by the Office of General Counsel in two other cases in which the Supreme Court again rejected the asserted violation of the oath and duties of an attorney to support the law within the meaning of sections 6068 (a) and 6103 in connection with alleged rule violations and violation of section 6106. (*Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931 [citing *Baker* for the proposition that section 6103 "defines no duties"]; *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245; but see *Layton* v. *State Bar*[7] (1990) 51 Cal.3d 889.) **[4, 5]** *Baker* is unequivocal in rejecting section 6103 as a basis for culpability and *Sands* reinforces the holding in *Baker* that section 6068 (a) is inapplicable to alleged violations of the State Bar Act or the Rules of Professional Conduct adopted by the Supreme Court pursuant thereto.

The examiner cites two other Supreme Court cases subsequent to *Baker* and *Sands* as asserted authority for reconsideration of the viability of the violations of 6068 (a) and 6103 charged against respondent Mapps. The cited cases are *Phillips* v. *State Bar* (1989) 49 Cal.3d 944 and *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071. Neither case addressed the issue of whether, and if so, under what circumstances, a respondent may properly be charged

6. These "By the Department" decisions were all issued without oral argument pursuant to rule 452 of the Rules of Procedure because no request for review was filed. The modifications made by the review department in the referee's decisions in such cases did not affect the recommended discipline and were deemed insubstantial.

7. In *Layton*, the Supreme Court upheld culpability under section 6103 on the facts before it (misconduct violating former rules 6-101(2) and 6-101(A)(2)) without any reference to the Court's recent holdings in *Baker*, *Sands*, and *Friedman*. It is not apparent from the opinion whether the respondent objected to a determination of culpability under section 6103. Also, the determination of his culpability under that section, in addition to the charged rule violations, does not appear to have affected the degree of discipline imposed.

with a violation of section 6068 (a) or 6103. They merely recited in passing that the respondent in each case had stipulated to violations of sections 6068 (a) and 6103 as well as other statutory and rule violations. Such stipulations were commonplace prior to *Baker* since the Office of Trial Counsel routinely charged respondents with violation of both provisions while also charging other more specific statutory and rule violations. The examiner has raised no cogent argument for reconsideration of our conclusion in *Mapps* that *Baker* required us to reject culpability under sections 6068 (a) and 6103.

The examiner's assertion that Government Code section 68081 requires a rehearing is likewise without merit.[8] [6a] That statute does not apply to the review department of the State Bar Court which has a different standard of review than that of a court of appeal. [7] Proceedings before the review department are governed by rule 453 of the Rules of Procedure adopted by the State Bar Board of Governors effective September 1, 1989. It provides in pertinent part: "(a) In all matters before the review department, that department shall independently review the record and may adopt findings, conclusions and a decision or recommendation at variance with the hearing department. The review department may take action as to an issue whether or not that issue was raised in the request for review or briefs of any party."

[8] While the review department is not required to afford the parties an opportunity to brief additional issues, it is the preference of the court to have issues thoroughly briefed and our rules expressly allow for deferral of submission of cases after oral argument to permit supplementary briefs when considered appropriate. (Rules of Practice of the State Bar Court, rule 1311(a).) [9] In the event, as here, that an issue is addressed in the opinion which was not previously addressed by the parties in their briefs or at oral argument, the Rules of Procedure permit a motion for reconsideration affording the parties an opportunity to brief such issues. (Rule 455, Rules Proc. of State Bar.) [6b] Thus, opportunities are afforded the parties under our rules of procedure that parallel those provided by Government Code section 68081.

The Office of Trial Counsel having availed itself of the opportunity to file a request for reconsideration and to present its views through supplemental briefing, and such request having been considered by the review department, it is hereby DENIED. In serving this order on the parties, the clerk is hereby also directed to serve the examiner's request for reconsideration on respondent Mapps.

We concur:

NORIAN, J.
STOVITZ, J.

8. Government Code section 68081, enacted in 1986, provides, in pertinent part: "Before . . . a court of appeal, or the appellate department of a superior court renders a decision in a proceeding . . . based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." Even if that statute were applicable, it is extremely tenuous to argue that it should be construed to require a rehearing on the striking of surplusage not affecting the outcome of the case, particularly when such is done pursuant to the unequivocal mandate of the Supreme Court.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ELROY R. GIDDENS

Petitioner for Reinstatement

[No. 89-R-10039]

Filed March 27, 1990; as modified, March 29, 1990

SUMMARY

Petitioner was disbarred in 1981 following a criminal conviction for conspiracy to distribute amphetamines. His first petition for reinstatement was denied in 1986. In this proceeding, he again sought reinstatement as a member of the State Bar.

A referee of the former, volunteer State Bar Court concluded after a hearing that petitioner met the reinstatement requirements and recommended that petitioner be reinstated. (James L. Kellner, Hearing Referee.)

The review department reviewed this matter at the State Bar examiner's request. Upon the review department's independent review, it concluded that although petitioner had the requisite learning and ability in the general law and had passed the required professional responsibility examination, petitioner had omitted material information from his application for reinstatement. One of the items petitioner omitted was a lawsuit to which he had been a party, and which did not appear to reflect favorably on him. Despite petitioner's very strong favorable character testimony, the review department concluded that petitioner had not met his burden to demonstrate his reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time."

COUNSEL FOR PARTIES

For Office of Trials: Stephen J. Strauss, Loren J. McQueen

For Petitioner: David A. Clare, Kenneth Kocourek

HEADNOTES

[1] **161 Duty to Present Evidence**
2504 Reinstatement—Burden of Proof
The Supreme Court has consistently held that petitioners seeking reinstatement have the burden to show by clear and convincing evidence that they meet readmission requirements, and that burden is a heavy one.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **161 Duty to Present Evidence**
2504 Reinstatement—Burden of Proof
Persons seeking reinstatement after disbarment should be required to present stronger proof of their present honesty and integrity than persons seeking admission for the first time whose character has never been called into question.

[3] **2504 Reinstatement—Burden of Proof**
In an application for reinstatement, although treated by the Supreme Court as a proceeding for admission, the proof presented must be sufficient to overcome the Court's former adverse judgment of applicant's character. In determining whether a reinstatement petitioner has met this burden, the evidence of present character must be considered in light of the moral shortcomings which resulted in the imposition of discipline.

[4] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
As to matters of testimonial credibility, the review department properly gives great weight to the hearing referee who saw and heard the witnesses and who resolved those issues. The review department should ordinarily be reluctant to deviate from the factual findings of the referee resolving testimonial matters. (Rule 453(a), Trans. Rules Proc. of State Bar.)

[5] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Under rule 453, Trans. Rules Proc. of State Bar, review by the review department is not an appeal from the hearing panel decision. The hearing panel's findings serve as a recommendation to the review department, which may make findings or draw conclusions at variance with those of the hearing referee.

[6] **166 Independent Review of Record**
The independent review conducted by the review department requires that it independently examine the record, and reweigh the evidence and pass upon its sufficiency.

[7] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
Examiner's brief violated rule 1306 of the Provisional Rules of Practice of the State Bar Court by failing to include topical index and authorities table, but review department declined to strike it due to recent adoption of rule and lack of asserted prejudice to opposing party. Review department noted that rule 1312 of the Provisional Rules of Practice of the State Bar Court provides for clerk's office to return, unfiled, papers not conforming to rules, absent application to and order from Presiding Judge.

[8] **165 Adequacy of Hearing Decision**
166 Independent Review of Record
2509 Reinstatement—Procedural Issues
Review department's review of reinstatement matter was made more difficult by hearing referee's failure to make findings on many of the specific issues in dispute, but review department's independent review of the record permitted it to make the necessary findings.

[9] **165 Adequacy of Hearing Decision**
166 Independent Review of Record
2504 Reinstatement—Burden of Proof
2551 Reinstatement Not Granted—Rehabilitation
2552 Reinstatement Not Granted—Fitness to Practice
Upon its independent review of the record, the review department found that circumstances of reinstatement petitioner's omission of two law suits from reinstatement petition demonstrated that petitioner had not met his heavy burden of showing clearly and convincingly his rehabilitation and present moral fitness. While review department was reluctant to differ with referee who weighed the credibility of witnesses, including petitioner, and who concluded that petitioner met reinstatement standards, it was review department's duty to independently examine record, reweigh evidence and pass on its sufficiency. Doing so, review department concluded that hearing referee had not given sufficient care to analyzing petitioner's evidence about his non-disclosure of two lawsuits as it bore on the qualities needed for reinstatement.

[10] **221.00 State Bar Act—Section 6106**
2552 Reinstatement Not Granted—Fitness to Practice
In disciplinary cases, the Supreme Court has considered an attorney's acts of gross neglect in representing clients' interests to involve moral turpitude. Reinstatement petitioner's lack of care as to his own duties regarding disclosure of litigation on reinstatement petition, while not requiring strong label of moral turpitude, fell short of highest standard of fitness which petitioner must demonstrate for reinstatement.

[11] **2504 Reinstatement—Burden of Proof**
The petition for reinstatement is not merely a paperwork exercise to hurdle on the way to readmission; verified petition serves as important, formal written presentation by which petitioner seeks decision on reinstatement. A court evaluating a petition for reinstatement should be able to rely on it as candid and complete in the same manner as a court would rely on an attorney's affidavit or declaration made under penalty of perjury.

[12] **2504 Reinstatement—Burden of Proof**
2559 Reinstatement Not Granted—Other Basis
Where reinstatement petitioner failed to disclose litigation completely in two successive petitions, his failure to do so was not excused by theory of mistake; rather, his offer of that theory cast further doubt that he had achieved insight into standard of sustained exemplary conduct he had to meet for reinstatement.

[13] **2559 Reinstatement Not Granted—Other Basis**
Omission of employment information from reinstatement petition, standing alone, would not warrant denial of reinstatement, but when coupled with omission of lawsuits, also showed that petitioner had failed to sustain his burden.

[14 a, b] **193 Constitutional Issues**
2551 Reinstatement Not Granted—Rehabilitation
As with any aspirant to membership in State Bar, reinstatement petitioner is entitled to access to courts to decide good faith claims, but where petitioner who worked for confusingly intertwined entities sued customer of one entity for punitive damages for complaining against one entity instead of another, and failed to show justification for suit, petitioner failed to sustain burden of showing exemplary conduct required to qualify for reinstatement.

[15] **148 Evidence—Witnesses**
2504 Reinstatement—Burden of Proof
2552 Reinstatement Not Granted—Fitness to Practice
In reinstatement proceeding, impressive testimonials of witnesses were neither conclusive nor necessarily determinative; witnesses could not be given conclusive weight in light of petitioner's failure to file complete and sufficient application for reinstatement.

[16 a, b] **2504 Reinstatement—Burden of Proof**
The Supreme Court has not specified the exact amount of legal learning required for reinstatement. Petitioner's inability to answer one specific legal question at hearing did not significantly undermine the strength of the showing he had made regarding current legal learning.

[17] **2504 Reinstatement—Burden of Proof**
2551 Reinstatement Not Granted—Rehabilitation
Where, in ordering reinstatement petitioner's earlier disbarment, Supreme Court had set as the standard for his reinstatement that he show reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time," this standard did not require perfection nor total freedom from true mistake. However, where petitioner did not justify omission of lawsuits from reinstatement petition by ascribing them simply to mistake; could not justify materially incomplete petition in respect of his employment; and had taken inconsistent position in lawsuit, petitioner's showing fell short of sustained exemplary conduct.

ADDITIONAL ANALYSIS

[None.]

OPINION

STOVITZ, J.:

Petitioner, Elroy Giddens, was disbarred in 1981. His earlier petition for reinstatement was denied in 1986 and he has again sought reinstatement as a member of the State Bar. (Bus. & Prof. Code, § 6082.) In this proceeding, he must establish: rehabilitation and present moral qualifications for readmission, present ability and learning in the general law and passage of the Professional Responsibility Examination. (Cal. Rules of Court, rule 952(d); Rules of Proc. of State Bar, rule 667.) In the words of the Supreme Court opinion disbarring him, petitioner must demonstrate his reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time." (*In re Giddens* (1981) 30 Cal.3d 110, 116.)

After taking testimony and receiving documentary evidence at a two-day hearing, a referee of the State Bar Court concluded that petitioner met the reinstatement requirements and recommended that he be reinstated. We review this matter on the State Bar examiner's request. (Rules Proc. of State Bar, rule 450(a).)

As we will detail, upon our independent review, we have concluded that although petitioner has the requisite learning and ability in the general law and has passed the required Professional Responsibility Examination, he omitted material information from his application for reinstatement. One of the items he omitted, a lawsuit to which he was then a party, did not appear to reflect favorably on him. Despite his very strong, favorable character testimony, we have concluded, and will explain below, that petitioner has not met his burden to demonstrate his reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time." (See *ante*.)

Before proceeding to our detailed review of the central issues in this case, we find it helpful to set forth the background of this matter and the principles governing our review.

1. BACKGROUND

A. Background of Petitioner's Disbarment

Petitioner, now 49, was originally admitted to practice law in California in 1972. Effective December, 11, 1978, he was placed on interim suspension from practice by the Supreme Court after his federal conviction of a crime of moral turpitude: conspiracy to distribute controlled substances (amphetamines). (21 U.S.C. § 841(a)(1); see Bus. & Prof. Code, §§ 6101-6102; Cal. Rules of Court, rule 951.)

Effective November 30, 1981, petitioner was disbarred. (*In re Giddens*, *supra*, 30 Cal.3d 110.)

In its opinion, the Supreme Court pointed to several factors which supported the disbarment recommendation of the State Bar: the lack of petitioner's explanation for his criminal conduct, that his conduct "extended over several months and involved several transactions," that he took no steps to end the continuing scheme or report it until after indictment and that he could not satisfactorily explain why he did not withdraw from the conspiracy at an earlier time. (*In re Giddens*, *supra*, 30 Cal.3d at pp. 115-116.) The Court noted that petitioner did not suffer from financial hardship, drug or alcohol dependency or emotional distress at the time of his crime. (*Id.* at p. 115.) The Court also observed that during his involvement in the drug conspiracy, petitioner "furnished between 30 and 40 percent of the money used to buy multi-100,000 lots of amphetamines . . . and realized therefrom a profit of $5,000 to $7,000 [over four to five months]." (*Id.* at p. 113.)

In disbarring petitioner, the Court noted character testimony in his favor but concluded that petitioner had not shown sufficient evidence of rehabilitation. Such a showing, held the Court, would involve his demonstrating in a reinstatement proceeding his reattainment of the standard of fitness to practice law by "*sustained exemplary conduct over an extended period of time*." (*Id.* at p. 116, emphasis added.)

Since his disbarment, petitioner worked for an engineering company between 1981-1982 and since

1982, he has worked in a non-legal capacity, managing roofing or paving companies. During the past few years, he has also worked as a law clerk to several attorneys, including working as a volunteer law clerk since about the beginning of 1988 for the Legal Aid Society of Orange County.

B. Prior Petition for Reinstatement

In 1985, petitioner filed his first application for reinstatement. Although it was denied and is not the subject of review here, it is part of the present record. After trial in that matter, a State Bar Court hearing panel recommended by vote of two to one that petitioner be reinstated. In 1986, upon its review, the former review department adopted revised findings and unanimously denied the petition. On March 4, 1987, the Supreme Court denied review (L.A. 32292 [minute order]).

The former review department's denial of petitioner's previous application rested on findings showing that petitioner's testimony was either false or not credible concerning his business activities and lawsuits to which he had been a party and which suits he had omitted from his then pending application for reinstatement. The department also characterized petitioner's evidence of rehabilitation as "weak to nonexistent" and it concluded that since disbarment, petitioner had continued to associate with known criminals and engaged in conduct inconsistent with rehabilitation.

2. PRINCIPLES OF REVIEW OF REINSTATEMENT MATTERS

[1] Our Supreme Court has consistently held that the petitioner seeking reinstatement has the burden to show by clear and convincing evidence that he meets readmission requirements and that burden is a heavy one. (E.g., *Hippard* v. *State Bar* (1989) 49 Cal.3d 1089, 1091-1092; *Tardiff* v. *State Bar* (1981) 27 Cal.3d 395, 403; *Feinstein* v. *State Bar* (1952) 39 Cal.2d 541, 546.) **[2]** The Court reviewed the standard in *Tardiff, supra*, explaining: "As we have repeatedly said: '"The person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. **[3]** In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character." [Citations.] In determining whether that burden has been met, the evidence of present character must be considered in the light of the moral shortcomings which resulted in the imposition of discipline.' [Citation.]" (*Tardiff* v. *State Bar, supra*, 27 Cal.3d at p. 403).

Moreover, the Supreme Court has held that this petitioner must show that he has reattained the standard of fitness to practice law required for reinstatement, by showing "sustained exemplary conduct over an extended period of time." (See *ante*.)

[4] In conducting this intermediate review, as to matters of testimonial credibility, we properly give great weight to the hearing referee who saw and heard the witnesses and who resolved those issues. (*Feinstein* v. *State Bar* (1952) 39 Cal.3d 541, 547; Trans. Rules Proc. of State Bar, rule 453(a).) We should ordinarily be reluctant to deviate from the factual findings of the referee resolving testimonial matters. **[5]** Nevertheless, under rule 453, our review is not an appeal from the hearing panel decision. Those findings serve as recommendations to us and we may make findings or draw conclusions at variance with those of the hearing referee. (Rules Proc. of State Bar, rule 453(a); *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.) **[6]** Our independent review requires that we:

1) independently examine the record; and
2) reweigh the evidence and pass upon its sufficiency.

(E.g., *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 843.)

Although there is no dispute that petitioner passed the Professional Responsibility Examination, and we so find (Petitioner's exh. C), the examiner[1] contends in this review that petitioner has not estab-

1. At oral argument, the State Bar examiner who tried this case, Stephen J. Strauss, was unavailable and another examiner, Loren McQueen, appeared in his place.

lished rehabilitation, his present moral qualifications or ability and learning in the law. We will review the evidence received below and the examiner's contentions[2] [7 - see fn. 2] in light of the above legal standards for review in these matters. [8] Our review is made more difficult because the hearing referee did not make findings on many of the specific issues in dispute. Nevertheless, our independent review of the record permits us to make the necessary findings.

3. PETITIONER'S SHOWING RE REHABILITATION AND MORAL FITNESS

A. Petitioner's Failure to Disclose Two Lawsuits to Which He Was a Party

It is undisputed that petitioner omitted from his petition for reinstatement two pending lawsuits to which he was a party, even though he was aware that the petition called for him to disclose those suits. (2 R.T. p. 171.)

To evaluate properly petitioner's conduct as it bears on his rehabilitation, we must set out the lawsuits to which petitioner had been a party as of the time he filed his reinstatement petition.

Petitioner filed his current application for reinstatement on January 18, 1989. Therein, he listed his involvement in five lawsuits:

> *Chillar* v. *Giddens*, a small claims action filed against him in 1988 for breach of a construction contract in which petitioner prevailed;
>
> *O'Sullivan* v. *Ability Builders*, a municipal court action filed against him and his contracting business in 1986 for breach of contract which included a charge of fraud. The matter was still pending at the time of hearing;
>
> *Giddens* v. *Farmers Insurance*, a superior court action he filed in 1987 for breach of insurance contract which he dismissed after settling with the insurance company;
>
> *Ability Builders* v. *Bunning*, a pending municipal court action he filed in 1987 in a dispute arising from a construction contract; and
>
> *Normandy Park Apartments* v. *Pavco Paving & Coating, Inc.*, a superior court action filed against him and his contracting business in 1987 with which he had not been served and the status of which he was unaware.

At the end of the above list, petitioner stated in his petition that he researched the records of all courts in Orange County to discover any lawsuits filed and not served. Petitioner stated that he "did not discover any lawsuits that are not included in this petition or disclosed in the hearing of the prior petition." (Exh. B, attachment 11.)

In March 1989, about two months after petitioner filed his current reinstatement application, a State Bar investigator told petitioner's counsel that it appeared that petitioner had omitted several lawsuits from his petition. Petitioner's counsel discussed this with petitioner and then counsel wrote to the State Bar examiner with details of the omitted lawsuits and the explanation petitioner has consistently offered thereafter: that petitioner researched the index of lawsuits of a court nearby to business he was conducting, copied cases involving him as a party, placed those copies in a legal file but copies of two omitted suits were misfiled so they were not included in his petition. (Exh. 1.)

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2. [7] By request in his brief on review, petitioner asks that we strike and not consider the State Bar examiner's brief because it exceeded 10 pages and did not contain the topical index and authorities table required by rule 1306, Provisional Rules of Practice of the State Bar Court. We decline to do so, noting that the examiner's brief was submitted very early in the history of this review department and that the predecessor bodies which had been in existence for over 20 years had no such rules. Petitioner has asserted no prejudice arising from the defects noted. We assume that in the future, all counsel will comply with applicable briefing and motion requirements and we note that rule 1312 of the Rules of Practice provides for our clerk's office to return, unfiled, papers which do not conform to the rules, absent application to the Presiding Judge and her appropriate order.

The lawsuits petitioner omitted from his petition are:

Marangi v. *Giddens*, a small claims suit brought by Connie Marangi, a school teacher, in January 1987, after she employed petitioner's roofing company to repair a leaking roof and the roof still leaked after four additional repairs. Petitioner did not appear in defense of the action and Marangi was awarded judgment against him for about $1,400. Petitioner sought to set aside the judgment and when that was unsuccessful, he paid it promptly (exh. 1); and

Ability Builders and Giddens v. *Marangi*, a superior court suit petitioner and his construction company brought against Marangi in October 1987 for fraud, slander and interference with contract (exh. 5). In the first cause of action, petitioner referred to the small claims action Marangi filed against him, claimed that she testified in the small claims action that petitioner completed an inferior roofing job on her property, that her testimony was false because another company (Pacific Paving and Coating ("Pacific")) did the work, not Ability Builders ("Ability") and "in furtherance of this fraudulent scheme," she contacted Ability's bonding company and attempted to collect the small claims judgment.

The second cause of action of petitioner's suit against Marangi rested on his claim that she "slandered" petitioner by filing a complaint with the Contractors State License Board, claiming that Ability, instead of Pacific did roof work on her property. In this second cause, petitioner also alleged that she further slandered him by stating under penalty of perjury to Ability's bonding company that "shoddy work" had been completed on roof when another company (Pacific) had done the work (exh. 5).

In his suit against Marangi, petitioner asked for unstated compensatory damages and for punitive damages of $100,000. (Exh. 5; 2 R.T. pp. 177-181.) His suit against Marangi was filed by attorney Norma Scott who testified that petitioner was doing part-time work for her as a law clerk. (1 R.T. pp. 130, 137.) Petitioner testified that he had given Marangi an open extension of time to answer and the suit is unresolved. (2 R.T. p. 180.)

When asked at the reinstatement hearing below whether he had completely forgotten about his suit against Marangi, petitioner testified that, at the time he prepared his reinstatement petition, it had slipped his mind. (2 R.T. p. 205.) According to petitioner, he had no intent not to disclose the suit: "It was a mistake." (2 R.T. p. 176.)

The hearing referee did not make any express findings on the extent to which petitioner's omission of the two *Marangi* suits bore on his burden of establishing rehabilitation and present moral fitness. Yet it seems clear from his ultimate findings in petitioner's favor as well as the referee's statement on the record[3] that he concluded that petitioner's omission of these suits did not reflect adversely on the showing petitioner needed for reinstatement.

Before us, the State Bar examiner urges that petitioner's omission of the lawsuits was intentional; or, at the very least raises serious questions about petitioner's worthiness of the public's trust and confidence.

[9] On our independent review of the record, we find that the circumstances of petitioner's omission of the *Marangi* suits demonstrates that petitioner has not met his heavy burden in this proceeding of showing clearly and convincingly his rehabilitation and present moral fitness.

While we are reluctant to differ with the referee who weighed the credibility of witnesses, including petitioner, and who concluded that petitioner met the reinstatement standards, as we said earlier in this opinion, it is our duty to independently examine the record, reweigh the evidence and pass on its sufficiency. Doing so, we have concluded that the hearing referee did not give sufficient care to analyzing petitioner's evidence about his non-disclosure of the *Marangi* suits as it bears on the qualities needed for reinstatement.

3. During the hearing, the referee interjected at one point and stated, "I'm convinced that it's oversight that [petitioner] didn't include some of these lawsuits, unless there's evidence to the contrary." (2 R.T. p. 177.)

We have no reason to doubt petitioner's explanation that his misfiling of copies of the *Marangi* litigation papers resulted in his not having them in front of him when he prepared his petition. However, in the circumstances of this particular case, we find petitioner's complete omission of the suits from his petition inexcusable.

Marangi's small claims suit against petitioner does not appear, by itself, to reflect adversely on the qualities needed for reinstatement. Petitioner did not defend this suit and claimed to have no knowledge of its prosecution, but he did learn of it after judgment, for he made an appearance and sought without success to set aside the judgment. After that point, he determined that Marangi had communicated with Ability's bonding company. In response, he filed a superior court action against her seeking $100,000 in punitive damages for remarks she assertedly made against petitioner's roofing work to Ability's bonding company—a still-pending action commenced just 15 months before filing his petition for reinstatement. In these circumstances, including that the number of suits to which petitioner had been a party was not great, we find incredible that petitioner would have no recollection of either of the two *Marangi* actions when filing his reinstatement petition or that the process of completing that petition and listing the other suits, would not have refreshed his recollection as to the *Marangi* suits.

Petitioner's mistake theory is also implausible as an excuse for his omission for another reason: it rested on his having acquired copies of lawsuits from courts in which they were filed and filing (or misfiling) those copies in his personal files. But it is clearly implausible that petitioner, a law clerk and eager aspirant for reinstatement as a member of the State Bar, would not have had his *own* file copy of the Marangi superior court suit which he initiated and which was still pending. For that suit, he would not have been dependent on acquiring a copy from court records.[4]

In 1986, petitioner learned that his earlier petition for reinstatement was denied, in part, because he had failed to disclose lawsuits to which he had been a party. Yet by his own testimony, he depended for information to file this 1988 reinstatement petition on the process of visiting courts, checking court indexes and making copies of suits naming him. He testified that he had no independent recollection or any other record-keeping method to identify a pending suit for punitive damages in which he and his company were plaintiffs. In these circumstances, we find petitioner's lack of care tantamount to gross neglect.

[10] In disciplinary cases, the Supreme Court has considered an attorney's acts of gross neglect in representing clients' interests to involve moral turpitude. (E.g., *Ridley* v. *State Bar* (1972) 6 Cal.3d 551, 560.) While we need not place that strong label on petitioner's lack of care here as to his own duties, we do find that it falls short of the highest standards of fitness petitioner must demonstrate for reinstatement.

In *Calaway v. State Bar* (1986) 41 Cal.3d 743, the Supreme Court, by divided vote, reinstated an applicant who had omitted a third party claim from his petition. The Supreme Court majority noted that the applicant disclosed the underlying action but did not disclose ancillary proceedings brought in the matter (apparently under the same court case number). As the Supreme Court majority noted, Calaway's failure to provide details of the ancillary action rested on his not unreasonable assumption that the State Bar would review the entire court case file if it deemed the matter significant. Here, unlike in *Calaway*, petitioner disclosed no portion of any of the *Marangi* litigation, leaving it to chance whether the bar's investigation process would uncover the two suits. When it did, petitioner was content to rest on his explanations that his omission was just a mistake and he continues to assert his entitlement to reinstatement based on his incomplete petition.

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4. Another reason we are less reluctant to reverse the hearing referee's determination in favor of petitioner as to his omission of the Marangi suits is that the referee's decision may rest on an erroneous view of the evidence. The referee recited that petitioner "made a list of his lawsuits" but misfiled the particular ones discussed. (Hearing referee's decision, p. 8, lines 9-10.) We find no evidence that petitioner kept any list of suits to which he was a party; only that he made copies of the suits themselves as he came across them in court indices and filed the copies in personal files.

[11] The petition for reinstatement is not merely a paperwork exercise to hurdle on the way to readmission. For an applicant such as this petitioner, whose moral character was found wanting earlier in disbarment proceedings, the *verified* petition for reinstatement serves as the important, formal written presentation by which the petitioner now places himself before the State Bar, the legal profession, the judiciary and the public for decision whether he or she should again be allowed to discharge the high responsibilities required of an attorney at law in this state. A court evaluating a petition for reinstatement should be able to rely on it as candid and complete in the same manner as a court would rely on an attorney's affidavit or declaration made under penalty of perjury.

[12] In two consecutive applications for reinstatement, petitioner has been unable to disclose completely, as required, litigation to which be was a party. Particularly in his current application, petitioner should have known the importance of disclosing *all* actions to which he was a party. We cannot deem his failure to do so to be excused by his theory of mistake. Rather, his offer of that theory to excuse his omission, casts further doubt that he has achieved an insight into the standard of sustained exemplary conduct he must meet for reinstatement.

B. Petitioner's Failure to Disclose Other Information About His Employment

The State Bar examiner also contends that petitioner's omission from his petition for reinstatement of his status as Ability Builders President and his employment with Pacific Pavings and Coatings ("Pacific") casts doubt on his rehabilitation. [13] We conclude that these omissions, standing alone, would not warrant denial of reinstatement; but, when coupled with petitioner's omission of the *Marangi* lawsuits, we find that his omission of his employment with Pacific also shows that petitioner has failed to sustain his burden.

In seeking reinstatement, petitioner was required to disclose his employment history by listing "every position" held since disbarment. (Exh. B, p. 6.) Except as noted *post*, the only position he listed was with Ability from January 1985 to "present" as general manager. At the evidentiary hearing, petitioner testified on direct examination that he was part-owner of Ability (he held a 40 percent interest), its office manager, job estimator and caretaker of the "economics" of the company. On cross-examination for the first time, just before being shown records from the Contractors State License Board, petitioner testified that he was Ability's president between May 1986 and February 1989. (2 R.T. pp. 167-168, 211-212.) Petitioner would not answer the question whether his non-disclosure of his presidency of Ability was significant but he offered that he had disclosed his presidency at the hearing on his earlier petition and was not trying to hide anything.[5]

While it would have been completely open of petitioner to have revealed his presidency of Ability on his petition for reinstatement, in the context of Ability's extremely small, almost family corporate structure, we do not find his lack of disclosure of his presidency of Ability on the petition shows lack of rehabilitation. He did not mislead anyone and he did disclose that he was general manager. In the earlier proceeding which he also revealed on his present petition, he disclosed his 40 percent ownership interest in Ability.

We reach a different result as to petitioner's omission of his employment with Pacific. Indeed, evidence taken in this proceeding regarding petitioner's position with Pacific casts further doubt on the good faith of petitioner either in this proceeding or in his lawsuit for puuitive damages against Marangi. Petitioner noted that the former company name of Ability was Pavco Paving and Coating, Inc. ("Pavco") and he referred to his prior petition for reinstatement for other employment (exh. B). As pertinent here, his prior petition listed his work with an engineering company between December 1980 and November 1981 and his employment as general manager of Pavco from January 1982 to the time he completed his earlier petition. (Exh. B., attachment.) Neither his present or former petitions for reinstatement referred to petitioner's work with Pacific.

5. Petitioner did not disclose this fact in his earlier *application* for reinstatement. The transcript of the earlier hearing is not part of the record before us. The prior review department's decision denying reinstatement refers to petitioner's 40 percent ownership in Ability.

At the hearing on petitioner's current petition, the referee received evidence that petitioner had signed contracts for and correspondence regarding roof work on three jobs in 1985 on behalf of *Pacific*, including the work done for Marangi. (Exhs. 2, 5, 6 and 7.) Petitioner also used a business card with both the Pacific name and petitioner's. (Exh. 10.) Postcards were also sent to persons in the Huntington Beach area using both the Pacific name and the Ability name. (Exhs. 10 and 11.) Letterheads and contracts used by petitioner for Pacific gave the same address and telephone number later used by petitioner for Ability. (Exhs. 2, 5, 6 and 7.)

At the hearing, petitioner testified that the basis of his suit against Marangi was that she falsely stated to Ability Builders' bonding company that *Ability* was responsible for the roof work when petitioner signed her contract on behalf of *Pacific*, not Ability. (2 R.T. pp. 179, 225.) Nonetheless, petitioner denied he was an employee of Pacific, testifying that Pavco ran Pacific. Petitioner testified that they were "two different entities, doing different types of work." (2 R.T. p. 220; see also 2 R.T. p. 178.) He conceded however, that he "estimated and sold jobs for" Pacific. (2 R.T. p. 221.)

Petitioner's testimony showed how Marangi could have assumed that Ability was responsible for making good on the warranty of roof work done by Pacific: "Well, [Marangi] told me why Ability Builders was named as defendant—because Ability Builders used the *same type of advertising*—that is, mailing a post card to property owners in different areas. And, when she got a post card from Ability Builders that was *similar to Pacific* Paving and Coatings, then she sued Ability Builders, also. And, I think, when I talked to her on the phone, I told her I was involved with Ability Builders. This is two years later, so I—but, we were still servicing the Pacific Paving and Coatings warranty calls, and retaining the Pacific phone number for that purpose." (2 R.T. p. 179, emphasis added; see also 2 R.T. p. 232.) "Because I sign 90 per cent of the contracts that Ability Builders and Pacific and PAVCO entered into, and when people sue, they don't seem to pay attention to who they've got the contract with. They sue every name they find." (2 R.T. p. 182 [petitioner's testimony in answer to questions as to why he was sued by O'Sullivan].)

Thus, the record shows that petitioner himself treated his work on behalf of Pacific as so intertwined with his responsibilities at Ability and its predecessor Pavco that he made no separate mention of Pacific on his application for reinstatement while the suit against Marangi for punitive damages for treating the entities as the same business was still pending.

[14a] As is any aspirant to membership in the State Bar, petitioner is fully entitled to access to the courts to decide claims brought in good faith. But in the circumstances of this record, it is hard to avoid the conclusion that petitioner either made a material omission in his petition for reinstatement or he brought a very questionable suit[6] against his customer which he has taken no steps to resolve.

The confusing was in which petitioner held out the intertwined entities to the public; his numerous hats at each entity undisclosed in his petition; his apparent failure to give careful consideration to the theories of his case against Marangi before filing suit for punitive damages coupled with his failure to keep records of or remember that such action was even pending all reflect poorly on petitioner. **[14b]** Having introduced evidence which showed the great similarities among petitioner's successive contract-

6. In the superior court action petitioner alleged that Marangi made a false claim against Ability's bond when she sought to collect on the small claims judgment against Ability which resulted from Ability's default. It would seem that the issue of Ability's responsibility to Marangi should have been raised earlier in defense of the underlying small claims action. As previously discussed, petitioner also included an allegation in part that Marangi slandered petitioner by "filing a complaint with the State Contractor's License Board." (Exh. 2: civil complaint, p. 7.) However, petitioner testified that her complaint to the licensing agency was "probably privileged." (2 R.T. p. 181.) Indeed, for many years, complaints directed to licensing or disciplinary agencies in California have enjoyed *absolute privilege* from defamation action. (See *Lebbos* v. *State Bar* (1985) 165 Cal.App.3d 656, 667 [complaints to the State Bar]; *Long* v. *Pinto* (1981) 126 Cal.App.3d 946, 948 [report to Board of Medical Quality Assurance]; *King* v. *Borges* (1972) 28 Cal.App.3d 27, 31-32 [complaint to Real Estate Commissioner]; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 512, pp. 601-602.)

ing businesses, it was his burden to demonstrate how they were different from one another and how any difference among them justified his bringing the particular punitive damage against his customer Marangi which he omitted from his reinstatement application. He failed to sustain his burden in this regard and fell short of showing exemplary conduct, particularly as a would-be practitioner of business or corporate law which petitioner hoped to practice should he be reinstated. (See *post*.) These factors all demonstrate his failure to sustain the burden of showing exemplary conduct in order to qualify for reinstatement.

C. Other Contentions Raised by the State Bar Examiner

The State Bar examiner contends that the *O'Sullivan* action (see *ante*) casts doubt on petitioner's showing of rehabilitation. Once again, the hearing referee failed to make specific findings on this issue but inferentially considered it insufficient to weaken what he concluded was petitioner's affirmative showing. With regard to the *O'Sullivan* action, while a suit charging fraud can have a very serious bearing on an applicant's eligibility for reinstatement, we find expressly that pendency of the *O'Sullivan* suit does not show lack of rehabilitation. The only information we have concerning it in the record, other than petitioner's testimony about it,[7] is the civil complaint itself. That bare complaint does not disclose any facts showing lack of rehabilitation or fitness. Neither O'Sullivan's testimony nor any other evidence was elicited to support the point the State Bar examiner makes.

Similarly, with regard to the State Bar examiner's claim that differing evidence was presented by attorney Young on whether petitioner was or was not paid for legal research, we do not find the subject to bear significantly on petitioner's eligibility for reinstatement.

D. Character Evidence

At the evidentiary hearing, petitioner testified that he wanted to be reinstated because he really enjoyed and loved the law. He did not see the law as a way to make a "fast buck" since he earned a good living with his contracting business, Ability Builders. If he was reinstated, he planned to "do a little general practice," probably with another attorney, concentrating in business, corporations, personal injury and maybe some criminal law. He also planned to continue to be involved with Ability. In the event he was not reinstated, petitioner testified he would stay somewhat involved with some of the attorneys for whom he worked, including those at Legal Aid who are his friends, although he noted that it was quite a time problem for him to be involved in business and remain current in the law. (2 R.T. pp. 190-192, 194.)

At the evidentiary hearing, petitioner presented an impressive group of witnesses. These included four lawyers for whom petitioner had acted as a law clerk over various periods of time. They also included four business people who had known petitioner for from three to ten years and an investigator for the State Bar who had known petitioner for five years and who had previously served for 31 years as a Los Angeles police officer, mostly in homicide investigation. Each of these witnesses knew the circumstances of petitioner's disbarment and each was positive and unequivocal in testifying to petitioner's industry, honesty and integrity.

In his decision, the hearing referee summarized the testimony of petitioner's witnesses at length and we need not repeat that testimonial summary. (See decision, pp. 2-7.) It is clear from reviewing the reporter's transcript of testimony and examining the referee's decision, that the referee who saw and heard all witnesses, including petitioner, was impressed by petitioner's favorable wit-

7. Petitioner testified that his company repaired the roof in question in the *O'Sullivan* suit. He gave the previous owner a letter that he saw no other leaks at the time. A few months later, the owner sold the building to O'Sullivan and five months after that O'Sullivan complained that the roof leaked. Petitioner inspected the roof again and found that someone else had done some other work on the roof in the interim and had placed nails in the roof without properly sealing them. Petitioner refused to repair this separate work he had not done since the warranty he had given was limited to the area in which his company had performed the work. O'Sullivan threatened to and did sue. (2 R.T. p. 183.)

nesses. **[15]** However, our Supreme Court has held that impressive testimonials of witnesses are neither conclusive nor necessarily determinative. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1094; *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404.) While we are likewise impressed by petitioner's witnesses, we cannot give them conclusive weight in view of petitioner's failure to bring forth a complete and sufficient application for reinstatement.

4. PETITIONER'S SHOWING RE LEARNING AND ABILITY IN THE GENERAL LAW

We turn last to petitioner's showing as to his learning and ability in the general law.

While not making detailed findings on the subject, the hearing referee concluded that petitioner succeeded in staying current with California law and demonstrated a current knowledge of law. (Decision, p. 9.) The evidence on which the referee's conclusions rest is clear and convincing. It includes not just petitioner's testimony as to his work for several attorneys over the past few years and his reading of a number of legal publications, but also the strong, positive testimony of four members of the State Bar who hired or supervised petitioner in his performance of legal research or law clerk duties.[8]

The foregoing evidence was convincing to the hearing referee and involved the weighing of testimonial credibility. In our independent review of the record, we find that petitioner has established the learning and ability in the law required for reinstatement. We also find no reason to deviate from the identical conclusion of the hearing referee.

[16a] The Supreme Court has not specified the exact amount of legal learning required for reinstatement. (*Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 756 (dis. opn. of Bird, C.J.).) Petitioner's activities involving the law in recent years have been of the same type deemed satisfactory in other cases when reinstatement was otherwise merited. (E.g., *Resner* v. *State Bar* (1967) 67 Cal.2d 799, 804; *Allen* v. *State Bar* (1962) 58 Cal.2d 912, 914.)

The State Bar contests petitioner's showing by focusing largely on his lack of an answer to one question the State Bar examiner put to him at the evidentiary hearing. Petitioner was asked to state how the Civil Discovery Act changed in 1987, in response to testimony petitioner gave that he read and remained current with a Continuing Education of the Bar publication, "Civil Discovery Practice in California." (2 R.T. pp. 263-264.) **[16b]** We do not believe that petitioner's lack of an answer to this question significantly undermines the strength of the showing he has made.

5. CONCLUSION AND DISPOSITION

Petitioner has taken important steps toward rehabilitation since disbarment. In view of the strength of his character evidence and the hearing referee's favorable recommendation, we have most diligently considered the record before reaching our decision. It is unfortunate that petitioner's own acts in submitting a materially incomplete application will again result in denial of his second application for reinstatement. **[17]** As we noted early in our opinion, in ordering petitioner's disbarment, the Supreme Court set as the standard for his reinstatement that he show reattainment of the standard of fitness to practice law by "sustained exemplary conduct over an extended period of time." This standard does not require perfection from an applicant nor total freedom from true mistake. However, in this case petitioner did not justify the omission of lawsuits he undeniably made in his petition by ascribing them simply to mistake.

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8. Representative of the testimony of members of the State Bar in support of petitioner's learning in the law was that of Ellen Pierce, petitioner's supervising attorney at the Legal Aid Society of Orange County for the past one-and-a-half years prior to the reinstatement hearing. Petitioner had been volunteering at the Legal Aid Society as a law clerk for that time.

As Pierce testified when asked if she had an opinion as to petitioner's current learning in the law: "Well, I think what I just told you is typical. He's up to the day, and back to the books. Now, one day we were arguing about law, and I just knew I was right. I stepped out to go do something, and then I thought, 'I'll go back and look, and pull out the code.' It was off the shelf, and [petitioner] had it—checking me, and I'm checking him, to see who's got it right. And we're doing that all the time. He wants to keep current, he is current—he must read the Daily Journal for breakfast." (1 R.T. p. 24 (underlining in original).)

Nor could he justify his materially incomplete petition in respect of his employment, and the inconsistent position taken in his lawsuit against Marangi. In sum, the showing he made in this proceeding falls short of the sustained exemplary conduct petitioner was obligated to show for reinstatement to the legal profession.

As petitioner is undoubtedly aware, he may reapply for reinstatement two years after this petition is denied. (Rules Proc. of State Bar, rule 662.) When he is able to place before the State Bar a complete, forthright petition for reinstatement, show in other respects his rehabilitation and fitness according to the standards of our Supreme Court and again show that he has maintained his learning and ability in the law, he will be entitled to the State Bar Court's recommendation of his reinstatement—a decision which we would not hesitate to make upon his proper showing.

Petitioner's application for reinstatement is denied.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ERNEST L. ANDERSON

A Member of the State Bar

[No. 88-C-14303]

Filed April 17, 1990

SUMMARY

Respondent was referred for State Bar disciplinary proceedings following his second criminal conviction for driving under the influence. After a hearing on the referral, the State Bar examiner requested review, contending that the hearing referee's recommended discipline was inadequate. (Hon. Robert K. Barber (retired), Hearing Referee.)

In the matter before the review department, the State Bar examiner had conceded that moral turpitude was not involved in respondent's misconduct, and the hearing department had therefore concluded that no moral turpitude was involved. Because neither the parties nor the hearing referee had focused on the issue of moral turpitude in accordance with the Supreme Court's referral order, the review department remanded the matter to the hearing department to determine whether the facts and circumstances surrounding respondent's convictions involved moral turpitude and to determine the appropriate degree of discipline.

At the time of the review department's consideration of the matter on review, a second referral proceeding, arising out of respondent's third conviction for driving under the influence, was pending before the hearing department. The review department remanded the matter on review to the hearing judge before whom the second matter was pending, and directed that judge, on remand, to consolidate the two matters unless consolidation would result in prejudice to substantial rights of either party, in order to give the Supreme Court a single record analyzing all facts and circumstances surrounding the referred convictions and a single recommendation of discipline.

COUNSEL FOR PARTIES

For Office of Trials: Hans M. Uthe

For Respondent: James L. Crew, Tom Low

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record
Although the examiner sought review on the issue of degree of discipline, once the review department had jurisdiction over the proceeding, all issues were subject to its independent review. (Trans. Rules Proc. of State Bar, rule 453(a).) The review department's review of the record is an independent one and not limited by the examiner's position.

[2 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
The question whether criminal conduct involved moral turpitude is one of law ultimately for the Supreme Court to decide, based on all of the facts and circumstances surrounding the conviction. Moral turpitude may be found in a driving under the influence matter depending on possible aggravating factors.

[3] **119 Procedure—Other Pretrial Matters**
135 Procedure—Rules of Procedure
Stipulations by both parties in the interests of justice on a wide variety of issues, including the entire proposed disposition of disciplinary matters, are encouraged and are provided for in State Bar procedural rules. (Trans. Rules Proc. of State Bar, rules 401, 405-408.)

[4 a, b] **161 Duty to Present Evidence**
162.20 Proof—Respondent's Burden
166 Independent Review of Record
It is the duty of any accused member of the bar to present at the evidentiary hearing in the disciplinary proceeding all evidence favorable to him or her. The respondent cannot necessarily rely on the State Bar examiner's position conceding an issue in the case. The review department's review of the record is independent and not limited by the examiner's position, and the Supreme Court, in turn, is not limited by the recommendation of the review department or that of the hearing department in assessing the record.

[5] **110 Procedure—Consolidation/Severance**
130 Procedure—Procedure on Review
Where a related proceeding was pending in the hearing department, the respondent's argument in favor of a remand by the review department carried more weight, because the pendency of the related proceeding created an opportunity for a fuller record to be prepared in the remanded matter without undue delay.

[6 a-c] **110 Procedure—Consolidation/Severance**
139 Procedure—Miscellaneous
1699 Conviction Cases—Miscellaneous Issues
Where respondent's two convictions were interconnected in their surrounding facts and circumstances, and where the record in the earlier matter lacked information regarding respondent's compliance with his criminal probation and his subsequent rehabilitation, a remand of the first matter and consolidation with the subsequent, related matter would be appropriate, in order to give the Supreme Court a single, more complete record and a single recommendation of discipline, if any.

[7 a, b] **110 Procedure—Consolidation/Severance**
135 Procedure—Rules of Procedure

Consolidation may be ordered on the Presiding Judge's own motion, if no substantial rights will be prejudiced. (Trans. Rules Proc. of State Bar, rules 2.22, 2.25 and 262.) Consolidation is encouraged at the hearing department level where feasible to avoid substantial duplicate effort expended by counsel and the hearing department to create trial records. Consolidation was appropriate where at most a brief delay would result, and a substantial savings of time would result from a single proceeding on review.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

The State Bar's Office of Trial Counsel, by its examiner ("examiner") has requested that we review[1] the decision of a hearing referee of the State Bar Court in this matter recommending that Ernest L. Anderson ("respondent") be suspended from the practice of law in this state for five years, stayed, on conditions of probation including a three-month actual suspension. This matter is a "conviction referral" originated by the Supreme Court[2] after respondent was convicted in 1985 of Vehicle Code section 23152, subdivision (a) (driving under the influence). In his 1985 conviction, respondent admitted his prior conviction in 1984 of driving under the influence.[3] A third such conviction occurred in 1989 which is now the subject of a second proceeding pending before the hearing department on referral by the Supreme Court.

For reasons we shall detail below, we have concluded that the appropriate disposition of this matter is to remand it to the hearing department of the State Bar Court with directions to consider whether the facts and circumstances surrounding respondent's 1985 conviction involved moral turpitude, particularly in light of *In re Alkow* (1966) 64 Cal.2d 838; and, in so doing, to permit the parties to adduce any additional evidence bearing on the question and on the issue of discipline, as the hearing judge deems appropriate.

We also direct that this matter be set before Judge Jennifer Gee, the same hearing judge before whom is pending on referral by the Supreme Court, respondent's 1989 driving under the influence conviction (State Bar Court No. 88-C-14545) evidence of which respondent introduced in this proceeding we now review. We further direct that Judge Gee consolidate this matter, 88-C-14303, with 88-C-14545 for the purpose of a single set of findings and conclusions on the issues referred by the Supreme Court and a single recommendation with respect to discipline unless she determines that consolidation of the two convictions would result in prejudice to substantial rights of either party,[4] a situation we do not find from the record before us. The introduction of such record in the new trial may obviate most of the task of the parties and trial judge in reconsidering the facts and circumstances of this matter.

PROCEDURAL HISTORY

In referring this matter, 88-C-14303, to the State Bar, the Supreme Court requested that a hearing be held and a report and recommendation made on whether or not the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline and, if so, the appropriate degree of discipline to recommend.[5]

The State Bar Court Hearing Department held the requested hearing in this matter on July 18, 1989.[6] About four weeks earlier, on June 21, 1989, the Supreme Court had referred to the State Bar another conviction of respondent on May 19, 1989, for driving under the influence arising out of his arrest in 1988.[7] (State Bar Court No. 88-C-14545.) For reasons not evident from the State Bar Court's records in 88-C-14545, but apparently relating to the transition in the State Bar Court from setting matters for hearing before volunteer referees or retired judges to

1. See Transitional Rules of Procedure of the State Bar, rule 450(a). In seeking our review, the examiner urges that the discipline recommended is inadequate.

2. Business and Professions Code sections 6101-6102; California Rules of Court, rule 951.

3. Respondent's 1984 conviction also found him guilty of Vehicle Code section 12500, subdivision (a) (driving while unlicensed).

4. See Transitional Rules of Procedure of the State Bar, rule 262.

5. See minute orders of the Supreme Court filed December 1, 1988 and January 5, 1989 in Bar Misc. No. 5960.

6. Since the hearing was set to occur before September 1, 1989, it was set before a referee (here a retired judge) sitting under the provisions of Business and Professions Code section 6079 as that section read prior to July 1, 1989.

7. See minute order of the Supreme Court filed June 21, 1989 in S010596.

setting matters for hearing before full-time judges appointed by our Supreme Court, the notice of hearing in that more recent matter was not issued until November 17, 1989, after the Supreme Court had augmented its earlier order to include the issue of discipline.[8] State Bar Court records show that respondent's recent conviction in 88-C-14545 was assigned to and is pending before hearing judge Jennifer Gee. Trial before her is set for April 20, 1990.

At the trial hearing in the case we review, respondent's counsel acknowledged his client's third conviction (88-C-14545) and requested it be included in the scope of this proceeding. (R.T. pp. 6-7.) As respondent's counsel stated: "[Respondent's third conviction] is certainly not a matter that is positive toward my client, but rather another matter that is negative toward him. But we feel that it makes more sense to deal with all of the problems at one given time, rather than doing it in two stages. And I would think that the Supreme Court, faced with the same problem, would agree with our analysis, that it ought to be handled all at once." (R.T. p. 8.) The examiner opposed consolidating 88-C-14545 with this matter for two reasons: first, respondent's more recent conviction was not the subject of a Supreme Court referral order,[9] thus the hearing referee had no jurisdiction to make it the subject of hearing, and second, 88-C-14545 had come to the State Bar too recently to allow for discovery to be conducted. (R.T. p. 7-8.) The referee sustained the examiner's objection, on the ground that it appeared that he had no jurisdiction to extend the hearing to cover 88-C-14545. Nevertheless, the referee did deem relevant to the facts and circumstances in this matter, some evidence concerning respondent's 1988 arrest which led to his 1989 conviction. (R.T. p. 58.) Moreover, respondent's counsel continued to proceed in this matter as if respondent's third conviction were an admitted fact. (E.g., R.T. p. 162.)

Regarding the issue of moral turpitude in the matter under review, 88-C-14303, after the examiner presented his opening statement and respondent's counsel included in his reply a statement that no moral turpitude was involved in respondent's acts, the examiner stated: "The State Bar is *not* seeking to establish moral turpitude. It's a *borderline case*, but we are primarily looking at other conduct warranting discipline. And also my comments during opening statement were strictly directed to be that." (R.T. p. 14, emphasis added.) Prior to the presentation by respondent of character evidence, the examiner asked for a finding that respondent engaged in misconduct warranting discipline. (R.T. p. 75.) The referee granted the examiner's motion. Although on review the examiner sought a substantial increase in the referee's disciplinary recommendation, and asserted that respondent's conduct "was outrageous!" (Review Department Brief of Examiner, p. 8), he has always maintained that the facts and circumstances surrounding respondent's convictions did not involve moral turpitude, but only other misconduct warranting discipline.

At oral argument, respondent's counsel argued that in view of the examiner's consistently stated position that moral turpitude was not at issue it would be prejudicial to respondent for the review department to reassess the issue of moral turpitude on the present record. He requested that the matter be

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8. Pursuant to Business and Professions Code section 6079.1(f), effective July 1, 1989, the Board of Governors fixed September 1, 1989, as the date after which all formal regulatory matters in the State Bar Court Hearing Department could be tried only by a judge appointed by the Supreme Court or a judge pro tempore. This change had a major effect on all case assignments and case calendaring. Cases had to be calendared several months before the trial date to allow for pre-hearing and discovery procedures. Since the enabling legislation was not effective until July 1, 1989, terms of new State Bar Court judges and the newly constituted State Bar Court Executive Committee could not start before July 1, 1989 (Bus. & Prof. Code, § 6079.1) thus delaying formulation of transitional rules of practice. Finally, to support the full-time judges, a branch court clerk's office was opened in San Francisco in September of 1989 requiring hiring and training of new employees.

9. The examiner was apparently unaware that, as noted *ante*, footnote 7, the Supreme Court had earlier referred 88-C-14545 to the State Bar. As also noted *ante*, no notice of hearing was issued by the State Bar Court clerk's office in that matter until November 1989. Had counsel and the referee been aware of that action at the time of the trial in this matter, it would have eliminated the very real jurisdictional concern posed by the examiner and held by the referee.

remanded to provide respondent with an opportunity to introduce additional evidence on such issue.

DISCUSSION

1. Moral Turpitude.

We deal first with the issue of moral turpitude referred by the Supreme Court to the State Bar in this matter for a hearing, report and recommendation to the Supreme Court.

[1a] Although our review was invoked by the examiner on the issue of degree of discipline, once we have jurisdiction over a proceeding, all issues are subject to our *independent* review. (Trans. Rules Proc. of State Bar, rule 453(a).) Moreover, since this matter arose from a decision of a hearing referee under former Business and Professions Code section 6079, we would have been required to undertake an independent review of the record even in the absence of a request for review. (Trans. Rules Proc. of State Bar, rule 452(a).) **[2a]** Further, it is settled that the question of moral turpitude is one of law ultimately for the Supreme Court to decide. (E.g., *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 109-110; *In re Mostman* (1989) 47 Cal.3d 725, 736.) However, such determination must be made based on all of the facts and circumstances surrounding the conviction. (*In re Carr* (1988) 46 Cal.3d 1089, 1091.)

In *In re Carr*, the petitioner had pled no contest in 1983 and 1984 to two separate counts of driving under the influence of alcohol. The two convictions were separately referred by the Supreme Court to the State Bar Court for a hearing, report and recommendation. The two matters were consolidated by the State Bar Court and reviewed as a single proceeding before the Supreme Court. The Supreme Court held, after reviewing the entire record and considering all the facts and circumstances, that "Carr's conduct did not involve moral turpitude, but did involve other misconduct warranting discipline." (*Id.* at p. 1091.) It ordered Carr suspended from practice for six months.

The Supreme Court subsequently issued its referral in this matter to have a similar determination made after hearing as to whether under all the facts and circumstances respondent Anderson's conduct constituted moral turpitude or other misconduct warranting discipline. **[2b]** It seems clear that the Supreme Court did not intend its decision in *In re Carr, supra*, to be dispositive of the issue of moral turpitude in all driving under the influence cases. Given possible aggravating factors indicated by the record in this case[10] the examiner's concession of the issue at an early point in the proceedings below is troublesome.[11] **[3 - see fn. 11]**

It also appears that neither the parties nor the hearing referee expressly considered the Supreme Court's decision *In re Alkow* (1966) 64 Cal.2d 838. Prior to oral argument we invited counsel at argument to address the effect of that decision on the question of moral turpitude in this matter. In *Alkow*, the Court ordered six months suspension of the attorney holding that the facts and circumstances surrounding the vehicular manslaughter conviction of that attorney involved moral turpitude. In reaching that conclusion, the court emphasized Alkow's

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10. For example, respondent's own testimony in this record established that he was well aware of the dangers of driving under the influence, for he started his legal career as a deputy district attorney. As such, he prosecuted between 30 and 40 driving under the influence cases to jury trial. (R.T. pp. 54-55, 62-63.) His testimony also showed that he drove while intoxicated more times than the three in which he was arrested and this conduct spanned a five year period. (R.T. pp. 49-50, 58-61, 66-68.) When arrested, respondent's blood alcohol level was well in excess of legal standards (exhibit 1) and the circumstances of his arrests appear to have been aggravated in other respects, including his lack of a currently valid driver's license on at least one occasion. (R.T. pp. 18-24, 38-45.) As to the extreme risk posed to public safety by driving under the influence, see, e.g., *Burg* v. *Municipal Court* (1983) 35 Cal.3d 257, 262.

11. We do not wish to be overly critical of the examiner in this case for exercising his judgment to concede an issue which he apparently did not feel could be won. We assume he relied on his interpretation of the facts in light of *In re Carr, supra*. **[3]** Stipulations by both parties in the interests of justice on a wide variety of issues, including the entire proposed disposition of disciplinary matters, are encouraged and the procedural rules explicitly provide for such stipulations. (Trans. Rules Proc. of State Bar, rules 401, 405-408.)

disregard of the law, the terms of his probation and the public safety. (*Id.* at p. 841.)

There are several similarities between the facts of this case and *Alkow*.[12] Although there may be differences as well which would support the hearing referee's conclusion of no moral turpitude, we believe that the issue of moral turpitude is a far closer question than viewed by the examiner and one which we would have expected to have been focused on by both sides at the hearing below in accordance with the Supreme Court's referral order. The examiner having conceded the fundamental issue of moral turpitude early in the hearing below, respondent's counsel argued to us that he relied on that concession and chose not to present certain evidence as a result. As discussed above, he urged remand if we were considering reaching a different conclusion on moral turpitude than reached by the referee below.

Respondent's reliance on the examiner's position is not in and of itself a persuasive reason for remanding the case. **[4a]** It is the duty of any accused member of the bar to present at the evidentiary hearing, all evidence favorable to him or her. (See, e.g., *Warner* v. *State Bar* (1983) 34 Cal.3d 36, 42.) **[1b]** Respondent was placed on notice from the outset pursuant to rule 453(a) and the case law that our review of the record is an independent one, not limited by the examiner's position. (Cf. *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.) **[4b]** The Supreme Court is in turn not limited by our recommendation or that of the hearing referee in assessing the record. (*In re Young* (1989) 49 Cal.3d 257, 264.) **[5]** If a related proceeding were not currently pending in the hearing department, the argument in favor of remand would carry much less weight. However, the pendency of such proceeding creates an opportunity for a fuller record to be prepared in this case without undue delay. **[6a]** As discussed *post*, remand also would permit consolidation which appears desirable because the record before us includes some evidence regarding respondent's subsequent conviction and his alleged abstention from alcohol thereafter through the date of oral argument. We are in effect being asked to consider part, but not all, of the same circumstances which are currently at issue before Judge Gee.

Under all the circumstances, we deem it appropriate to remand this matter to Judge Gee of the Hearing Department of the State Bar Court to consider further the issue of moral turpitude, relieving the examiner of his prior concession of that issue. Our remand will give both parties the chance to present any additional evidence deemed appropriate by the hearing judge. **[6b]** The remand will also permit an improved record on the issue of the extent to which respondent complied with the conditions of his probation imposed in his 1984 and 1985 convictions, an important issue when analyzing *Alkow* but about which this record is unclear. (See R.T. pp. 160-161.) In addition, since respondent has urged in rehabilitation his recent total abstention from alcohol, the hearing judge on remand will be in a better position than we are to assess respondent's evidence.

2. Consolidation.

[6c] Respondent's 1984, 1985 and 1989 convictions are interconnected in their surrounding facts and circumstances. In the present matter, the hearing referee properly ruled that some of the facts surrounding respondent's 1988 arrest, which led to his 1989 conviction, are relevant. Since conviction matters referred by the Supreme Court are not limited to the facts underlying the *immediate* conviction (*In re Arnoff* (1978) 22 Cal.3d 740, 745-746; *In re Langford* (1966) 64 Cal.2d 489, 496-497), we can anticipate that the circumstances surrounding respondent's 1984 and 1985 convictions will be inquired into in the hearing yet to occur on his 1989 conviction. If kept separate, each of the referrals will contain pieces of the other; and neither will constitute a single whole. Because of the particular timing of these referrals and our decision to remand this matter on the issue of moral turpitude, we have an opportunity, as did the State Bar Court *In re Carr*, *supra*, 46 Cal.3d 1089, to give the Supreme Court a single record analyzing all facts and circumstances surrounding both referred convictions with a single set of findings and conclusions and, if moral turpitude or other misconduct

12. See footnote 10, *ante*.

warranting discipline is found, a single recommendation of discipline.

[7a] Consolidation may be ordered by the Presiding Judge of the State Bar Court on her own motion, if no substantial rights will be prejudiced. (Trans. Rules Proc. of State Bar, rules 2.22, 2.25, 262.) Here, the respondent urged below that the matters be consolidated. The examiner's objection was founded on his mistaken belief that the Supreme Court had not yet referred the 1989 conviction and on a lack of time for discovery which could have been remedied by a continuance.

[7b] Consolidation is encouraged at the hearing department level where feasible to avoid substantial duplicate effort expended by counsel and the hearing department to create trial records. We recognize that that is not always possible. Indeed, as the State Bar disciplinary system continues to work to reduce delay in pendency of matters, it is inevitable that different matters of a similar nature concerning the same attorney may pend concurrently at different levels of the State Bar Court. To avoid undue delay, those matters may often need to be judged as they each independently become at issue. However, in this instance in which Judge Gee has yet to act in the proceeding before her, if any delay is occasioned by consolidation, it would at most, be brief; and it would appear that most of the facts and circumstances of this matter, 88-C-14303, can be established simply by introduction into evidence in 88-C-14545 of the record from the prior hearing. It would also appear that a substantial savings of time of this review department and the Supreme Court will result from a single proceeding on review as occurred in *In re Carr, supra*, 46 Cal.3d 1089.

DISPOSITION

For the reasons stated, we remand the above matter, 88-C-14303, to the Hearing Department of the State Bar Court with directions to the hearing judge to consider whether the facts and circumstances surrounding respondent's 1985 conviction (including his 1984 prior conviction) involved moral turpitude, particularly in light of *In re Alkow, supra*, 64 Cal.2d 838, and, in so doing, to permit the parties to adduce any additional evidence bearing on the question of moral turpitude and on the question of appropriate discipline, as the hearing judge deems appropriate.

We further direct that this matter be set before Judge Jennifer Gee, the same hearing judge before whom is pending 88-C-14545, and we also direct that this matter, 88-C-14303, be consolidated with 88-C-14545 for the purpose of a single set of findings and conclusions on the issues referred by the Supreme Court and a single recommendation with respect to discipline unless Judge Gee determines that consolidation of the two convictions would result in prejudice to substantial rights of either party.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STEPHEN J. HEISER

A Member of the State Bar

[No. 87-O-16747]

Filed April 26, 1990

SUMMARY

Respondent issued seven dishonored checks to satisfy personal debts, some drawn on his personal checking accounts, and some drawn on client trust accounts, at times when the accounts either were closed or were without sufficient funds. He also failed to maintain a current address with the State Bar. The hearing referee recommended a one year suspension, stayed, with six months actual suspension. (Thomas A. Welch, Hearing Referee.)

The State Bar examiner sought review, contending that respondent also should have been found culpable of making misrepresentations to the State Bar investigator and failing to cooperate with the State Bar investigation, and also contending that the recommended discipline was inadequate, and respondent should be disbarred. The review department modified the findings to reflect culpability for failure to cooperate with the State Bar, and modified the conditions of the recommended discipline, but declined to recommend disbarment.

COUNSEL FOR PARTIES

For Office of Trials: Donald Steedman

For Respondent: No appearance (default)

HEADNOTES

[1 a, b] 135 Procedure—Rules of Procedure
166 Independent Review of Record
The review department must independently review the record in all cases brought before the court. (Trans. Rules Proc. of State Bar, rule 453.) Since the review department does not have the opportunity to observe the demeanor of witnesses, it accords great weight to findings of fact made by the hearing department which involve resolving testimony and issues relating to testimony. However, the review department has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record
The issues raised or addressed by the parties on review do not limit the scope of issues in a case that can be considered and resolved by the review department. (Trans. Rules Proc. of State Bar, rule 453(a).)

[3] **802.30 Standards—Purposes of Sanctions**
The review department's overriding concern is the same as the Supreme Court's: the protection of the public, courts and legal profession, the preservation of public confidence in the profession and the maintenance of high professional standards.

[4] **221.00 State Bar Act—Section 6106**
The continued practice of issuing numerous checks which the attorney knows will not be honored violates the fundamental rule of ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice. An attorney's issuance of multiple bad checks has consistently been found to be an act of moral turpitude, even when the checks were written on personal accounts for non-legal expenses.

[5 a–c] **280.00 Rule 4-100(A) [former 8-101(A)]**
Trust accounts, open or closed, are never to be used for personal purposes, barring the very narrow exceptions outlined in the rule governing such accounts. Using checks drawn on a client trust account to pay personal debts constituted a violation of the rule prohibiting use of a client trust account for personal purposes, even though there was no evidence that there were any client funds in the account.

[6] **280.00 Rule 4-100(A) [former 8-101(A)]**
420.00 Misappropriation
Where the balance in a client trust account falls below the total of those client funds deposited and held in trust, that fact alone can support a finding of misappropriation.

[7] **106.90 Procedure—Pleadings—Other Issues**
107 Procedure—Default/Relief from Default
Where "and/or" language was used as part of the allegations in the notice to show cause, such language could not be used to establish respondent's culpability based solely on admitted allegations by default.

[8] **420.00 Misappropriation**
Where an attorney issued checks for personal debts which were drawn on a client trust account that was closed and empty, the attorney could not be found culpable of misappropriating client funds.

[9] **135 Procedure—Rules of Procedure**
161 Duty to Present Evidence
162.90 Quantum of Proof—Miscellaneous
In disciplinary matters, where the State Bar has the burden of proof, the examiner is obligated to produce sufficient evidence to permit the State Bar Court to make adequate determinations and appropriate recommendations to the Supreme Court as to discipline. (Rules Proc. of State Bar, rule 402.)

[10] **107 Procedure—Default/Relief from Default**
162.90 Quantum of Proof—Miscellaneous
Taking of evidence which negated allegation of notice to show cause permitted hearing department to reject allegations based on a conflict between the admission of the allegations by default and the evidence adduced at trial.

[11] **162.11 Proof—State Bar's Burden—Clear and Convincing**
Reasonable doubts in proving a charge of professional misconduct must be resolved in the accused attorney's favor.

[12] **176 Discipline—Standard 1.4(c)(ii)**
Where the review department recommended that an attorney be placed on actual suspension for six months and until payment of restitution, the review department also recommended that if such actual suspension amounted to more than two years, the attorney should be required, before being relieved of the suspension, to show fitness to practice, rehabilitation, and present ability and learning in the law.

ADDITIONAL ANALYSIS

Culpability
Found
213.91 Section 6068(i)
214.01 Section 6068(j)
221.11 Section 6106—Deliberate Dishonesty/Fraud
280.01 Rule 4-100(A) [former 8-101(A)]
Not Found
220.15 Section 6103, clause 2
221.50 Section 6106
420.54 Misappropriation—Not Proven
Aggravation
Found
521 Multiple Acts
584.10 Harm to Public
591 Indifference
611 Lack of Candor—Bar
Mitigation
Found
710.10 No Prior Record
Standards
833.20 Moral Turpitude—Suspension
833.30 Moral Turpitude—Suspension
Discipline
1013.06 Stayed Snspension—1 Year
1015.04 Actual Suspension—6 Months
1017.08 Probation—2 Years
Probation Conditions
1021 Restitution
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School

1026 Trust Account Auditing
1030 Standard 1.4(c)(ii)

Other

1093 Substantive Issues re Discipline—Inadequacy

OPINION

STOVITZ, J.:

A hearing referee of the State Bar Court has recommended that Stephen J. Heiser ("respondent"), a member of the State Bar since 1973 and with no prior record of discipline, be suspended from the practice of law in the state for one year, stayed, with conditions including actual suspension for six months of his one-year probationary term. Respondent did not answer the formal charges and his default was properly entered. (Rules Proc. of State Bar,[1] rules 552.1, et seq.)

We review this matter at the request of the State Bar's Office of Trial Counsel examiner ("examiner"). (Trans. Rules Proc. of State Bar, rule 450(a).) The examiner seeks additional findings of culpability on the two counts dismissed by the referee: respondent's alleged misrepresentations to the State Bar and his alleged failure to cooperate with the State Bar investigation. He also argues that disbarment is the appropriate discipline in this case. As an alternative to disbarment, the examiner requests imposition of additional conditions to probation, including passage of the Professional Responsibility Examination and compliance with rule 955, California Rules of Court. Upon review, we agree that some, but not all, of the additional findings and conclusions on the issues identified by the examiner should be made and we shall detail below our changes to the findings and conclusions. For the reasons stated, *post*, we shall recommend that respondent be suspended for one year and until restitution is paid to two individuals, stayed, on conditions including a two-year probationary period and an actual suspension for the first six months of his probation and until restitution is made.

A. FACTS

1. Returned Checks and Use of Trust Accounts

The focus of this disciplinary matter is a series of seven checks respondent wrote for personal expenses totaling $5,428 between June 1987 and April 1988, on both his personal checking and closed client trust accounts at Wells Fargo Bank. All of these checks were returned by the bank either for insufficient funds or because they were written on a closed account. At issue are the following checks dated as shown (exhibits 12, 13, 16 and 17):

Date	*Amount/expense*	*Account*	*Disposition*
06/03/87	$925 condo rent Crystal Palace Realty (Mona Horwitz)	law office (personal) 23-093277	paid later
09/03/87	$200 "Cash" Ted's Bar (Avery Roberts)	closed trust acc't 23-033251 (closed 7/31/87)	settled after small claims action filed and private investigator hired
09/04/87	$3900 condo rent Crystal Palace Realty (Mona Horwitz)	closed trust acc't 23-033251 (closed 7/31/87)	paid after police intervention11/16/87
02/13/88	$203.50 dry cleaning York Cleaners (David Lewis)	closed trust acc't 539-035444 (closed 12/31/87)	still outstanding
04/21/88 04/24/88 04/29/88	$100 50 50 to Gatsby's Bar (K.G. Martin)	personal checking acc't 539-322552	still outstanding

1. The Rules of Procedure of the State Bar, in effect prior to September 1, 1989, govern the proceedings held before the hearing referee because the taking of evidence had commenced before that date. (Trans. Rules Proc. of State Bar, rule 109.) The Transitional Rules of Procedure of the State Bar, effective September 1, 1989, apply to this review department, created by Business and Professions Code section 6086.65 and appointed by the Supreme Court, and to proceedings conducted by the hearing judges and judges pro tem after September 1, 1989.

Bank records submitted by the examiner show respondent was charged 102 times against his personal checking account between May 1987 and July 1988 for checks he had issued that were returned for insufficient funds. (Exhs. 10 and 11.)[2] His law office account was in deficit from June 30, 1987 until it closed on October 16, 1987. (Exhs. 8 and 9.) There was no evidence concerning the source of funds in the two accounts designated as trust accounts at the time the checks were written. According to the record, no criminal charges have been filed against respondent.

2. State Bar Investigation

Between early 1988 and early 1989, the four individuals noted above filed complaints with the State Bar and State Bar investigator J.D. Pickering attempted to contact respondent by letter for his response on each complaint. After the first letter was sent on February 25, 1988 (the Mona Horwitz complaint), Pickering secured a subpoena for respondent's bank records and respondent was notified.[3] On April 29, 1988, he called Pickering for an explanation, denied that he had received the February 25 letter, claimed he had left his membership address on Eddy Street and gave Pickering his home address in San Anselmo. Pickering initially testified at the hearing below that respondent did not make any mention of having contacted membership records to notify them of the change. (R.T. pp. 41/7-42/6.)[4] After a short recess, the examiner "refreshed" Pickering's recollection by showing him a copy of his contemporaneous memo on the telephone conversation. (Exh. 19.) Pickering then stated his best recollection of their conversation was that he recommended that respondent provide the State Bar with his most recent address and respondent claimed he had done so that morning. (R.T. p. 43/2-25.) In the same conversation, respondent promised to provide a full explanation of the complaint filed by Horwitz. On May 3, 1988, investigator Pickering sent a confirming letter to respondent at his home address, enclosing the February 25th letter and a copy of Business and Professions Code section 6068 (i) (attorney's duty to cooperate in the State Bar investigation) and asked him to address the issue of his failure to advise the State Bar of his new address within 30 days. (Exh. 6, attachment E.) Between July 28, 1988, and January 6, 1989, Pickering sent three subsequent letters on the remaining three complaints to respondent's former office on Eddy Street in San Francisco. The investigator received no further reply from respondent and none of the letters was returned by the post office.[5]

B. STATE BAR FORMAL PROCEEDINGS

The notice to show cause was filed on April 17, 1989. The record indicates that the notice was originally sent by certified mail to the Eddy Street address, the most recent on file with State Bar membership records (Bus. & Prof. Code, § 6002.1; rules 240-243, Rules Proc. of State Bar), as well as to a forwarding address in South Lake Tahoe, Nevada. Each was returned marked "unclaimed." Respondent did not respond and, after notice, his default was entered on June 19, 1989.

2. The bank statements in evidence reflect only the return check charges accrued by respondent. Multiple charges may result from the same check presented for payment several times. The bank records are silent on the number of checks respondent actually issued that were returned NSF and on the number of previously returned checks that were eventually paid by the bank or by respondent.

3. It is unclear whether respondent learned of the subpoena from Wells Fargo Bank or under rule 302, Rules of Procedure of the State Bar. (R.T. p. 41/3-6.)

4. The investigator was called to testify after the referee questioned the examiner (R.T. pp. 38-39) concerning the investigator's declaration. (Exh. 6.) The declaration stated that the respondent had telephoned the investigator on April 29, 1988, but did not provide a foundation to determine how the investigator identified the caller as respondent.

5. In his declaration (exhibit 6), the investigator detailed the efforts he or his office made to secure a better address for respondent: searches of the records of the Department of Motor Vehicles, voter registrations and telephone books of Marin and San Francisco Counties, interviews with the office managers of respondent's last known law office in San Francisco, and a telephone call to respondent's ex-wife.

The trial hearing was held on August 23, 1989. Because the matter was heard prior to September 1, 1989, a hearing referee appointed under now repealed section 6079 of the Business and Professions Code, presided. (Bus. & Prof. Code, § 6079.1 (i); rule 109, Trans. Rules Proc. of State Bar.) In his revised findings of facts, conclusions and recommendations,[6] the referee concluded that respondent committed acts involving moral turpitude and dishonesty contrary to Business and Professions Code section 6106 by issuing checks on a personal checking account without sufficient funds to cover them; and, in three instances (Gatsby's Bar), by failing to make good on the obligations. He found the acts were "tantamount to fraud or obtaining money under false pretenses." (Referee's decision, p. 5.) As to the checks issued on the closed client trust accounts, the referee found the respondent's actions to be acts of moral turpitude and dishonesty, and in violation of former rule 8-101[7] as an attempt to misappropriate client trust funds.

The referee found respondent violated Business and Professions Code sections 6068 and 6103 by failing to inform the State Bar of his current address. As to the charges that respondent failed to cooperate with the State Bar investigation and, further, misled the investigator, the referee concluded that there was "not sufficient evidence to find the necessary intent on the part of the member to support a finding of culpability" on those counts. (Referee's decision, p. 6).

Since respondent's default had been entered, he did not appear at the hearing and there was no mitigating evidence presented at the hearing. However, the referee noted that respondent had no prior record of discipline and the misconduct did not involve clients as the checks at issue were presented to satisfy personal debts. As aggravating factors, the referee found respondent misused client trust accounts by commingling client trust accounts with personal obligations. The referee concluded that the misconduct "evinces a pattern involving dishonesty" and that respondent was indifferent toward remedying or atoning for his behavior. (Referee's decision, p. 7.) He recommended that respondent be suspended for one year, stayed, with one year of probation with conditions that included an actual suspension of six months, restitution to the two uncompensated complainants, with interest; and, after completion of the suspension, a periodic accounting of respondent's law office and client trust accounts.

C. STANDARD OF REVIEW

[1a] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it, this review department, like the Supreme Court, must independently review the record. (See *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928.) We accord great weight to findings of fact made by the hearing department which involve resolving testimony and issues relating to testimony. (*In re Bloom* (1987) 44 Cal.3d 128, 134; rule 453(a), Trans. Rules Proc. of State Bar.) However, the review department has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar.) **[2]** Moreover, the issues raised or addressed by the parties on review do not limit the scope of issues in a case that can be considered and resolved by the review department. (*Ibid.*) **[3]** Our overriding concern is the same as the Supreme Court's, the protection of the public, courts and legal profession, the preservation of public confidence in the profession and the maintenance of high professional standards. (See Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V, std. 1.3; e.g., *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117.)

D. DISCUSSION

1. Moral Turpitude and Misappropriation

[4] The California Supreme Court has always reserved harsh language for an attorney's practice of

6. The original decision of the referee was filed on October 3, 1989. The examiner filed a request for reconsideration under rule 562, Rules of Procedure of the State Bar and, on October 24, 1989, the referee filed a revised decision. That is the decision we review.

7. Unless otherwise noted, all references to rules are to the former Rules of Professional Conduct of the State Bar which were in effect from January 1, 1975, until May 26, 1989. (E.g., *Pineda* v. *State Bar* (1989) 49 Cal.3d 753, 759, fn. 4.)

issuing bad checks. In a recent disbarment case, the Court noted: "It is settled that the 'continued practice of issuing [numerous] checks which [the attorney knows will] not be honored violates "the fundamental rule of ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice."' [Citations.]" (*Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 109 [bracketed language in original].) In every instance of which we are aware, where an attorney was found to have written multiple bad checks, the Court has found such continued conduct to be an act of moral turpitude. (See *Rhodes* v. *State Bar* (1989) 49 Cal.3d 50, 58; *Tomlinson* v. *State Bar* (1975) 13 Cal.3d 567, 577; *Alkow* v. *State Bar* (1952) 38 Cal.2d 257, 263-264.) Attorneys have been found culpable even when, as in this case, the checks were written on personal accounts for non-legal expenses. (*Segal* v. *State Bar* (1988) 44 Cal.3d 1077, 1086; *Rhodes* v. *State Bar*, *supra*, 49 Cal.3d at p. 55.)

In this case, the facts unquestionably support the referee's conclusion that respondent committed acts of moral turpitude in violation of Business and Professions Code section 6106 by issuing NSF checks on both open personal and closed trust accounts.

When NSF checks are drawn against a client trust account, the attorney's conduct is potentially more damaging. First, by using trust account checks to pay personal debts, the attorney cloaks the transaction with the care and soundness represented by the account and its relationship to the confidential bond between attorney and client. Trading on the "aura" of the trust account, the attorney seeks to offer the check recipient added assurance as to the validity of the instrument. More significantly, if client funds *are* in the account, invading the trust account to satisfy personal debts puts the client funds in outright jeopardy, contrary to the very therapeutic purpose of rule 8-101, designed to prevent such risk. (See *Fitzsimmons* v. *State Bar* (1983) 34 Cal.3d 327, 331.)

[5a] Trust accounts, open or closed, are never to be used for personal purposes, barring the very narrow exceptions outlined in rule 8-101(A). **[6]** Where the balance in a client trust account falls below the total of those *client* funds deposited and held in trust, that fact alone can support a finding of misappropriation. (*Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 474.)

[7] The evidence supporting the conclusion that respondent's actions constituted an attempt to misappropriate funds is not clear. The notice to show cause, count 2, part 2, alleged that between June 1987 and December 1987, respondent wrote checks on his client trust accounts without sufficient funds, thereby misappropriating client funds "and/or" commingling personal funds "and/or" using the client trust accounts for personal purposes. This "and/or" language in the notice cannot be used to establish respondent's culpability of misappropriation based solely on admitted allegations by default.

[5b] The proof offered by the examiner shows that respondent did use his trust accounts for personal purposes, contrary to rule 8-101(A). **[8]** Although the examiner argued that respondent had misappropriated client funds, he introduced no proof that client trust funds were in the account when respondent wrote the dishonored checks. As noted *ante*, there is no evidence in the record to establish that the monies in the trust accounts were client funds. Moreover, these accounts were closed during the major part of the time period identified in the notice to show cause. The respondent could not be found to be misappropriating client funds from a closed and empty account.

[5c] Therefore, we find that respondent wilfully violated rule 8-101(A) by using client trust accounts for personal purposes, but that he did not attempt to misappropriate client funds.

2. Misrepresentation and Failure to Cooperate

[9] In cases such as this, where the State Bar has the burden of proof, the examiner is obligated to produce sufficient evidence, which may take many forms, to permit the State Bar Court to make adequate determinations and, when required, appropriate recommendations to the Supreme Court as to discipline. (Rule 402, Rules Proc. of State Bar.)

On the issue of respondent's alleged misrepresentation, the examiner had in evidence the respondent's admission by default, as well as the

declaration by the investigator. (Exh. 6.) In addition, the examiner properly offered testimony calculated to allay the referee's concern that the investigator's description of respondent's phone call did not give a proper foundation in the declaration for identifying respondent as the caller. The varying nature of the investigator's testimony (before and after his recollection was refreshed) apparently cast doubt in the referee's mind as to the strength of that evidence to support the charge in count 5 that respondent had misrepresented to the investigator that he *had* changed his State Bar address. **[10]** The taking of evidence negating such allegations permitted the referee to reject the allegations based on a conflict between the admission and the evidence adduced at trial. (See *Riddle* v. *Fiano* (1961) 194 Cal.App.2d 684 [refusing to reverse a trial court's ruling that evidence adduced by the plaintiff in proving a default negated the admitted allegations of the complaint].) **[1b]** Since we do not have the opportunity to observe the demeanor of witnesses, our rules require us to give great weight to the referee's action in resolving matters of testimonial credibility. (See *ante*.) **[11]** Further, reasonable doubts in proving a charge of professional misconduct must be resolved in the accused attorney's favor. (See *Ballard* v. *State Bar* (1983) 35 Cal.3d 274, 291.) On this record, we cannot say that the referee's resolution of evidence was an abuse of his discretion. Therefore, we do not find sufficient evidence in the record as a whole to support the conclusion that respondent misrepresented facts to the State Bar.

As to the charge of failing to cooperate with the State Bar in its investigation (count 6), the examiner correctly focused on the investigator's conversation with respondent and confirming letter dated May 3, 1988, which enclosed the investigation letter concerning the Horwitz complaint. The conversation, coupled with the letter to respondent's latest address,[8] would be sufficient notice of the inquiry and of his obligation to cooperate under Business and Professions Code subsection 6068 (i). His undisputed failure to respond constitutes a violation of subsection 6068 (i). Nothing concerning the investigator's varying testimony undercuts a finding of culpability here.

In sum, we find that respondent:

1. Committed acts involving moral turpitude and dishonesty contrary to Business and Professions Code section 6106 by issuing four checks on his personal bank accounts between June 1987 and April 1988 without sufficient funds available for them to be honored. (Count 1.)

2. Committed acts involving moral turpitude and dishonesty contrary to Business and Professions Code section 6106 by issuing three checks on client trust accounts between September 1987 and February 1988, when those accounts were either closed or did not contain sufficient funds for the checks to be honored. These acts do not constitute a misappropriation or commingling of client funds, in violation of rule 8-101. (Count 2.)

3. Used his client trust accounts for personal purposes, contrary to rule 8-101(A), by issuing three checks on his client trust accounts between September 1987 and February 1988 to satisfy personal obligations. (Count 3.)

4. Failed to maintain his current office address with the official membership records of the State Bar, in violation of Business and Professions Code section 6068 (j). However, contrary to the referee's conclusion, this misconduct does not constitute a violation of Business and Professions Code section 6103. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815.) (Count 4.)

5. Has not been shown to have misrepresented facts to the State Bar during its investigation into this matter. (Count 5.)

6. Failed to cooperate with the State Bar in its investigation, contrary to Business and Professions

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8. The subsequent letters of inquiry on the three additional complaints were sent to the Eddy Street address, rather than to San Anselmo. Because the investigator knew respondent was no longer at the Eddy Street address, those letters would not constitute notice to him of the additional complaints and thus we find no additional culpability based on those complaints.

Code section 6068 (i), by failing to respond to the inquiries of the State Bar investigator, specifically, to the investigator's May 3, 1988 letter seeking information on the Horwitz complaint. (Count 6.)

E. DISCIPLINE

Looking to the Standards for Attorney Sanctions for Professional Misconduct ("standards"), the most severe specific standard applicable to the misconduct found is standard 2.3 (misconduct involving moral turpitude, fraud dishonesty and concealment). That standard provides for disbarment or actual suspension depending on the extent of the harm to the victim, the magnitude of the misconduct, and the degree to which it relates to acts within the practice of law.

The examiner argues that the findings in this case compel disbarment. When the respondent issued seven checks over a period of less than one year on either closed trust accounts or overdrawn personal accounts, to pay for personal obligations, his conduct constituted a pattern of dishonesty and moral turpitude. Under the argument advanced by the examiner, the use of the closed trust accounts closely binds respondent's conduct to the practice of law, although no clients were involved or demonstrably injured by respondent's actions. Respondent failed to pay approximately $400 to two of the complainants and restitution to the other two creditors was secured only after legal proceedings were initiated. His failure to cooperate with the State Bar investigation and State Bar membership records is compounded by his failure to appear at the instant proceedings. In mitigation, respondent has no prior record of discipline in 16 years of practice.

The examiner cited case law in his brief and argument to support his position for disbarment. However, the cases cited all involve facts, circumstances and misconduct of a far more serious magnitude than we have found in this case. In contrast, the examiner did not cite a recent case in which, as here, NSF checks were the heart of the case, *Rhodes* v. *State Bar* (1989) 49 Cal.3d 50. In *Rhodes*, the primary allegations against the attorney involved his issuance of numerous worthless checks over a four-year period and the use of his trust account for personal purposes. There were several differences from the instant matter. In *Rhodes* there were *additional* counts of attorney-client misconduct. The attorney had a misdemeanor conviction from the issuance of one of the checks in question, as well as a prior disciplinary case which had resulted in imposition of two years of probation. At the disciplinary hearing, Rhodes participated, provided evidence of the effect of personal tragedies and domestic difficulties as mitigating facts, showed remorse, ultimately reimbursed all parties and presented favorable character witnesses. The Supreme Court suspended Rhodes for five years, stayed, with two years actual suspension, and required a showing under standard 1.4(c)(ii) prior to resuming practice. (*Id.* at p. 61.)

In this case, respondent wrote dishonored checks in order to pay personal debts, and thereafter did not cooperate in the State Bar investigation nor appear at his hearing. He engaged in multiple acts of wrongdoing spanning an eight-month period (standard 1.2(b)(ii)) and involving checks totalling over $5,000. The victims had to incur expense to secure repayment and two have yet to be repaid. (Standard 1.2(b)(v)-(vi).) Respondent's brief use of his trust account did relate his misconduct to the practice of law but not in an overly significant way. There is little if any mitigating evidence in the record; however, respondent's lack of a prior record of discipline since admission in 1973 is a factor in his favor. (Standard 1.2(e)(i)); *In re Rivas* (1989) 49 Cal.3d 794, 802.) Respondent has not shown any contrition or paid any restitution. On the other hand, respondent's lack of cooperation and default demonstrate an indifference to the regulatory process, and his obligations under it. While we consider Rhodes's showing in mitigation to be more impressive than this respondent's, we believe that Rhodes's more extensive misconduct and prior record of discipline demonstrate that less of a sanction is needed to fulfill the purposes of professional discipline as to respondent Heiser than was ordered in *Rhodes*.

Therefore, we shall modify the referee's recommendation in this case and we shall recommend the suspension of respondent for one year and until restitution is made, stayed, with two years probation, with conditions to be set forth below but to include an actual suspension of six months and until respondent

has made restitution, plus legal interest, to the remaining victims of his misconduct, David Lewis and K.G. Martin and has furnished the State Bar Court with proof of payment. Probation monitoring and periodic reporting on the office and trust accounts during probation will be required. As separate recommendations, we shall recommend compliance with rule 955, California Rules of Court and his passage of the Professional Responsibility Examination within one year. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 890-891, fn. 8.) **[12]** If respondent is suspended more than two years under these conditions, we will recommend he be required to show his fitness to practice, rehabilitation and present ability and learning in the law before being relieved of suspension. (Standard 1.4(c)(ii); see *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1.)

F. RECOMMENDATION

Accordingly, we recommend to the Supreme Court that respondent, Stephen J. Heiser, be suspended from the practice of law in California for one year, that execution of the order of suspension be stayed and that he be placed on probation for two years upon the following conditions:

(1) Respondent actually be suspended from the practice of law for the first six months of the probationary period and until he (a) makes restitution to Kenneth G. Martin in the amount of $200, plus interest at ten percent per annum from April 29, 1988, and to David Lewis in the amount of $203.50, plus interest at ten percent per annum from February 13, 1988; and (b) furnishes satisfactory proof of such restitution to the Office of the Clerk, State Bar Court, Los Angeles.

(2) If under condition 1 above, respondent is actually suspended from the practice of law in this State for two years or more, that suspension shall continue until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

(3) During the remainder of his probation, he shall comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California.

(4) During the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

(5) That if he is in possession of clients' funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books and other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(i) Money received for the account of a client and money received for the attorney's own account;

(ii) Money paid to or on behalf of a client and money paid for the attorney's own account; and

(iii) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

(c) That respondent has maintained a permanent record showing:

(i) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(ii) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(iii) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held, and

(iv) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients.

(6) That respondent be referred to the Department of Probation, State Bar Court, for the assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with the terms of this probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar;

(7) During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by section 6002.1;

(8) That, except to the extent prohibited by the attorney client privilege and the privilege against self-incrimination, he shall answer fully, promptly, and truthfully to the Presiding Judge of the State Bar Court, her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation; and

(9) That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective.

Further, during the first year of his probation, or if respondent should be actually suspended in excess of one year, during the period of his actual suspension, we recommend that respondent be required to take and pass the Professional Responsibility Examination given by the National Conference of Bar Examiners, and provide proof thereof to the Office of the Clerk, State Bar Court.

Finally, we recommend that respondent be required to comply with rule 955, California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days respectively, after the effective date of the Supreme Court's order in this case.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JESS TRILLO

A Member of the State Bar

[No. 85-O-13726]

Filed May 3, 1990

SUMMARY

Respondent was hired by two clients to pursue a civil matter for both of them and a wage claim against the same parties for one of the clients. Respondent rendered some services on the wage claim, but thereafter ceased to perform services and failed to communicate with the clients. He also misrepresented to his clients that he was a partner in a law firm, and misappropriated unearned advanced attorney's fees and costs. The hearing referee recommended disbarment. (Burton R. Popkoff, Hearing Referee.)

The review department modified the referee's findings and conclusions, and concluded that the referee's disbarment recommendation was excessive. Instead, it recommended a three-year stayed suspension, three years probation, and actual suspension for one year and until respondent makes restitution to his clients.

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: No appearance (default)

HEADNOTES

[1] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
Only violations of the Rules of Professional Conduct that are wilful are grounds for discipline. Where hearing referee's decision did not expressly state that respondent's rule violation was wilful, but referee's comments indicated conclusion of wilfulness, review department regarded referee as having found violation to be wilful.

[2] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Under rule 453(a) of the Transitional Rules of Procedure, the review department independently reviews the record; that is, the review department treats the findings of the hearing referee as recommendations to it and may make findings or draw conclusions at variance with those of the

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

referee. This type of review requires the review department to examine the record independently and reweigh the evidence and pass upon its sufficiency. As to any matter resolving issues concerning testimony, the review department gives great weight to the hearing referee who saw and heard the witness.

[3] **106.20 Procedure—Pleadings—Notice of Charges**
107 Procedure—Default/Relief from Default
192 Due Process/Procedural Rights
221.00 State Bar Act—Section 6106
545 Aggravation—Bad Faith, Dishonesty—Declined to Find
Where notice to show cause did not charge that respondent misrepresented to his clients the status of their claims, and respondent defaulted and did not appear at hearing, the review department declined to find, based on client's testimony at hearing, that respondent had committed act of dishonesty by making such misrepresentation. The review department is most reluctant to consider, even for the purpose of aggravation, misconduct which could have been, but was not charged in notice to show cause, especially where respondent is in default and has no opportunity to learn of or rebut matters arising during hearing.

[4 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Respondent wilfully failed to provide legal services competently, where although respondent's attention was repeatedly directed to clients' legal needs for which he had accepted significant advanced fees and costs, respondent failed to provide promised services for a year, resulting in prejudice to clients due to defendant's bankruptcy.

[5] **410.00 Failure to Communicate**
Attorney's failure periodically to communicate with clients, standing alone, warrants discipline.

[6] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Where attorney was hired to handle two matters, but retainer agreement made clear that advanced fee was attributable only to one of the matters, attorney was obligated to return entire advanced fee after failing to perform any services on that matter, even though attorney did perform some services on the other matter.

[7 a, b] **163 Proof of Wilfulness**
280.00 Rule 4-100(A) [former 8-101(A)]
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Respondent's admission to a State Bar investigator that he misused advanced costs given to him by his clients and failed to place them in a trust account, and his clients' testimony that he did no work on the matter for which the costs were advanced and failed to refund or account for the advanced costs, established respondent's wilful violation of his duties to hold the funds in a trust account, to render an accounting for the funds, and to refund them on request.

[8] **221.00 State Bar Act—Section 6106**
Respondent's false representation to his clients that he was a partner in a law firm and respondent's conversion of advanced attorney's fees and costs without performing any services were acts of dishonesty.

[9] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
420.00 Misappropriation
An attorney's conversion of advanced attorney's fees and costs without performing any services is regarded most seriously by the Supreme Court. Taking money for services not performed or not to be performed is close to the crime of obtaining money by false pretenses.

[10] **802.30 Standards—Purposes of Sanctions**
Review department recommends professional discipline not to punish, but to protect the public, courts and legal profession, to preserve public confidence in the profession and to maintain professional standards.

[11] **822.39 Standards—Misappropriation—One Year Minimum**
824.10 Standards—Commingling/Trust Account—3 Months Minimum
Even though only one matter was involved, respondent's misconduct was serious; misappropriation of advanced costs alone could result in recommendation of at least one year of actual suspension, and abdication of trust account responsibilities could warrant three month actual suspension.

[12] **725.32 Mitigation—Disability/Illness—Found but Discounted**
Where there was evidence that respondent was ill during the time period in which misconduct occurred, but there were no details of duration or extent of illness or how it may have accounted for respondent's misconduct, illness was not considered to be a mitigating factor.

[13] **107 Procedure—Default/Relief from Default**
615 Aggravation—Lack of Candor—Bar—Declined to Find
Where respondent admitted many of the serious charges against him during State Bar investigation, review department declined to find failure to cooperate with State Bar as aggravating factor, despite respondent's failure to participate in proceedings against him.

[14] **543.10 Aggravation—Bad Faith, Dishonesty—Found but Discounted**
Respondent's false representation to his client that he was a partner in a law firm was not appropriately considered as aggravating factor because it was already the basis for finding respondent culpable of dishonesty.

[15] **1091 Substantive Issues re Discipline—Proportionality**
1092 Substantive Issues re Discipline—Excessiveness
Recommendation of disbarment for misconduct in single matter, involving failure to perform services, misappropriation of advanced fees and costs, trust fund violation, and misrepresentation to clients was excessive when viewed in the context of decisions of the Supreme Court.

[16] **176 Discipline—Standard 1.4(c)(ii)**
Where review department recommended that respondent be suspended for one year and until respondent made restitution to clients, review department also recommended that if respondent was suspended for more than two years, he be required to make showing required by standard 1.4(c)(ii).

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106—Deliberate Dishonesty/Fraud
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found

221.50 Section 6106
277.55 Rule 3-700(D)(1) [former 2-111(A)(2)]

Aggravation

Found

521 Multiple Acts
582.10 Harm to Client
601 Lack of Candor—Victim

Mitigation

Found

710.10 No Prior Record

Discipline

1013.09 Stayed Suspension—3 Years
1015.06 Actual Suspension—1 Year
1017.09 Probation—3 Years

Probation Conditions

1021 Restitution
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing
1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, J.:

A hearing referee of the State Bar Court has recommended that Jess Trillo ("respondent"), a member of the State Bar since 1974 with no prior record of discipline, be disbarred. Respondent did not answer the formal charges and his default was properly entered. (Rules Proc. of State Bar, rules 552.1, et seq.)

We review this matter at the request of the State Bar examiner ("examiner"). (Trans. Rules Proc. of State Bar, rule 450(a).) The examiner contends that the hearing referee ("referee") failed to make certain findings and conclusions warranted by the record. Commendably, the examiner also points out that the referee's disbarment recommendation may be excessive. As we shall discuss, our independent review of the record has led us to conclude that the referee should have made the additional findings and conclusions requested by the examiner and we shall make those findings we deem appropriate. We shall also delete one of the referee's findings as not within the formal charges. Finally, we have concluded that the referee's recommendation of disbarment is excessive and we shall recommend a three-year suspension, stayed, on conditions including actual suspension for one year *and until* respondent makes restitution to his clients of $2,500 of unearned fees and costs, together with interest. We shall also make other recommendations customary in such suspension matters and set them forth fully at the end of this opinion.

1. THE CHARGES

On January 23, 1989, the notice to show cause (formal charges) was filed in this matter. It was properly served by certified mail on respondent's current address of record. (Exhs. 1 and 2; see also proofs of service attached to notice to show cause; Bus. & Prof. Code, § 6002.1 (c).)

The notice to show cause charged that in August 1984, respondent was hired by two clients to file a civil action for monies they had invested in a business venture. Respondent was also hired to pursue a claim filed by one of the clients with the Labor Commissioner for back wages. The clients advanced respondent $500 as costs and $2,350 as attorney fees. In late March 1985, one of the clients received a labor commission award of $9,250 for wages owed. Respondent represented to his clients that he would take action to enforce that award but failed to perform the services for which he was hired and failed to communicate with his clients despite their attempts to contact him. Respondent allegedly misrepresented to his clients that he was a partner in a law firm and he failed to refund to the clients their unearned legal fees. Moreover, respondent failed to deposit and maintain in his trust account the advanced costs and fees and misappropriated the funds to his own use. Respondent was alleged to have violated his duties in wilful violation of Business and Professions Code sections 6068 (a) and 6103; to have violated section 6106 of that Code and the following (former) Rules of Professional Conduct of the State Bar: 2-111(A)(2), 2-111(A)(3), 6-101(A)(2), 8-101(A) and 8-101(B)(1), (3), (4).[1]

2. THE EVIDENCE

Since respondent's default was entered for failure to answer the notice to show cause, the charges of that notice were admitted (Bus. & Prof. Code, § 6088; rule 552.1(d)(iii), Rules Proc. of State Bar), but a trial hearing was nonetheless held. At the default trial, one of the clients who hired respondent, Ms. Hortense Casillas, an accountant, testified. In addition, the referee received documentary evidence, several items of which were authored by respondent and given to Casillas. That evidence shows:

1. All references to the Rules of Professional Conduct are to the former rules in effect between January 1, 1975, and May 26, 1989, and which apply to respondent's conduct. (See *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1113, fn. 3.) Unless otherwise noted, these rules will be cited as "rule" or "rules". As pertinent, the rule 2-111(A)(2) and (3) charges concern respondent's withdrawal from employment without returning the clients' property and unearned fees paid in advance, the rule 6-101(A)(2) charges concern his failure to perform legal services competently and the rule 8-101 charges concern his failure to handle properly monies advanced to him for costs.

In 1984, Casillas, together with the other client, Ms. Alberta Lee Klein, were in the apparel manufacturing business together. The clients needed legal counsel, for they had a dispute with two other people involved in the apparel business, a Mr. and Mrs. Palacios (also relatives of Casillas). The clients had invested jointly about $22,000 in the Palacios' business and wanted to recover their monies. In addition, Klein had a back wage claim against one or both Palacios. A relative of Casillas referred the clients to the law firm of Alexander and Hughes. A secretary of the law firm told Casillas that the clients would be meeting with respondent who was a "junior partner" of that firm whom Mr. Michael Alexander of the law firm had assigned to meet with clients. (R.T. pp. 7-10, 19.) Later respondent also told clients that he was a "junior partner." However, the senior partner of the firm, Alexander, also told Casillas later that respondent was not a partner but was either an associate or was only "renting space" from the Alexander and Hughes firm. (R.T. pp. 41, 44-46.) The clients first met with respondent on August 10, 1984. Respondent said that, based on initial discussion, he thought the clients had a good case but he would have to discuss the case with Alexander before accepting it. (R.T. p. 10.)

The clients returned to respondent's office on August 15, 1984. Respondent told them he would take the case and he asked for two separate checks for the clients' suit against the Palacios to recover investment monies: a $500 check for court costs and a $2,000 advance retainer. Respondent requested that the checks be made out to respondent himself (not the firm of Alexander and Hughes) in order to "expedite things." (R.T. pp. 11-17; exhs. 4 and 5.) That same day, respondent gave the clients a retainer agreement acknowledging receipt of the total sum of $2,500, acknowledging that $500 of that sum was to be for "Court Costs," that respondent's work above the $2,000 "minimum fees" was to be at the rate of $100 per hour and that this money was for legal action against the Palacios (not for the labor claim). The fee agreement respondent gave to the clients showed that they were retaining respondent only (not the law firm of Alexander and Hughes). (Exh. 3.)

On October 2, 1984, a lawyer representing the Palacios sent a letter to clients seeking to resolve their dispute. (Exh. 7.) Casillas gave the letter to respondent. Respondent told the clients not to worry; that he would answer it. However, respondent did no work on the matter. He did tell the clients about ten times that he had prepared or was preparing a draft of a lawsuit and that all it needed was the clients' signature on it. (R.T. pp. 24-25, 27-28.)

At some point, the clients learned that respondent's strategy was to pursue the labor claim first for back wages. If that were successful, Respondent would then pursue the civil matter. (R.T. p. 28.)

In March 1985, respondent represented Klein in obtaining a favorable outcome on the labor claim. After getting that resolved, respondent was to seek a writ of attachment against Palacios' property in order to seek to collect the claim. (R.T. pp. 30-31, 35-36.)

Between March and July 1985, the clients tried at least three times a week to reach respondent but they were not successful. Since Casillas was related to one of the Palacios, she had heard family talk that Palacios might file bankruptcy. (R.T. pp. 30-31, 35-36.)

At some unstated time which appears to be between March and June 1985, respondent told Klein that he was in the process of pursuing the civil action against Palacios and Klein gave respondent $350 more which he said he needed for fees for services for this work. (R.T. pp. 35-36; exh. 9.)

In June 1985, the clients had difficulty locating respondent. Even the law office secretary at the firm of Alexander and Hughes did not know respondent's whereabouts. In July 1985, clients received a very apologetic letter from respondent that he was unable to meet with them. The letter referred to the past week or so as the "most miserable" of his existence, related various health problems, nausea and dizziness he had suffered and scheduled a meeting a few days later with the clients. (R.T. pp. 33-35, 39; exh. 8.) Respondent kept his promise to meet with the clients and repeated that he was very sick and he cried during the meeting; but told the clients they should not worry because Mr. Alexander was ready to go in immediately and do everything that needed to be done to represent the clients. (R.T. pp. 34-35.)

Between July 18 and August 5, 1985, the clients were again unable to reach respondent but they were able to set up a meeting with Alexander, partner of the firm of Alexander and Hughes. At this meeting, respondent was also present. During this meeting, which took place sometime between August 5 and August 14, 1985, Alexander laid out an entire course of action that he would take to pursue the labor claim and the civil action against Palacios. During this meeting, respondent never denied Alexander's statement that he (respondent) had never been a partner of the firm. Alexander apologized to the clients for the inaction of his office, referred to the conduct of the office as having been "totally remiss and negligent" for having done absolutely nothing to proceed in the matter of the civil claim against Palacios. (R.T. pp. 43-46.)

After another month or two passed without hearing any word from respondent or Alexander, the clients returned to Alexander's office and confronted him again. On this occasion, the clients saw respondent in the office but he was in the process of calling the clients to tell them that he (respondent) would not be able to attend the meeting. Alexander told the clients that they could ask that someone else take over their representation and he let the clients look at the file. Casillas, an accountant, saw that all the papers had just been thrown into two boxes and that the so-called "file" was a "mess." She saw no evidence that any work had been done and no draft of any suit, correspondence that had been sent by respondent or his office or any other work. On September 8, 1985, the clients wrote to the firm of Alexander and Hughes stating that no services had been performed on their behalf with regard to pursuing the civil claim against Palacios and requested the refund of $2,850 given Respondent.[2] (R.T. pp. 47-51; exh. 9.)

According to Casillas, she never received any refund nor any further contact from respondent. She testified that Klein attempted unsuccessfully to pursue the labor award earlier rendered in her favor by hiring a new attorney who handled bankruptcy matters but the new attorney told her that nothing further could be done and Alexander had told her the same thing in August or September of 1985, since the Palacios did file bankruptcy as Casillas had predicted. (R.T. pp. 53-54.)

In November 1988, two months before the notice to show cause issued, a State Bar Office of Trial Counsel attorney (not the examiner in the case) met with respondent regarding this complaint. In that conversation, respondent admitted that he had received advance fees and costs, that he cashed the check and spent the proceeds for his own use instead of depositing the monies in a client trust account. Respondent also stated that he did not have a client trust account in August 1984, and that he did not have one at the present time (November 1988). Respondent stated that he did not incur any costs on behalf of his clients except "maybe $50.00." (Exh. 10.)

After presenting the above evidence, the examiner recommended to the hearing referee that respondent be suspended for three years, stayed on conditions of probation including actual suspension for one year. (R.T. pp. 63-64.)

3. THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS

a. The Referee's Initial Decision.

The referee filed his initial decision on July 21, 1989. In substance, he made the following ultimate findings and drew the following conclusions from those findings:

Respondent knew of misrepresentations that had been made that he was a junior partner of the firm of Alexander and Hughes. (Finding 3.) In August 1984, clients retained respondent, not the firm of Alexander and Hughes. (Finding 4.) Respondent received $2,000 in advance attorney fees and $500 in advanced costs, deposited all of those monies in his

2. Effective February 4, 1989, Alexander's resignation was accepted by the Supreme Court with disciplinary charges pending. (Bar Misc. No. 5995.)

personal bank account and converted the entire sum. (Findings 5-6.) Respondent failed to perform the services for clients for which retained and failed and refused to promptly communicate with them regarding the status of their matters. (Findings 7-8, 10.) In July 1985, respondent "falsely and fraudulently" represented that work for the clients was ready about June 18, 1985. (Finding 9.) Respondent failed and refused to refund his clients the $2,500 of advanced fees and costs despite the clients' demands. (Finding 10.)

In mitigation, the referee found that respondent had no prior record of discipline in 14 years of practice. In aggravation, the referee found that respondent did not cooperate with the clients or the State Bar, his misconduct was compounded by bad faith and misrepresentations to clients and his failure to perform services caused his clients irreparable harm since the limitations periods on their claims expired. (Hearing referee's decision, p. 5.)

The referee concluded that respondent violated rule 2-111(A)(2),[3] **[1 - see fn. 3]** wilfully violated rule 8-101(A) and violated his oath and duties as prescribed by Business and Professions Code sections 6068 (a) and 6103. The referee did not relate his conclusions to the specific findings (see, e.g., *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 968); however, he did briefly indicate the manner in which respondent committed the cited violations. Although the referee found and concluded that respondent had misrepresented his status as a law firm partner, he failed to conclude that that act was one of dishonesty or moral turpitude. (Bus. & Prof. Code § 6106.) Further, although the referee found that respondent had failed to refund unearned fees paid in advance, the referee drew no conclusion as to whether that act violated rule 2-111(A)(3) even though the referee had concluded that respondent violated rule 2-111(A)(2). Finally, although the referee found that respondent failed to refund to the clients costs he did not earn, the referee drew no conclusion as to whether that act was a wilful violation of rule 8-101(B)(4).

The referee stated that while this case was not "extraordinarily egregious," disbarment was appropriate when viewed in the context of respondent's misrepresentations of his status and the absence of any compelling mitigating circumstances. (Decision, p. 7.)

b. The Referee's Modifications to His Decision.

On August 4, 1989, the examiner requested that the referee reconsider his decision. The examiner urged that the referee's findings warranted additional conclusions of law and that his recommendation of disbarment was excessive under case law. The examiner reasserted his earlier recommendation for probationary suspension including one year actual suspension and he cited decisions of the Supreme Court in support of his position.

On October 23, 1989, the hearing referee ruled on the examiner's reconsideration request. He concluded that respondent wilfully violated rules 2-111(A)(2) and 8-101(B)(3). He also concluded that respondent violated Business and Professions Code section 6106 on account of his having falsely misrepresented to his clients the status of their matter—a subject not charged in the notice to show cause. However, he declined to conclude that respondent violated rule 8-101(B)(4), because he concluded that there was no evidence as to what portion of the $500 paid to respondent as costs were not used for that purpose. Since the referee found that the evidence showed respondent pursued the labor claim of Klein, he concluded that respondent performed some services for clients and was unable to determine if any part of the $2,000 in fees had been earned. Therefore, the referee could not conclude that respondent violated rule 2-111(A)(3).

As to the recommendation of discipline, the referee considered the authorities cited by the examiner, incorrectly referred to the decision in *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357 as ordering

3. **[1]** Although the referee's initial decision of July 21, 1989, referred to "rule 1-111 (A) 2)" he meant rule 2-111(A)(2). (See referee's ruling on request for reconsideration, filed October 23, 1989, p. 1.) From his comments on page 6, lines 4-6 of the July decision, we regard his conclusion that respondent violated rule 2-111(A)(2) as wilful, although not expressly so stated. (See Bus. & Prof. Code, § 6077; rule 1-100, Rules Prof. Conduct [only "wilful violations" of the rules are grounds for discipline].)

disbarment and, while unable to conclude whether or not respondent misappropriated any of the $2,000 in advance fees, concluded that he (the referee) was not comfortable reducing his earlier recommendation of disbarment, believing that if that reduction were to be made in this case, the Supreme Court should be the body to do it.

The examiner's request to us for review followed.

4. DISCUSSION

a. The Scope of Our Review.

We begin our analysis with the principles governing our review. [2] Our review is independent; that is, we treat the findings of the hearing referee as recommendations to us and we may make findings or draw conclusions at variance with those of the hearing referee. (Trans. Rules Proc. of State Bar, rule 453(a).) The type of review we conduct requires that we: 1) independently examine the record; and 2) reweigh the evidence and pass upon its sufficiency. (See *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 843.)

As to any matter resolving issues concerning testimony, we properly give great weight to the hearing referee who saw and heard the witnesses. (Trans. Rules Proc. of State Bar, rule 453(a); see *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 929.) Here there are no real conflicts in testimony. The testimony of the only witness, Casillas, one of the clients, was consistent with the documentary evidence.

More significantly, since this case proceeded by way of default entered for respondent's failure to answer the notice to show cause, the charges of that notice are deemed admitted. (Rules Proc. of State Bar, rule 552.1(d)(3).) In the hearing below, the documentary and testimonial evidence was consistent with the admitted charges and served to explain them.

b. The Appropriate Findings and Conclusions.

Upon our independent record review, except for the points we note, we conclude that findings of fact 1-11 of the hearing referee as contained on pages 1-5 of his *original* decision filed July 21, 1989, are supported by the record. Except for the following few changes below, we adopt those findings as our own.

To finding of fact 3 (decision, p. 2), we add the following phrase at the end of the text of that finding: "and he personally misrepresented that he was a partner of that law firm." This amended finding is established by respondent's admission by default of the third paragraph of the notice to show cause as well as the testimony of Casillas at the hearing.

To finding of fact 4 (decision, p. 2), we add the following sentence: "That retainer agreement covered respondent's representation only as to the clients' claims against the Palacios arising from the business venture."

To finding of fact 5 (decision, p. 3), we add the following sentence: "The costs and fees clients advanced respondent covered respondent's representation only as to the clients' claims against the Palacios arising from the business venture."

Our amendments to findings 4 and 5 are established by respondent's own retainer agreement with the clients, supplemented by Casillas' testimony.

[3] From finding of fact 9 (decision, p. 4), we delete the last sentence: "At that time Respondent falsely and fraudulently represented that 'everything' regarding the claims of Ms. Casillas and Ms. Klein against Palacios had been ready to go on or about June 18, 1985." While Casillas' testimony was to the effect that at this meeting, respondent did tell her that he had done work in the matter, the notice to show cause did not charge him with deceiving his clients in this manner. Especially in the case of a default, as here, where the accused attorney has no opportunity to learn of or rebut matters which arise during the hearing, we are most reluctant to consider, even for the purpose of aggravation, conduct which could have been, but was not charged in the notice to show cause.

In sum, the factual findings we adopt show that the clients retained respondent in 1984 to prosecute their civil action against the Palacios and advanced

them $2,000 in fees and $500 in costs. They also hired respondent to pursue a labor claim of Klein against Palacios. Respondent performed no services with regard to the civil matter and, after getting a judgment in the labor claim, did not pursue the matter further despite being requested to do so by Klein. At times, he also failed to promptly communicate with his clients and he misrepresented to them his status as a law firm partner. He failed to keep the $500 of costs advance in a required trust account and converted it instead of using it for the clients' benefit. He also failed to earn any part of the $2,000 in advance fees and returned none of it to the clients.

We turn now to the proper conclusions to draw from the factual findings of respondent's misdeeds. At the outset, we observe that respondent's misconduct toward his clients was indeed serious. It shows that respondent violated several of the minimum standards of attorney conduct in this state.

[4a] The referee below adopted no conclusions on whether respondent's conduct violated rule 6-101(A)(2) as charged. The examiner urges that respondent's conduct did violate that rule. We agree. It is clear from the findings of the referee below which we have amended and adopted (decision, findings 7-10) that respondent wilfully violated the rule. (E.g., *Farnham* v. *State Bar* (1988) 47 Cal.3d 429, 439-446.) **[5]** His failure periodically to communicate with his clients, standing alone, would warrant discipline. (*Mepham* v. *State Bar* (1986) 42 Cal.3d 943, 949-950.) **[4b]** Respondent's attention was repeatedly directed to his clients' legal needs for which he accepted significant advance fees and costs and he failed to provide the promised services for a period of a year. Such delay appears to have substantially prejudiced the clients' legal rights because of the bankruptcy of the defendant.

[6] We also agree with the examiner that, contrary to the referee's conclusion, respondent's acts show that he wilfully violated rule 2-111(A)(3) by refusing to return to the clients their unearned fees and we so conclude based on the referee's findings 5, 7, 10 and 11 which we have adopted as amended. (*Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 903.) The referee declined to so conclude based on his belief that it appeared that respondent performed some services and the referee could not determine the amount of the $2,000 in advance fees unearned. (Referee's ruling on reconsideration, pp. 1-2.) When we examine the entire record, we see that while respondent appears to have performed some services in handling Klein's labor claim, it is also clear from respondent's own retainer agreement covering the $2,000 clients advanced him that that sum was *solely for the civil matter.* It is equally clear that he performed no services in that matter. Contrary to the referee's conclusion, we do not conclude that respondent violated rule 2-111(A)(2). (See *Slavkin* v. *State Bar, supra.*)

[7a] The examiner is also correct that respondent's misconduct shows his wilful violation of rule 8-101(B)(4) by failing to promptly pay at the clients' request, the $500 they had given him as costs, which he never used as directed. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 817.) This conclusion follows from the referee's findings 5, 6, 7, 10 and 11 which we have adopted as amended. The referee declined to conclude that respondent violated rule 8-101(B)(4) because there was no evidence as to what portion of the $500 respondent did not expend. As in the case of the $2,000 advanced fees, his receipt of the $500 in costs was solely for the civil action, not the labor claim. His own admission to the State Bar that he misused these costs, coupled with Casillas' testimony that respondent did no work in the civil case, and failed to refund the costs justifies the conclusion that respondent wilfully violated rule 8-101(B)(4). This same conduct also justified our conclusion that, as charged, respondent wilfully violated rule 8-101(B)(3) since he has never accounted to the clients for the costs he received from them.

[7b] Also justified is the referee's conclusion which we adopt that respondent's conduct was a wilful violation of rule 8-101(A). That rule on its face commands that all funds held for a client's benefit, including the costs respondent received, be placed in a proper trust account. Respondent admitted during the State Bar investigation that he did not do so. (See referee's findings 5, 6 and 11, which we have adopted as amended.)

[8] Finally, we conclude that respondent committed acts of dishonesty in violation of Business and

Professions Code section 6106 but not for the reasons given by the referee that he deceived his clients that he had performed services for them. As we have discussed, that conduct was uncharged and we have deleted the referee's finding. Rather, our conclusion that respondent acted dishonestly rests on the referee's findings 3, 5-6, 10 and 11 which we have adopted as amended showing, respectively, respondent's misrepresentation concerning his partnership status and his conversion of advance fees and costs without performing any services. [9] The latter conduct has been regarded most seriously by our Supreme Court. (E.g., *Matthew* v. *State Bar* (1989) 49 Cal.3d 784, 791; *Nizinski* v. *State Bar* (1975) 14 Cal.3d 587, 595; *Hulland* v. *State Bar* (1972) 8 Cal.3d 440, 449.) As the Court stated in *Hulland, supra*: "Surely the legal profession is more than a mere 'money getting trade' [citation]; it at least requires the rendition of services for any payment received. 'Taking money for services not performed or not to be performed is close to the crime of obtaining money by false pretenses.'" (*Ibid.*)

c. The Appropriate Degree of Discipline.

[10] We recommend professional discipline not to punish, but to protect the public, courts and legal profession, to preserve public confidence in the profession and to maintain professional standards. (See Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ("stds."), std. 1.3; e.g., *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117.)

[11] Although only one matter is involved, as we have noted, respondent's misdeeds were serious. His misappropriation of client trust funds (advanced costs), standing alone could result in our recommendation of a minimum of one-year actual suspension. (Std. 2.2(a); see also *Pineda* v. *State Bar* (1989) 49 Cal.3d 753, 759.) Moreover, his admitted abdication of trust account responsibilities could, itself, warrant recommendation of at least a three-month actual suspension. (Std. 2.2(b).) His deceit of his clients was inexcusable as was his failure to perform any services for his clients in the civil matter against Palacios despite receiving substantial advanced fees and costs.

We find, as did the referee below, that in mitigation, respondent has practiced for more than a 14-year period with no prior record of discipline. (See std. 1.2(e)(i); *In re Rivas* (1989) 49 Cal.3d 794, 802.) [12] While we note from the record that apparently respondent reported to his clients that he was ill during the summer of 1985, he provided no details of its duration or extent or how that illness might have accounted for his misdeeds. (See *Gary* v. *State Bar* (1988) 44 Cal.3d 820, 828.) We therefore decline to consider any evidence of illness to be mitigating here.

However, in aggravation we find, as did the referee, that respondent's failure to perform services harmed the clients. (Std. 1.2(b)(iv).) We also find that respondent has not cooperated with his clients and acted in bad faith toward them. (Std. 1.2(b)(vi).) Indeed, his failure, at this late date to make any restitution of the fees and costs he clearly did not earn or use properly defies understanding and is most reprehensible. [13] We decline to adopt the referee's finding that respondent did not cooperate with the State Bar. He admitted many of the serious charges against him during the bar's investigation. What he did not do is to participate in the proceedings against him, thus making it difficult for the referee below and for us to tailor more precisely a disciplinary sanction that might best assure public protection. [14] We also decline to adopt the referee's findings in aggravation that respondent made misrepresentations to his clients. We have already adopted such a finding of culpability and do not believe it appropriate to assign aggravation to the identical conduct. However, we do find in aggravation that respondent's misconduct involved multiple acts of wrongdoing. (Std. 1.2(b)(ii).)

We have given consideration to the referee's recommendation of disbarment. [15] However, we believe it excessive when viewed in the context of decisions of the Supreme Court. We also believe that the referee's recommendation may have been guided by his mistaken understanding that the Supreme Court's decision in *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357 imposed disbarment rather than the two-year actual suspension which the Court in fact ordered. (See referee's ruling on reconsideration, p. 3.)

In *Lawhorn, supra*, 43 Cal.3d 1357, the attorney's negligence and inexperience surrounded his misappropriation of about $1,355 in trust funds. (*Id.* at pp. 1366-1367.) Only one transaction was involved and the attorney restored the funds with interest about five months later. (*Id.*) The Court imposed a two-year actual suspension as part of a longer probation. (*Id.* at pp. 1368-1369.) Other recent decisions of the Supreme Court have also declined to disbar even in cases where more than one matter was involved of the type in *Lawhorn* or here. Among representative cases, see *Pineda* v. *State Bar* (1989) 49 Cal.3d 753 (five years suspension stayed, two years actual; court would have disbarred but for mitigation; seven client matters over eight-year period including misappropriation); *Gold* v. *State Bar* (1989) 49 Cal.3d 908 (three years suspension stayed, thirty days actual; two matters of failing to perform services and failing to communicate properly with his clients with deceit in one of the matters—25 years of practice and no prior record [three justices would have followed the review department recommendation to actually suspend for 90 days]); *Carter* v. *State Bar* (1988) 44 Cal.3d 1091 (two years suspension stayed, six months actual; two matters of abandonment with misrepresentation); *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894 (three years suspension stayed, one year actual and until rehabilitation proven; two matters [one abandonment, the other deceit to get a loan] occurring over a short time but surrounded by alcohol and cocaine problems showing need for closely supervised probation); *Levin* v. *State Bar* (1989) 47 Cal.3d 1140 (three years suspension stayed, six months actual; two matters involving deceit [one involved settlement of client's injury claim without permission and failure to properly account for funds]; no prior discipline); and *Segal* v. *State Bar* (1988) 44 Cal.3d 1077 (three years suspension stayed, one year actual suspension; four matters of failure to perform services and giving an NSF check with a prior suspension for NSF checks).

The foregoing decisions represent a range of discipline from thirty days actual suspension to two years actual depending on an evaluation of the unique facts in the individual case in light of the goals of imposing discipline. One distinguishing factor is that in almost all cases where our Supreme Court has issued an opinion, the attorney participated at trial in the State Bar Court and most often also participated before the review department. Here, respondent has done neither.

As we shall set forth in full below, we believe the appropriate discipline to recommend is that respondent be suspended from practice for three years, stayed, on conditions of a three-year probation with actual suspension for the first year and until he restores the $2,500 of unearned advance fees and costs to his clients, together with interest. **[16]** If he is suspended for more than two years, we will recommend he be ordered to make the showings required by standard 1.4(c)(ii).

5. RECOMMENDATION OF THE REVIEW DEPARTMENT

For the foregoing reasons, we recommend that respondent, Jess Trillo, be suspended from the practice of law in the State of California for a period of three (3) years; that execution of the order for such suspension be stayed; and that respondent be placed upon probation for said period of three (3) years upon the following conditions:

1. That respondent shall be suspended from the practice of law in the State of California during the first year of his period of probation and until he:

a) makes restitution jointly to Hortense Casillas and Alberta Lee Klein in the total amount of $2,500, plus interest at the rate of ten per cent per annum from September 1, 1984, until paid in full; and

b) furnishes satisfactory evidence of said restitution to the Office of the Clerk, State Bar Court, Los Angeles; if the State Bar Client Security Fund has repaid Casllas or Klein any portion of the $2,500, respondent shall repay that principal amount to the Fund;

2. If under condition 1 above, respondent is actually suspended from the practice of law in this state for two years or more, that suspension shall continue until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct;

3. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

4. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

5. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) Money received for the account of a client and money received for the attorney's own account;

(2) Money paid to or on behalf of a client and money paid for the attorney's own account;

(3) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

(c) That respondent has maintained a permanent record showing:

(1) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(2) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(3) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

6. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall co-

operate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

7. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

8. That, except to the extent prohibited by the attorney-client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, or her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

9. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective;

10. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of three (3) years shall be satisfied and the suspension shall be terminated;

Further, during the first year of his probation, or if respondent should be actually suspended in excess of one year, during the period of his actual suspension, we recommend that respondent be required to take and pass the Professional Responsibility Examination given by the National Conference of Bar Examiners, and provide proof thereof to the Office of the Clerk, State Bar Court;

Finally, we recommend that respondent be required to comply with rule 955, California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days respectively, after the effective date of the Supreme Court's order in this case.

We concur:

PEARLMAN, P.J.,
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JAY ALLEN PETERSON

A Member of the State Bar

[No. 87-O-17586]

Filed May 30, 1990; as modified, September 28, 1990

Motion denied, September 28, 1990 (see separate opinion, *post*, p. 83)

SUMMARY

Respondent failed to perform competently and abandoned his client's interests in three separate client matters, and failed to cooperate in the State Bar's investigation of his conduct. In addition, respondent deceived two clients about the status of their cases. After considering the lengthy time period over which respondent's misconduct occurred, the extensive deceit he practiced on his clients and the harm he caused them, his failure to participate in the State Bar Court proceedings, and the lack of any significant mitigation, the review department adopted the referee's recommended discipline, consisting of three years stayed suspension, three years probation, and one year of actual suspension. (Maynard D. Davis, Hearing Referee.)

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: No appearance (default)

HEADNOTES

[1 a, b] **221.00 State Bar Act—Section 6106**
Attorney's repeated acts of deceit to clients in falsely representing that attorney had filed suit on clients' claims constituted acts of moral turpitude.

[2] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
844.11 Standards—Failure to Communicate/Perform—No Pattern—Suspension
Attorney's failure to perform legal services as agreed, and abandonment of three clients, constituted very serious misconduct.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **521 Aggravation—Multiple Acts—Found**
535.10 Aggravation—Pattern—Declined to Find
842.51 Standards—Failure to Communicate/Perform—Pattern—No Disbarment
844.11 Standards—Failure to Communicate/Perform—No Pattern—Suspension
Abandonment of three clients did not constitute a pattern of abandonment, but did constitute multiple acts of severe disregard of clients' interests.

[4] **221.00 State Bar Act—Section 6106**
541 Aggravation—Bad Faith, Dishonesty—Found
601 Aggravation—Lack of Candor—Victim—Found
833.90 Standards—Moral Turpitude—Suspension
Attorney's repeated, protracted deceit of clients, which had effect of forestalling them from discovering true status of their matters, was perhaps even more serious than harm caused by attorney's inattention to client duties. An attorney's practice of deceit is inimical to the high ethical standards of honesty and integrity required of members of the legal profession and to the promotion of confidence in the trustworthiness of members of the profession.

[5] **213.90 State Bar Act—Section 6068(i)**
Attorney's failure to participate in State Bar's investigation of misconduct was a clear breach of attorney's legal and ethical duties.

[6 a, b] **833.90 Standards—Moral Turpitude—Suspension**
844.11 Standards—Failure to Communicate/Perform—No Pattern—Suspension
844.12 Standards—Failure to Communicate/Perform—No Pattern—Suspension
844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension
Where respondent's misconduct occurred over a period of time, included extensive deceit practiced on clients, and caused harm and expense to clients, and where respondent failed to participate in State Bar proceedings and there was no significant mitigation, appropriate recommended discipline for abandonment and deception of three clients plus failure to cooperate with State Bar investigation was three years stayed suspension, three years probation, and one year of actual suspension.

[7] **107 Procedure—Default/Relief from Default**
172.19 Discipline—Probation—Other Issues
1099 Substantive Issues re Discipline—Miscellaneous
Review department recognized that respondent's default raised concerns regarding respondent's suitability for probation, but concluded that respondent should not be denied opportunity to comply with probation terms which would appear to have rehabilitative benefit.

ADDITIONAL ANALYSIS

Culpability
Found
213.91 Section 6068(i)
221.11 Section 6106—Deliberate Dishonesty/Fraud
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2

Aggravation

Found

582.10 Harm to Client

591 Indifference

Mitigation

Found but Discounted

710.53 No Prior Record

Discipline

1013.09 Stayed Suspension—3 Years

1015.06 Actual Suspension—1 Year

1017.09 Probation—3 Years

Probation Conditions

1022.10 Probation Monitor Appointed

1024 Ethics Exam/School

OPINION

STOVITZ, J.:

Jay Allen Peterson ("respondent"), a member of the State Bar since December 1977 and with no prior record of discipline, was found culpable by a referee of the former, volunteer State Bar Court[1] of professional misconduct showing that he abandoned three client matters between 1984 and 1987, deceived two of those three clients as to the status of their matters and failed to participate in the State Bar investigation into the complaints. Upon recommendation of the State Bar examiner ("examiner"), the referee recommended that respondent be suspended from practice for three years, stayed on conditions of a three-year probation with actual suspension for the first year of that probation.

As this opinion will explain, the principal issue in this matter is the appropriate degree of discipline to recommend. Since our review of the record is independent (Trans. Rules Proc. of State Bar, rule 453(c)), we shall make more detailed findings in some areas than did the hearing referee, while agreeing with his essential findings of fact. As required by our Supreme Court, we will then adopt the appropriate conclusions and relate them to our findings. Finally, we shall recommend the same basic degree of discipline recommended by the referee.

1. PROCEDURAL BACKGROUND.

On January 19, 1989, the State Bar's Office of Trial Counsel started this formal disciplinary proceeding by filing in the State Bar Court a notice to show cause. (Trans. Rules Proc. of State Bar, rule 550.) As prescribed, it was served on respondent by certified mail on his State Bar record address at the time. (See exhs. 1-2; declarations of service attached to notice to show cause dated January 23 and March 6, 1989; Bus. & Prof. Code, § 6002.1 (c).) Although warned in the notice that his default could be entered and the charges admitted if respondent did not timely file an answer to the notice to show cause, respondent failed to file an answer, his default was entered and the charges against him were deemed admitted. (Trans. Rules Proc. of State Bar, rules 552, 552.1(c).)

On June 20, 1989, the referee held a formal hearing on the charges. He received documentary evidence offered by the examiner including six declarations under penalty of perjury of clients, their subsequent counsel or State Bar investigators relating to the charges against respondent. After determining that respondent was culpable of professional misconduct, the referee invited the examiner to offer a recommendation as to discipline. (R.T. p. 14.) The examiner suggested a three-year stayed suspension on conditions including a one-year actual suspension. While initially expressing great concern over the apparent inadequacy of that recommendation, particularly as it squared with the evidence of harm to clients and the duration of respondent's misdeeds,[2] the referee ultimately concluded that harsher discipline would not likely be imposed either by us or the Supreme Court (R.T. pp. 21-22) and he followed the examiner's recommendation.

As expected, the examiner did not seek review of the referee's decision. Nevertheless, as part of the transition to the new State Bar Court system and under rules adopted by the State Bar Board of Governors, effective September 1, 1989, this review department created by Business and Professions Code section 6086.65 and appointed by the Supreme Court, must independently review the record of all such matters considered by former referees of the State Bar Court and assigned to this department after September 1. (Trans. Rules Proc. of State Bar, rules

1. See Bus. & Prof. Code, § 6079, eff. prior to July 1, 1989.

2. The referee stated as follows: "I'm not sure that if I were sitting at [the examiner's] end of the table that I would make a recommendation with quite the degree of generosity you have. I understand and I recognize that the offenses that have been committed by [respondent] are not the most heinous that we've seen coming before the courts. . . . But this is a man who has a course of conduct for three years, perhaps, that we're aware of, of ignoring clients and lying to clients and jeopardizing clients, and has in this case, at least as to the Meadows case and also the last matter, where the man's credit has been messed up as a result of [respondent], and I get very disturbed by this type of conduct, and I'm not sure why a man like this should be allowed to practice." (R.T. pp. 19-20.)

109 and 452(a).) After we reviewed this matter initially "ex parte," we notified the examiner that we had decided to set this matter for oral argument on our own motion. We invited the examiner to address the issue of whether the discipline recommended was adequate and we cited the then recently-filed decision of *Pineda* v. *State Bar* (1989) 49 Cal.3d 753 as an example of our concern. In response, the examiner argued that the discipline recommended by the referee was within an acceptable range for the respondent's offenses as measured by the Standards for Attorney Sanctions for Professional Misconduct and decisional law of the Supreme Court. However, the examiner submitted that this would not militate against still greater discipline.

2. FINDINGS AND CONCLUSIONS.

We first set out the appropriate findings and conclusions which should follow from the charges and record. While supporting the essential findings of fact of the hearing referee, we believe that the record permits us to make the slightly more detailed findings which follow:

a) Meadows Matter—Marriage Dissolution.[3]

In February 1984, Murl Meadows hired respondent to represent him in getting his marriage dissolved. Meadows paid respondent's fee of $400. In March 1985 Respondent represented Meadows at a dissolution trial and the court ordered the decree of dissolution granted.

Respondent promised to prepare the decree for the judge's signature in a few days. He did not do so and Meadows, who could not get an answer from respondent and who apparently moved to Oklahoma, hired an Oklahoma law firm ("new counsel") to try to find out what happened. In 1987, respondent promptly answered new counsel's first letter by asking that Meadows sign an "authorization for release of information." Meadows did so and new counsel returned it to respondent but he ignored the merits of the status request and two more letters from new counsel. Finally, new counsel wrote directly to the San Luis Obispo County Clerk and learned that no final judgment of dissolution had ever been entered for Meadows.

In January 1989 Meadows died and new counsel expressed concern to the State Bar that respondent's inaction in getting Meadows' divorce finalized would complicate the probate of Meadows' estate.

From the foregoing findings showing respondent's agreement to perform services, coupled with his persistent refusal either to complete the promised services over several years or to communicate adequately with Meadows or his new counsel, we conclude that respondent wilfully violated (former) rules 2-111(A)(2) and 6-101(A)(2), Rules of Professional Conduct,[4] but we decline to adopt the referee's conclusion that respondent also violated Business and Professions Code sections 6068 (a) and 6103. (*Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931; *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815.)

b) Hailey Matter—Auto Purchase Dispute.[5]

In March 1984, James Hailey hired respondent to represent him in a dispute with a local auto dealership about the performance of a car Hailey had purchased there. Respondent agreed to take the case on a contingent fee basis and Hailey gave him all the papers (auto contract, repair bills, etc.). Respondent attended a meeting with Hailey and the auto maker's zone representative and Hailey thought the matter could be settled. Then the prospect of settlement fell through and respondent agreed to file suit.

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3. In addition to the charges deemed admitted, the findings in this count were established by exhibits 3 (declaration of Oklahoma lawyer Billie Mickle) and 4 (statement of respondent's client, Murl Meadows).

4. Unless noted, all references to the Rules of Professional Conduct of the State Bar are to the former rules in effect between January 1, 1975, and May 26, 1989 and which apply to respondent's conduct. (See *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1113, fn. 3.)

5. In addition to the charges deemed admitted, the findings in this count were established by exhibits 7 (declaration of James Hailey) and 8 (declaration of Roy A. Hanley, Esq.).

At least two or three times thereafter, respondent misrepresented to Hailey that suit had been filed but due to crowded courts, cases were not being assigned for trial. Meanwhile,[6] on respondent's advice, Hailey stopped making monthly finance payments on the car. As a result, the creditor reported to a credit bureau that Hailey was delinquent and that hurt Hailey in getting other credit. During this time respondent did write a few letters to some creditors explaining the reason why Hailey stopped making payments, but he never wrote to the credit bureau despite promising to do so.

In late 1987—three and one-half years after hiring respondent—Hailey hired another lawyer. Hailey's new counsel found out that no suit had been filed and Hailey's many efforts to make an appointment with respondent were not successful. In early 1988, Hailey spotted respondent in the local area and he was able to talk to him. During that meeting, respondent admitted that he had never filed suit.[7] After this chance meeting with respondent, Hailey never heard from respondent. Hailey was unable to recover his papers from respondent. Hailey's cause of action against the auto dealership was barred by the statute of limitations. The creditor sold Hailey's vehicle and his credit was hurt.

From the foregoing findings showing respondent's agreement to perform services in this matter, coupled with his persistent refusal either to file and pursue the promised lawsuit over several years or to communicate adequately with Hailey or his new counsel, we conclude that respondent wilfully violated (former) rules 2-111(A)(2) and 6-101(A)(2), Rules of Professional Conduct, but we decline to adopt the referee's conclusion that respondent also violated Business and Professions Code sections 6068 (a) and 6103. (*Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931; *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815.) [1a] However, based on the findings showing respondent's repeated acts of deceit to Hailey that he had filed suit when he had not done so, we conclude that respondent violated Business and Professions Code section 6106.

c) Sommers Matter—Another Auto Purchase Dispute.[8]

In August of 1987, Frank Sommers hired respondent over a dispute he was having with a local auto dealer because his vehicle gave him "nothing but problems" since he bought it in 1986. Since Sommers was starting a new business, he needed a reliable vehicle and respondent was aware of Sommers's needs. Sommers paid respondent a $25 consultation fee. Respondent was to bill Sommers for the (unspecified) balance, which would not exceed about $1,000 if Sommers lost at trial. Respondent agreed to do all work needed to resolve the matter, including filing suit. After the first conference, Sommers met with respondent a few more times to discuss the case and Sommers signed a blank form of verification which respondent told Sommers he would file with a complaint in civil court. Sommers followed respondent's advice to return the vehicle to the dealer and cancel Sommers's auto insurance policy on it.

After mid-1987, respondent told Sommers he had filed suit but one of the defendants was hiding behind the "corporate veil" and would have to be served through the state "attorney general's" office. In January of 1988 respondent told Sommers the defendants just answered the suit and Sommers should hear something from the court in "a couple of weeks".[9] Later in 1988 respondent told Sommers there was a delay in the court process but a court date should be set soon. Finally, Sommers personally checked with the court in which respondent said his case was filed

6. The period of time involved here is not clear.

7. According to Hailey's declaration, in early 1988, when respondent admitted he never filed suit, he told Hailey if he wished to sue respondent, he (respondent) could guarantee that Hailey would win and respondent would consider settling with Hailey for $4,000 but would also consider filing for bankruptcy. (Exh. 7.)

8. In addition to the charges deemed admitted, the findings in this count were established by exhibits 5 (declaration of Frank Sommers) and 6 (declaration of Robert B. Lilley, Esq.).

9. All of these contacts were initiated by Sommers.

and found nothing. When Sommers asked respondent about this, respondent said the court made a mistake and respondent would "fix it."

In March 1988 having gotten nothing more from respondent, Sommers went to respondent's office. Respondent's secretary told Sommers he (respondent) didn't have time to handle his case. Sommers hired new counsel and it took him three letters and three months (with Sommers personally "chas[ing] down" respondent) to get the files. When he did get the files, he found them very sketchy with only drafts of complaints and an uuserved notice of rescission of contract. In the file, he saw no copies of correspondence, no receipts, no court case number and no record of expenditures or time spent on the case. Respondent's inaction hurt Sommers's and his new counsel's efforts to prevail. Sommers had to rent or borrow another vehicle since he left his with the auto dealer. Further, the California "lemon law"[10] changed for the worse.

From the foregoing findings showing respondent's agreement to perform services in this matter, coupled with his persistent refusal either to file and pursue the promised lawsuit over several years or to communicate adequately with Sommers or his new counsel, we conclude that respondent wilfully violated (former) rules 2-111(A)(2) and 6-101(A)(2), Rules of Professional Conduct, but we decline to adopt the referee's conclusion that respondent also violated Business and Professions Code sections 6068 (a) and 6103. (*Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931; *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815.) **[1b]** As in the *Hailey* matter, *ante*, based on the findings showing respondent's repeated acts of deceit to Sommers that he had filed suit when he had not done so, we conclude that respondent violated Business and Professions Code section 6106.

d) Failure to Cooperate With or Participate in State Bar Investigations.[11]

Between March and August, 1988, a State Bar investigator sent respondent a total of four letters inquiring about the complaints in each of the three matters discussed above. Each letter was sent by first class mail to respondent's official State Bar address, each letter called attention to Business and Professions Code section 6068 (i) (duty to cooperate and participate in State Bar investigation), none of the letters were returned to the State Bar undeliverable and none were answered by respondent.

From the foregoing findings showing respondent's failure to cooperate or participate in the State Bar investigation in these matters, we conclude that respondent wilfully violated Business and Professions Code section 6068, subdivision (i). For the reasons earlier stated, we decline to conclude that respondent violated section 6103 of that code.

3. DEGREE OF DISCIPLINE.

The findings and conclusions we have adopted show very serious misconduct on respondent's part. **[2]** In three matters, he agreed to perform services, performed some services in two of them but ultimately abandoned his clients' interests in all three. By itself, this misconduct is very serious. (*Gadda* v. *State Bar* (1990) 50 Cal.3d 344, 355; *Matthew* v. *State Bar* (1989) 49 Cal.3d 784, 790-791.) **[3]** While respondent's misdeeds do not constitute a pattern of abandonment (*Levin* v. *State Bar* (1989) 47 Cal.3d 1140; see standard 2.4, Standards for Attorney Sanctions for Professional Misconduct ("std.")), they do constitute multiple acts of severe disregard of clients' interests. Under standard 2.4(b), reproval or suspension is appropriate, depending on the extent of the misconduct and degree of harm to the client. Here, each client found it necessary to retain new counsel to attempt to complete the matters entrusted to respondent and respondent did not cooperate with new counsel in any of the three matters; although, he belatedly turned over Sommers's file after considerable effort by the client. Each client suffered harm because of respondent's abandonments.

[4] Perhaps even more serious than the harm caused by respondent's inattention to his client duties was his dishonesty in the *Hailey* and *Sommers*

10. See Civil Code section 1793.2, subdivision (e), governing the buyer's rights when a warrantied new motor vehicle cannot be repaired after a reasonable number of attempts.

11. In addition to the charges deemed admitted, the findings in this count were established by exhibit 9 (declaration of State Bar investigator Chris Staackmann).

matters. Respondent's deceit was repeated and protracted in both matters. Whether or not it was calculated to do so, it had the effect of forestalling these two clients from discovering the true status of their matters. In *Stanley* v. *State Bar* (1990) 50 Cal.3d 555, 567, the Court recently described the attorney's practice of deceit as "inimical to high ethical standards of honesty and integrity required of members of the legal profession and to promoting confidence in the trustworthiness of members of the profession." The applicable portion of the Standards for Attorney Sanctions for Professional Misconduct in this area provides for disbarment or actual suspension depending on several factors: the magnitude of the dishonesty, the extent of harm or misleading and the extent to which related to the practice of law. (Std. 2.3.) Respondent deceived his clients while handling their matters and the deception apparently forestalled their discovery of his inaction, injuring their legal position.

[5] Finally, it was respondent's legal and ethical duty to participate in the State Bar investigation of these matters. (Bus. & Prof. Code, § 6068 (i); *Hipolito* v. *State Bar* (1989) 48 Cal.3d 621, 627, fn. 2.) His failure to do so is a clear breach of his duties as an attorney.

We see no clearly mitigating circumstances. Respondent practiced for only about six years when he commenced his client abandonment and misrepresentations. That misconduct spanned over three years. Since he failed to participate in these proceedings, he has not presented any other mitigating evidence and we see none in our own record review. Rather, we find aggravating, as did the hearing referee (decision, p. 5), that the record shows multiple acts of wrongdoing by respondent. (Std. 1.2(b)(ii).) We also find that respondent's misconduct significantly harmed clients (std. 1.2(b)(iv)), he showed indifference to his clients for the consequences of his misconduct (std. 1.2(b)(v)) and he displayed a lack of candor and cooperation to his victims. (Std. 1.2(b)(vi).)

Discipline for offenses somewhat similar to respondent's has varied widely in recent decisions.

In *Gold* v. *State Bar* (1989) 49 Cal.3d 908, the attorney was found culpable of two matters of failing to perform services and failing to communicate properly with his clients with deceit in one of the matters. He had no prior record of discipline in 25 years of practice. A four-member Supreme Court majority imposed a three-year suspension stayed on conditions including 30 days actual suspension. Three members of the Court would have followed the State Bar Court's recommendation of 90 days actual suspension.

In *Carter* v. *State Bar* (1988) 44 Cal.3d 1091 the attorney was found culpable in two separate matters of abandonment in one of the matters and improper withdrawal in the other with misrepresentations. He had received a prior public reproval. The Court imposed a two-year suspension, stayed, on conditions including six months actual suspension.

In *Levin* v. *State Bar*, *supra*, 47 Cal.3d 1140 the attorney was found culpable of two matters involving deceit. One involved settlement of a client's injury claim without permission and failure properly to account for funds. He had no prior record in 18 years of practice. The Supreme Court ordered a three-year suspension, stayed on conditions, including a six-month actual suspension.

In *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894 the attorney's misconduct involved two matters: one of abandonment and the other of deceit to get a loan. She had no prior record in 10 years of practice. The Supreme Court ordered a three-year suspension stayed, on conditions, including one year actual suspension and until rehabilitation is proven. The Court observed that the attorney's offenses occurred over a short time but were surrounded by alcohol and cocaine problems showing the need for closely supervised probation.

Finally, in *Pineda* v. *State Bar*, *supra*, 49 Cal.3d 753 the Court found the attorney culpable of misconduct in seven client matters over a ten-year period. The misconduct included misappropriation. The Court imposed a five-year suspension, stayed on conditions including a two-year actual suspension.

In that case, the presence of mitigating evidence led the Court to order suspension rather than disbarment. In the present case, unlike in *Pineda*, we do not find that respondent engaged in a pattern of misconduct, although we do find multiple, serious acts.

[6a] Balancing all appropriate factors and guided by the Supreme Court's decisions, we have concluded that the appropriate discipline to recommend is that chosen by the hearing referee: a three-year suspension, stayed, on conditions of probation which will include actual suspension for the first year.[12] **[7 - see fn. 12]** We also recommend that respondent comply with rule 955, California Rules of Court and pass the Professional Responsibility Examination within one year. **[6b]** In making this recommendation, we are influenced by the length of time over which respondent's misconduct occurred, the extensive deceit he practiced on his clients, the harm and expense caused them and his lack of participation in these proceedings, coupled with the lack of any significant mitigation on respondent's behalf.

4. RECOMMENDATION

For the reasons stated above, we recommend that respondent, Jay Allen Peterson, be suspended from the practice of law in the State of California for a period of three (3) years; that execution of the order for such suspension be stayed; and that respondent be placed upon probation for said period of three (3) years upon the following conditions:

1. That during the first year of said period of probation, he shall be suspended from the practice of law in the State of California;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

4. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

5. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other

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12. [7] We have considered the referee's initial concern (see R.T. p. 22) as to whether probation would be appropriate in a case such as this where the respondent has not participated as a predictor of unwillingness to abide by probation. However, on this record, we do not believe this respondent should be denied the opportunity to comply with probation terms which would appear to have potential rehabilitative benefit for him. We also note that the referee made probation terms a part of his final recommendation and the State Bar examiner urges that we adopt that recommendation.

address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1.

6. That, except to the extent prohibited by the attorney-client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, his or her designee or to any probation monitor referee assigned under these conditions of probation at the Respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

7. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective; and

8. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of three years shall be satisfied and the suspension shall be terminated.

We further recommend that within one year of the effective date of the Supreme Court's order in this case, respondent be required to take and pass the examination in professional responsibility prescribed by the State Bar and provide proof thereof to the Clerk of the State Bar Court.

Finally, we recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days respectively, after the effective date of the Supreme Court's order in this case.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JAY ALLEN PETERSON

A Member of the State Bar

[No. 87-O-17586]

Opinion on Motion for Late Filing—Filed September 28, 1990

SUMMARY

In a published order, the review department modified its opinion to delete a finding that respondent had violated section 6068 (a) of the Business and Professions Code. This modification neither accomplished nor justified a change in the review department's recommendation to the Supreme Court.

The review department also denied respondent's motion to set aside default and two accompanying alternative motions. Under rule 555.1(b) of the Transitional Rules of Procedure, the time for respondent to seek to set aside his default as a matter of right had expired. This 75-day time period is not jurisdictional; however, once it has run, a greater showing must be made to justify setting aside the default.

Respondent contended that he did not learn of the review department's opinion until after it appeared in a legal newspaper, and that he did not receive other documents about these proceedings because he did not promptly notify the State Bar when he repeatedly moved his office. In denying respondent's motion to set aside the default, the review department concluded that respondent's failure to comply with his duties to notify the State Bar promptly of any change of his address of record did not justify granting the requested relief, and was not excused by respondent's claimed former alcohol problems.

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: Ellen A. Pansky

HEADNOTES

[1] **101 Procedure—Jurisdiction**
130 Procedure—Procedure on Review
The State Bar Court retains jurisdiction over a matter until it transmits the record to the Supreme Court.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2 a, b] **105 Procedure—Service of Process**
107 Procedure—Default/Relief from Default
192 Due Process/Procedural Rights
Where an attorney had failed to comply with the statutory duty to maintain a current address on the State Bar's member records and to notify the State Bar within 30 days of any address change, the attorney failed to show good cause for relief from default even though he did not receive notice of the State Bar proceedings until the review department's opinion was published. Because the address requirement is reasonable, an attorney receives reasonable notice of documents properly sent to the attorney's address of record with the State Bar.

[3] **107 Procedure—Default/Relief from Default**
125 Procedure—Post-Trial Motions
135 Procedure—Rules of Procedure
Under rule 555.1(b), Transitional Rules of Procedure, a respondent has until 75 days after the entry of his default to file, as a matter of right, a motion to set aside the default. This 75-day time period is not jurisdictional; however, after it has run, a much greater showing must be made to justify setting aside the default.

[4] **107 Procedure—Default/Relief from Default**
192 Due Process/Procedural Rights
211.00 State Bar Act—Section 6002.1
213.90 State Bar Act—Section 6068(i)
214.00 State Bar Act—Section 6068(j)
Respondent's claimed alcoholism did not excuse him from his statutory duties to notify the State Bar promptly of any change of his address of record, and to participate in State Bar disciplinary proceedings against him.

ADDITIONAL ANALYSIS

[None.]

ORDER MODIFYING OPINION AND DENYING MOTION TO PERMIT LATE FILING OF APPLICATION TO SET ASIDE DEFAULT

BY THE DEPARTMENT:

On May 30, 1990, we filed our opinion on review in the above matter.* [1] Since the record has not yet been transmitted to the Supreme Court (see Bus. & Prof. Code, § 6081) we retain jurisdiction over the matter.

It is ordered that our opinion be modified in section 2 d. at page 10, last paragraph, line 4 of the typed opinion, to delete the reference to subdivision (a) of Business and Professions Code section 6068 so that that line reads as follows: "Professions Code section 6068, subdivision (i). For the". [Editor's note: see *ante*, p. 79.]

Our modification is on the authority of *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931 and *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815 and does not accomplish or justify a change in our judgment or in our recommendation to the Supreme Court.

We have considered respondent's Application For Order Setting Aside Default And For Hearing De Novo, Or Alternatively, For Leave To Present Additional Evidence, Or Alternatively, For Order Vacating Submission And To Augment The Record On Appeal, presented to our clerk's office on August 23, 1990, and the State Bar examiner's response filed August 28. On May 2, *1989*, respondent's default was entered for his failure to answer the notice to show cause. His August 23, *1990* application is his first appearance in this formal proceeding. In essence, respondent now seeks to be heard for the first time to present evidence in mitigation either before the hearing referee by our granting his request for a hearing de novo or by our considering his evidence ourselves.

Respondent contends he did not learn of our opinion until just after it appeared in the Los Angeles Daily Journal's Daily Appellate Report on about August 15, 1990, and he claims he did not receive other important documents about this proceeding. Respondent states that he relocated his office four times between 1988 and 1989 and did not promptly update his membership records address.

[2a] We conclude that respondent has failed to present good cause for our granting relief. [3] The time for respondent to seek to set aside his default as a matter of right expired on July 17, 1989, 75 days after the May 2, 1989 default, and more than a year before his current motion. (Rules Proc. of State Bar, rule 555.1(b).) While rule 555.1(b) is not jurisdictional, a much greater showing must be made to justify setting aside his default after the 75 days have run. [2b] No sufficient showing has been made. Throughout this proceeding, respondent had a statutory duty to maintain a current address on the State Bar's member records and to notify the State Bar within 30 days of any address change. (Bus. & Prof. Code, §§ 6002.1 (a); 6068 (j).) In *Powers* v. *State Bar* (1988) 44 Cal.3d 337, 341, our Supreme Court used the following language in deeming that address requirement reasonable: "Powers further contends that he was not afforded reasonable notice. This claim depends upon the reasonableness of the requirement that au attorney keep the State Bar informed of his current address. We believe that requirement to be reasonable, and Powers provides no cogent argument to the contrary."

[4] While we are not unsympathetic to the problems of alcoholism which respondent claims to have suffered earlier and now recovered from, we see nothing in his showing which excused him from having to comply with the minimum duties binding on all attorneys to notify the State Bar promptly of any change of address of record and to participate in this proceeding, especially after the December 17, 1987, date of his claimed start of continued abstinence. (Bus. and Prof. Code, § 6068 (i).)

Respondent's motion is denied.

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* Editor's note: See *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

J. WILLIAM CONROY

A Member of the State Bar

[No. 87-O-15117]

Filed June 8, 1990

[Editor's note: Review granted, Nov. 15, 1990 (S016863); State Bar Court Review Department opinion superseded by *Conroy* v. *State Bar* (1991) 53 Cal.3d 495.]

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS R. KIZER

A Member of the State Bar

[No. 88-O-10224]

Filed June 19, 1990

SUMMARY

Respondent withheld money from personal injury clients' settlement proceeds to pay the clients' treating physician, misappropriated such money for his own use, and misrepresented to the clients that the physician's bills had been paid. Respondent also failed to participate in the State Bar's investigation of the matter. The hearing referee recommended disbarment. (Jay C. Miller, Hearing Referee.)

The review department set the matter for review on its own motion because of questions it had concerning the proper findings to make and the proper method of considering respondent's prior record of discipline. The review department held that the proper method for proving a respondent's prior record is to admit the supporting documents into evidence. In light of respondent's present misconduct and his prior record, the review department adopted the referee's recommendation that respondent be disbarred.

COUNSEL FOR PARTIES

For Office of Trials: Loren J. McQueen

For Respondent: No appearance (default)

HEADNOTES

[1] **165 Adequacy of Hearing Decision**
166 Independent Review of Record
Where the hearing department's findings are incomplete, the review department, because its review of the record is independent, is empowered to reweigh the evidence and make its own findings and conclusions flowing appropriately from the record.

[2] **280.00 Rule 4-100(A) [former 8-101(A)]**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Attorney's failure to keep sums owed to clients' treating physician in a proper trust account and to promptly pay the sums to the doctor as requested constituted a wilful violation of rules requiring keeping client funds in trust account and paying them promptly upon demand.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
Records of respondent's trust account, showing that balance dropped to a negative sum without payment having been made to clients' treating physician, warranted the conclusion that respondent misappropriated trust funds.

[4] **221.00 State Bar Act—Section 6106**
Attorney's misrepresentation to clients that attorney had paid all of clients' medical bills, when attorney had not done so, constituted act of moral turpitude.

[5 a, b] **120 Procedure—Conduct of Trial**
135 Procedure—Rules of Procedure
136 Procedure—Rules of Practice
146 Evidence—Judicial Notice
194 Statutes Outside State Bar Act
802.21 Standards—Definitions—Prior Record
An attorney's prior record of discipline is a record of the Supreme Court and also of the State Bar, and as such it is the proper subject of judicial notice. Even when judicial notice is taken of such records, the documents composing them should be identified, introduced in evidence, and made part of the record in the proceeding. (Rule 571, Rules Proc. of State Bar; rules 1260-1262, Prov. Rules of Practice of State Bar Ct.)

[6] **130 Procedure—Procedure on Review**
146 Evidence—Judicial Notice
166 Independent Review of Record
Ambiguity in the record, created when hearing referee took judicial notice of respondent's prior record of discipline but failed to admit it into evidence, was removed when review department admitted in evidence the prior record of discipline that was previously offered at trial and judicially noticed.

ADDITIONAL ANALYSIS

Culpability
Found
213.91 Section 6068(i)
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.19 Section 6106—Other Factual Basis
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.19 Misappropriation—Other Fact Patterns
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2

Aggravation
Found
511 Prior Record
521 Multiple Acts
591 Indifference

Standards

802.30 Purposes of Sanctions
805.10 Effect of Prior Discipline
822.10 Misappropriation—Disbarment
824.10 Commingling/Trust Account Violations
831.50 Moral Turpitude—Disbarment
861.30 Standard 2.6—Disbarment
861.40 Standard 2.6—Disbarment

Discipline

1010 Disbarment

OPINION

STOVITZ, J.:

A hearing referee of the State Bar Court has recommended that Thomas R. Kizer ("respondent") be disbarred from the practice of law in this state. Respondent is age 37 and was admitted to practice law in 1982. In December 1988, the Supreme Court ordered respondent suspended from practice for five years, stayed, with two years actual suspension and until he makes restitution. Respondent's prior discipline rested on findings showing that in 12 matters in 1983-1984, respondent either failed to pay over to doctors trust monies he withheld from clients' accident settlements (7 matters) or failed to notify or pay to the clients themselves their share of the settlements (5 matters). Respondent was also found culpable of two less serious counts. The amount of monies wrongfully withheld from doctors and clients totalled more than $33,000. Respondent restored most of that money to clients or doctors by 1986.

In the proceeding below, the record shows that in one matter in 1987, respondent withheld from his clients' personal injury settlement $1,180 of trust funds to pay to a doctor who treated respondent's clients; he failed to pay those funds to the doctor and instead misappropriated them, and he also misrepresented to his clients that he had paid the doctor bills. Respondent has failed to make restitution. In the second matter, the record shows that respondent failed to participate in the State Bar investigation in violation of his duties as an attorney.

We set this matter for review on our own motion because of questions we had concerning the proper findings to make and the proper method of considering respondent's prior record of discipline. Upon our independent record review, we shall modify the findings in several respects. Since we conclude that disbarment is the appropriate discipline, we shall adopt as our recommendation to the Supreme Court, the disbarment recommendation of the referee below.

1. PROCEDURAL BACKGROUND.

a. The Charges.

This formal disciplinary proceeding started on April 13, 1989, by the filing in the State Bar Court of a two-count notice to show cause ("notice"). (Trans. Rules Proc. of State Bar, rule 550.) In count one of the notice, respondent was charged in essence with having misrepresented to his personal injury clients that he had paid their medical bills from the total settlement he had received for them, with failing to promptly pay to the clients or their doctor all funds to which they were entitled and with misappropriating the funds respondent reeeived on behalf of his clients. (Bus. & Prof. Code, §§ 6068 (a), 6103 and 6106; Rules Prof. Conduct, rules 8-101(A) and 8-101(B)(4)).[1] In count two, respondent was charged with having failed to cooperate and participate in the State Bar investigation looking into the charges of count one. (Bus. & Prof. Code, §§ 6068 (a), 6068 (i) and 6103.)

b. Entry of Respondent's Default.

As prescribed, the notice was served on respondent by certified mail on his State Bar record address at the time. (See exhs. 1-2; declarations of service attached to notice to show cause dated April 19, 1989; Bus. & Prof. Code, § 6002.1 (c).)[2] The notice warned respondent that his default may be entered and the charges admitted if he did not timely file an answer to the notice. On June 19, 1989, after the State Bar sent respondent the prescribed additional notice that his default would be entered if he failed to answer within 20 days, his default was entered and the charges against him were deemed admitted. (Trans. Rules Proc. of State Bar, rules 552, 552.1(c).)

1. Unless noted, all references to the Rules of Professional Conduct of the State Bar are to the former rules in effect between January 1, 1975, and May 26, 1989, and which apply to respondent's conduct.

2. The certificate from the State Bar's supervisor of member records attesting to respondent's address of record, mistakenly refers to his city as Los Angeles. The records themselves, show it as Beverly Hills, he was served in Beverly Hills and thus it appears that any error was limited to the certificate itself and did not extend to the underlying records nor to the service of process. (Compare exh. 2 with declaration of service attached to notice to show cause.)

c. The Evidentiary Hearing.

On August 10, 1989, the referee assigned to this matter held a formal hearing on the charges. He received documentary evidence offered by the examiner including seven declarations under penalty of perjury of the clients or others concerning respondent's handling of the funds in this matter. The referee also received in evidence a declaration from a State Bar investigator relating to respondent's failure to participate in the investigation of the charges against him. After determining that respondent was culpable of professional misconduct, the referee invited the examiner to present evidence bearing on discipline. (R.T. p. 16.) In response, the examiner offered to introduce in evidence respondent's prior record of discipline. The referee stated that he would "just take judicial notice [of it]" but did not physically place the prior record into the record below. (R.T. pp. 17-18.) The examiner concluded her presentation by citing portions of the Standards for Attorney Sanctions for Professional Misconduct ("stds.") (Rules Proc. of State Bar, div. V) she deemed applicable to the record and recommended that respondent be disbarred. (R.T. p. 19.)

d. The Referee's Decision.

On August 10, 1989, the hearing referee filed his decision. In substance, the referee found that in October of 1989 [sic][3] respondent represented one set of clients, in April of 1987 he recovered a sum of money for them, falsely represented to them that he "would pay" all their medical bills owing a certain doctor, overdrew his trust account and failed on two occasions to respond to a State Bar investigator. The referee concluded in aggravation that respondent had a prior record of discipline and failed to cooperate with the State Bar in this (present) matter. The referee also concluded that respondent wilfully violated the same sections of the State Bar Act and Rules of Professional Conduct of the State Bar charged in the notice. (Bus. & Prof. Code, §§ 6068 (a), 6103 and 6106; Rules Prof. Conduct, rules 8-101(A) and 8-101(B)(4).) Finally, the referee recommended that respondent be disbarred and ordered to comply with rule 955, California Rules of Court.

Because of our concern over the adequacy and completeness of the referee's findings as well as the form by which the respondent's prior record of discipline was considered, we set the matter for hearing before us.[4]

2. THE APPROPRIATE FINDINGS OF FACT AND CONCLUSIONS.

a. The Present ("Ses") Matter.

[1] From even a cursory comparison of the hearing referee's findings with the charges (deemed admitted by respondent's default) and record, we have concluded that the referee's findings are incomplete in several important areas.[5] Because our review of the record is *independent* (Trans. Rules Proc. of State Bar, rule 453), we are empowered to reweigh the evidence and make our own findings and conclusions which flow appropriately from the record. Because this matter is relatively straightforward, we believe it will be clearer if we set forth our findings anew rather than attempt to modify selectively and adopt the referee's findings.

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3. This date is clearly an error. As we shall detail *post*, the record shows that these clients hired respondent in October *1986*.

4. We asked the State Bar (the respondent was in default) to address the propriety of considering respondent's prior record by judicial notice and not by introduction of the record in evidence; whether in the *Ses* matter, findings of misappropriation and misrepresentation as to payment of medical bills were warranted; and, in count two, whether the evidence would warrant a finding that respondent was culpable of failing to cooperate or participate in the State Bar investigation.

5. For example, the referee seemed to confuse respondent's misrepresentation as to payment of doctor bills with his promise in the future to pay them. He found the respondent's trust account overdrawn without making a finding that the funds were first placed in the account and then misappropriated therefrom and he appeared to have treated respondent's failure to participate in the State Bar investigation as an aggravating circumstance rather than a substantive offense as it was actually charged.

In October of 1986 three members of the Ses family hired respondent to represent them in seeking damages arising out of an accident. The Ses family spoke only the Cambodian language, but they had the assistance of someone who spoke both English and Cambodian. (Exh. 6.)

In mid-March and mid-April 1987, respondent settled all of the Ses' claims for a gross recovery of $11,250. These sums came to respondent by a total of six insurance company drafts made payable to the respective client and to respondent. He deposited each of the checks into his client trust account (no. 03-165-701) at the Mitsui Manufacturers Bank in Beverly Hills. (Exhs. 7, 8 and 9.) Respondent accounted for the Ses' claims separately, apportioning the settlement among each of the three clients. The following chart shows the breakdown of the settlement for each of the three Ses clients, including the gross settlement, respondent's fee, the amount paid directly to the client and the amount respondent withheld from each Ses settlement for the doctor who treated each of the Ses clients, Dr. Emmanual Taylan:

Client	*Gross Recovery*	*Respondent's Fee*	*Paid to Client*	*Kept for Dr. Taylan*
Lao Ses	$4,860	$1,620	$2,280	$ 960
Sothon Ses	1,470	490	760	220
Sophath Ses	4,920	1,640	2,260	1,020
Total	**11,250**	**3,750**	**5,300**	**2,200**

On April 14, 1987, the Ses clients went to respondent's office to sign settlement papers. At that time, respondent told them that respondent "had paid" their medical bills totalling $2,200. (Exhs. 3, 4 and 5.)[6] On a settlement breakdown sheet respondent gave Lao Ses, there appeared the words, "*Medical paid:* [¶] Taylan. 960 -." (Exh. 3, emphasis in original.)

On the breakdown sheet respondent gave Sothon Ses, there appeared the words, "*Medical paid:* [¶] S Taylan. 220 -." (Exh. 4, emphasis in original.)

Finally, on the breakdown sheet respondent gave Sophath Ses, there appeared the words: "Dr. Taylan $1020." (Exh. 5.)

Ms. Rose Taylan, Dr. Taylan's office manager, stated in her declaration, dated July 31, 1989, that in April 1987, respondent paid Dr. Taylan *$1,020* of the $2,200 of medical charges Dr. Taylan had recorded for treating the Ses clients. However, despite calling respondent's office several times and sending him a letter in October 1987, Ms. Taylan never received payment of the remaining $1,180 from respondent. (Exh. 10.)

The records of respondent's bank trust account show that his account balance remained above $1,180 until December 18, 1987. On December 18, the balance dropped to -$2,191.69. The balance stayed below +$1,180 until December 29, 1987. On January 4, 1988, that account balance was at -$2,681.69. (Exh. 9.)

b. Respondent's Failure to Cooperate with State Bar Investigation.

On May 31 and August 8, 1988, a State Bar investigator wrote to respondent about his alleged failure to pay to Dr. Taylan amounts withheld from the Ses. The August letter specifically referred respondent to Business and Professions Code section 6068 (i) (duty of member to cooperate and participate in any State Bar investigation). Respondent never replied to the investigator by telephone, in writing or by any other means. (Exh. 11 [declaration of State Bar investigator S. Hank Oh].)

c. Our Ultimate Findings and Conclusions.

From the charges standing alone, which were admitted by respondent's default and supplemented by additional evidence, we would be required to find as to count one (the Ses matter) that respondent

6. The evidence offered by the Ses clients was in the form of declarations under penalty of perjury. Another declaration was signed by Soboen Huot who stated he was fluent in Cambodian and English. Huot accompanied the Ses clients to respondent's office on April 14 and translated from English to Cambodian the settlement breakdown sheets which respondent gave each client. According to Huot, respondent told the Ses that he "had paid to Dr. Taylan the amounts circled in red on the left hand corner of the settlement breakdown sheets." Huot also translated from English to Cambodian each of the Ses' declarations offered here in evidence. (Exh. 6.)

misrepresented to his clients that he had paid all sums owing to Dr. Taylan for treatment when in fact he had not. Instead, he failed to keep those sums in his trust account, misappropriated them to his own use and failed to pay them to the doctor. These findings are also compelled by the independent documentary evidence and declarations under penalty of perjury from each client and a third party fluent in English and Cambodian as well as from a member of Dr. Taylan's office staff, copies of the insurance drafts and respondent's trust bank account records. [2] This evidence shows respondent's failure to keep the required sums owing to Dr. Taylan in a proper trust account and his failure to promptly pay the sum to Dr. Taylan and warrants a conclusion that respondent wilfully violated rules 8-101(A) and 8-101(B)(4). (*Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979.) [3] Moreover, the records of respondent's trust account standing alone, which showed that the balance dropped to a negative sum, without payment of monies owed Dr. Taylan would warrant the conclusion we make that respondent misappropriated trust funds in violation of Business and Professions Code section 6106. (See, e.g., *Jackson* v. *State Bar* (1979) 25 Cal.3d 398, 403.) [4] We conclude also that respondent's misrepresentation to the Ses clients that he had paid all their medical bills when he had not done so also violated section 6106. (See *Stanley* v. *State Bar* (1990) 50 Cal.3d 555, 567.)

The record also warrants a finding that as to count two, respondent failed to participate and cooperate in the State Bar investigation into this matter and we conclude that this breach was a wilful violation of Business and Professions Code section 6068 (i).[7]

We find in aggravation that respondent has a prior record of serious misconduct which we shall discuss in greater detail *post*. (See std. 1.2(b)(i).) We find also, that respondent's conduct in the Ses matter is aggravated by his failure to make restitution of the $1,180 he misappropriated (std. 1.2(b)(v)) and that respondent's misconduct in the present record shows multiple acts of wrongdoing (std. 1.2(b)(ii)). Regrettably, we see no evidence warranting findings in mitigation.

3. DISCUSSION.

a. Introduction Into Evidence of Respondent's Prior Record.

[5a] Respondent's prior record of discipline was a record of the Supreme Court of this state and also of the State Bar. As such, it was the proper subject of judicial notice. (Evid. Code, § 451, subd. (a); *id.*, § 452, subds. (c), (d), (g) and (h); *id.*, § 459, subd. (a).) Although judicial notice is no longer recognized expressly as a form of evidence,[8] it is a substitute for formal proof of facts. (1 Witkin, *California Evidence* (3d ed. 1986) Judicial Notice, § 80, pp. 74-75; 2 Jefferson, *California Evidence Benchbook* (2d ed. 1982) Judicial Notice § 47.1, p. 1748.) While taking judicial notice of the prior record, the referee did not specify the documents or records which he noticed, nor did he make them part of the record for our review.

The long-standing prescribed procedure in the State Bar Court is to offer in evidence the admissible prior record. (Rules Proc. of State Bar, rule 571; (former) State Bar Court Rules of Practice, rule 1263, effective at the time of the evidentiary hearing below; (present) Provisional Rules of Practice of the State Bar Court, rules 1260-1262.) This procedure of physically admitting a prior record of discipline insures that all bodies vested with deciding this case, including this department and the Supreme Court, are examining the identical documents and all counsel can cite uniformly to those documents. **[5b]** It is just as important to identify the documents composing a prior record of discipline and make them part of the record of State Bar proceedings when the hearing judge proposes to take judicial notice of them. (See Evid. Code, § 455; *People* v. *Maxwell* (1978) 78

7. We decline to adopt the hearing referee's conclusions in either count that respondent violated sections 6068 (a) and 6103 for the reasons articulated by our Supreme Court in *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931 and *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815.

8. Compare former Code of Civil Procedure section 1827 with Evidence Code section 140; see 1 Witkin, *California Evidence* (3d ed. 1986), Introduction, § 18, pp. 20-21.

Cal.App.3d 124, 130-131.) [6] In this case, ambiguity regarding the precise subject of judicial notice was removed when the examiner offered in evidence, at the time of oral argument before us, the respondent's prior record of discipline previously offered at trial. We have made it part of the record and we, too, take judicial notice of it (Evid. Code, § 459) to establish the Supreme Court's action and the stipulated facts and conclusions leading up to it. (Exh. 1 introduced before review department; Supreme Court Bar Misc. No. 5865; see, e.g., *People* v. *Thacker* (1988) 175 Cal.App.3d 594, 599.)

b. The Appropriate Degree of Discipline.

Were we to have before us *only* the record of the present two-count disciplinary matter we review, we would be compelled to consider recommending at least lengthy actual suspension from practice as a result of respondent's misappropriation of funds, his failure to comply with the important requirements of rule 8-101, his misrepresentation and his failure to participate in the State Bar investigation. (See stds. 2.2(a) and (b), 2.3 and 2.6.)

However, we now have in evidence the respondent's record of discipline. That record shows that respondent stipulated that he committed 12 offenses over a two-year period (1983-1984) as to his handling of funds in personal injury matters and committed two additional instances of misconduct unrelated to the handling of funds. That record shows that in seven matters respondent failed to pay over to doctors trust monies he withheld from clients' accident settlements and in five matters he failed to notify or pay to the clients themselves their share of the settlements. The total amount of monies wrongfully withheld from doctors and clients was more than $33,000. Respondent restored most of that money to clients or doctors by 1986. Significantly, respondent's prior discipline found only mitigating and no aggravating circumstances. Those circumstances were that respondent was candid and cooperative with the State Bar, he had no additional complaints, the conduct in the prior matter happened shortly after his admission and showed his unfamiliarity with and poor training about the business of law practice, all funds were intact in his trust account, competing claims needed to be resolved before respondent could pay some funds, respondent had made all needed restitution or had agreed to make the remaining restitution, he underwent a partnership dissolution, his records were seized in a law enforcement investigation, he was severely wounded when ambushed by a gunman in 1985 and since early 1983, he had experienced significant marital difficulties.

Despite the significant mitigating circumstances, the parties stipulated in the prior matter to a five-year suspension, stayed on conditions including two years of actual suspension. The Supreme Court ordered that discipline, effective December 17, 1988.

When we analyze respondent's present and prior records together, we are led to conclude that disbarment is now necessary to fulfill the purposes of imposing discipline: protection of the public, preservation of integrity in the profession and maintenance of confidence in the legal profession. (See std. 1.3; see also std. 1.7(a).) Although respondent's present record consists of only one client matter and one count of failure to participate in the State Bar investigation, it depicts conduct more serious than was found in his prior. In this record, unlike in his prior record, respondent failed to maintain inviolate trust funds in his account and instead misappropriated them. Moreover, none of the fourteen matters of culpability in respondent's prior record involved a finding of misrepresentation of facts. But respondent did misrepresent facts in the present matter. Although it was possible to ascribe respondent's conduct in the prior record to his inexperience, he had been practicing for over four years at the time he engaged in the misdeeds before us. Restitution is still owing in the Ses matter. Finally, the record shows no participation from respondent in this matter, in sharp contrast to his cooperation in the prior matter.

We are forced to conclude that the public, courts and legal profession would be exposed to an unwarranted risk of further harm were we to recommend that respondent be allowed to continue in practice, even after an additional lengthy suspension. (See, e.g., *Farnham* v. *State Bar* (1988) 47 Cal.3d 429, 447; *Arden* v. *State Bar* (1987) 43 Cal.3d 713, 728; *In re Vaughn* (1985) 38 Cal.3d 614, 620.)

4. FORMAL RECOMMENDATION.

For the reasons stated above, we recommend that respondent, Thomas R. Kizer, be disbarred from the practice of law in this state and that if his period of actual suspension from practice in the prior matter ends before the Supreme Court should impose its final disciplinary order in this matter, we also recommend that he be ordered to comply with the provisions of rule 955, California Rules of Court and to perform the acts specified by subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's final order.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD C. STAMPER

A Member of the State Bar

[No. 85-C-19022]

Filed July 9, 1990

SUMMARY

Respondent was referred for State Bar disciplinary proceedings following his criminal conviction for forgery and embezzlement based on his theft of funds belonging to his law partnership. The State Bar contended that respondent should be disbarred, and the referee concurred. (Guenter S. Cohn, Hearing Referee.)

The review department held that the summary disbarment provisions of section 6102(c) of the Business and Professions Code did not apply to respondent's crimes, because they were not committed in the course of respondent's law practice and did not involve any clients as victims. Accordingly, the review department considered respondent's mitigating evidence. It concluded that due to the persuasiveness of respondent's character evidence and the aberrational nature of his misconduct, respondent should not be disbarred. The review department recommended that respondent receive five years stayed suspension, five years probation, and four years actual suspension, with full credit against the actual suspension for the time respondent was on interim suspension following his initial conviction.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: Lily Barry

HEADNOTES

[1] **146 Evidence—Judicial Notice**
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
1691 Conviction Cases—Record in Criminal Proceeding
Court of appeal opinion regarding respondent's criminal appeal could be cited in related disciplinary proceeding, notwithstanding Supreme Court's depublication order, under Cal. Rules of Court, rule 977(b)(2).

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **166 Independent Review of Record**
In reviewing hearing department's findings, conclusions, and recommendation, review department undertakes an independent examination of the record, bnt gives great deference to the referee's findings of fact and substantial weight to the referee's recommendation as to discipline.

[3] **162.11 Proof—State Bar's Burden—Clear and Convincing**
166 Independent Review of Record
On review, the burden remains on the State Bar to prove its case by clear and convincing evidence.

[4] **801.30 Standards—Effect as Guidelines**
802.69 Standards—Appropriate Sanction—Generally
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
An attorney's commission of a crime involving moral turpitude is always a matter of serious consequence but does not always result in disbarment; the sanction imposed is determined in each case depending on the nature of the crime and the circumstances presented by the record.

[5] **193 Constitutional Issues**
1553.59 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
The issue of retroactive application of the summary disbarment statute (Bus. & Prof. Code § 6102(c)) to conduct occurring prior to its enactment has not been decided by the Supreme Court.

[6] **1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment**
Attorney's embezzlement from law partnership was not a crime committed in the course of the practice of law and did not involve a client as victim, and therefore did not come within the scope of the summary disbarment statute (Bus. & Prof. Code § 6102(c)).

[7] **169 Standard of Proof or Review—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
In determining whether nature of attorney's crimes warranted summary disbarment, review department gave great weight to decision of court of appeal issued on direct appeal from respondent's criminal conviction.

[8] **146 Evidence—Judicial Notice**
166 Independent Review of Record
169 Standard of Proof or Review—Miscellaneous
191 Effect/Relationship of Other Proceedings
1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment
1691 Conviction Cases—Record in Criminal Proceeding
Court of appeal opinion on direct appeal from attorney's criminal conviction is conclusive with respect to attorney's guilt of underlying crime, but for discipline purposes, State Bar Court must independently determine, through careful review of criminal record, whether clients were victims of misconduct or misconduct was committed in attorney's capacity as attorney.

[9 a, b] **1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment**

Where respondent embezzled from his law partnership through forgeries and other acts internal to the law firm and intended only to deceive his law partner, respondent breached the fiduciary duty of a partner to the partnership, but did not commit a crime related to respondent's status as an attorney.

[10] **1553.51 Conviction Matters—Standards—Enumerated Felonies—No Summary Disbarment**

Phrase "offense committed in the course of the practice of law", as used in standard 3.3 and in summary disbarment statute (Bus. & Prof. Code § 6102(c)), addresses the conduct of attorneys as such in dealing with clients and the public, and does not encompass crimes where attorney does not act as such in the commission of the offenses directly, but only in the surrounding circumstances.

[11] **695 Aggravation—Other—Declined to Find**
1691 Conviction Cases—Record in Criminal Proceeding

Fact that in a disciplinary proceeding arising from an attorney's criminal conviction, the conviction is conclusive evidence of the attorney's guilt, is not an aggravating factor, but the basis of the attorney's culpability.

[12] **695 Aggravation—Other—Declined to Find**

Failure to present expert psychological testimony regarding purportedly aberrant nature of attorney's misconduct was not an aggravating factor.

[13] **695 Aggravation—Other—Declined to Find**

Failure to explain motive for misconduct is not an aggravating factor.

[14] **523 Aggravation—Multiple Acts—Found but Discounted**

Existence of multiple acts of theft added to overall gravity of respondent's misconduct, but did not preclude consideration of mitigation to reach a result short of disbarment.

[15] **595.90 Aggravation—Indifference—Declined to Find**
625.20 Aggravation—Lack of Remorse—Declined to Find

Where evidence established that victim of attorney's misconduct had received in compensation from attorney an amount greater than the amount originally embezzled by attorney, attorney's belief that victim was not economically harmed, and failure to make additional restitution, did not demonstrate attorney's failure to appreciate wrongfulness of acts, or lack of remorse.

[16] **801.20 Standards—Purpose**
801.30 Standards—Effect as Guidelines
802.30 Standards—Purposes of Sanctions
802.69 Standards—Appropriate Sanction—Generally

In assessing appropriate discipline, State Bar Court looks to provisions of applicable standard, in light of goals of disciplinary system set forth in standard 1.3 and guidance from Supreme Court; standards are guidelines, not mandatory sentencing provisions.

[17] **1552.31 Conviction Matters—Standards—Moral Turpitude—Suspension**
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Standard 3.2 contemplates opportunity to introduce mitigating evidence which, if compelling, would justify sanction short of disbarment.

[18] **710.10 Mitigation—No Prior Record—Found**
Record of practicing without complaint subsequent to misconduct is as valid a mitigating circumstance as lack of a prior record.

[19] **710.10 Mitigation—No Prior Record—Found**
710.35 Mitigation—No Prior Record—Found but Discounted
Contrary to express terms of standard 1.2(e)(i), case law permits long record of practice without prior discipline to be treated as mitigation notwithstanding seriousness of present misconduct.

[20] **172.50 Discipline—Psychological Treatment**
Where attorney's expert witness testified that attorney still had personality traits that needed working on, protection of public required imposition of psychological treatment requirement as condition of probation.

[21] **148 Evidence—Witnesses**
162.19 Proof—State Bar's Burden—Other/General
169 Standard of Proof or Review—Miscellaneous
740.10 Mitigation—Good Character—Found
Where examiner stipulated to admissibility of character reference letters at hearing, and thus chose not to require the declarants to be cross-examined, examiner's attempt to discount letters before review department was without foundation.

[22] **1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply**
Where length of attorney's prolonged interim suspension was largely due to meritorious appeal from criminal conviction, it would have been inequitable not to give credit for interim suspension against period of actual suspension recommended after disciplinary hearing.

[23] **1552.59 Conviction Matters—Standards—Moral Turpitude—Declined to Apply**
Supreme Court has rejected rigid application of the requirement of prospective suspension in standard 3.2.

ADDITIONAL ANALYSIS

Aggravation
Found
541 Bad Faith, Dishonesty
Declined to Find
575.90 Refusal/Inability to Account
588.50 Harm—Generally
615 Lack of Candor—Bar
Mitigation
Found
720.10 Lack of Harm
725.11 Disability/Illness

745.10 Remorse/Restitution
750.10 Rehabilitation

Discipline

1613.11 Stayed Suspension—5 Years
1615.10 Actual Suspension—4 Years
1616.50 Relationship of Actual to Interim Suspension—Full Credit
1617.11 Probation—5 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1023.40 Testing/Treatment—Psychological
1024 Ethics Exam/School
1026 Trust Account Auditing

Other

1512 Conviction Matters—Nature of Conviction—Theft Crimes
1525 Conviction Matters—Moral Turpitude—Found
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

PEARLMAN, P. J.:

This case arose as a conviction referral from the California Supreme Court following the finality, after appeal, of respondent Richard C. Stamper's conviction by a jury of two counts each of forgery and grand theft by embezzlement.[1] On appeal, the crimes were ruled not to involve the practice of law or a client as a victim. By an earlier order dated September 17, 1986, issued following the entry of the original jury verdict, the Supreme Court had placed respondent on interim suspension due to his conviction of numerous felonies involving moral turpitude. Respondent was an active member of the State Bar with no disciplinary record from his admission in 1971 until his interim suspension went into effect on October 17, 1986. He has remained on interim suspension ever since.

We conclude that the summary disbarment provisions of Business and Professions Code section 6102 (c) are inapplicable to these facts and that respondent was entitled to put on evidence of compelling mitigation justifying a sanction less than disbarment under standard 3.2 of the Standards for Attorney Sanctions for Professional Misconduct ("standard(s)" or "std."). In accordance with the standards, respondent put on persuasive evidence in mitigation as to the lack of harm to clients or the person who was the object of the misconduct, the aberrational nature of his conduct, an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities, and his remorse, restitution and rehabilitation in the seven years since the acts occurred. Following Supreme Court precedent in *In re Young* (1989) 49 Cal.3d 257, we recommend five years' stayed and four years' actual suspension from the practice of law coupled with five years of probation, and that respondent receive credit against the actual suspension for the time he has been on interim suspension.

BACKGROUND

The hearing in this matter was conducted pursuant to the Supreme Court's referral order of November 10, 1988, before a compensated referee of the State Bar Court.[2] The State Bar introduced the record of respondent's criminal trial into evidence at the hearing. (Exhs. 1-8.)[3] It detailed respondent's elaborate scheme to embezzle a total of approximately $30,000 from his law partnership, Dotson & Stamper, at three different times over a five-year period from 1978 through 1983.

The Fourth District Court of Appeal, in an unpublished opinion,[4] **[1 - see fn. 4]** concluded that only four of the charged offenses were not time-barred; that no client funds were involved and that respondent's only victim was his law partner David

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1. Respondent originally was charged by information with 30 counts of theft by embezzlement from his law partnership and forgery, plus an allegation that the total amount taken was over $25,000. Two of the counts were stricken for lack of evidence. (Exh. 5, at p. 796.) Of the remaining 28 counts, respondent was acquitted of 4; in addition, the jury found the allegation that respondent had taken over $25,000 not to be true. On appeal, 20 of respondent's 24 convictions were reversed on the ground that they were time-barred. The convictions were affirmed as to two forgery counts and two counts of grand theft by embezzlement.

2. This proceeding was heard by a compensated referee appointed under Business and Professions Code section 6079, acting as a hearing panel of the State Bar Court as constituted prior to the implementation of the full-time State Bar Court system created by Business and Professions Code sections 6079.1 and 6086.65. Pursuant to Business and Professions Code section 6086.65 (b) and rule 109 of the Transitional Rules of Procedure of the State Bar, respondent's request for review, filed on November 9, 1989, was assigned to this full-time review department created by Business and Professions Code section 6086.65 (a).

3. The criminal trial record consisted of six volumes of reporter's transcript, and two volumes of clerk's transcript, as well as two volumes of preliminary hearing transcript introduced into evidence by respondent. (Exhs. J, K.)

4. **[1]** The opinion is included in the State Bar Court's file in this matter, as part of the record of respondent's conviction. It was certified for publication, and was printed in the advance sheets (*People* v. *Stamper* (1987) 195 Cal.App.3d 1608), but was deleted from the bound volume on the direction of the Supreme Court. (See 195 Cal.App.3d 1660, fn. 16.) We may nevertheless cite it in this related disciplinary proceeding. (Cal. Rules of Court, rule 977(b)(2).)

Dotson who was entitled to half of the embezzled funds. It further held that the jury was erroneously instructed that respondent's conduct was in breach of his fiduciary duty as a lawyer, because the crimes were unrelated to respondent's status as an attorney. The court held that this error was not prejudicial, however, because the jury was properly instructed that respondent had breached his fiduciary duty as a partner of the victim of the crimes. On remand, as part of his sentence, respondent was ordered to pay restitution to Dotson in the amount of $3,000. (II R.T. p. 7.)[5] Respondent paid Dotson the $3,000 as ordered. (*Id.*) He was by then under interim suspension from his law practice, had resigned from the firm he had joined in 1983 after leaving his partnership with Dotson and had complied with the notice requirements of rule 955 of the California Rules of Court, as ordered by the Supreme Court.

At the hearing, the State Bar of California, through its examiner, sought respondent's disbarment pursuant to Business and Professions Code section 6102 (c) and standard 3.2. The State Bar rested its case after introducing into evidence the record of respondent's criminal trial. (I R.T. pp. 7-8; exh. 1-8.) Respondent admitted the commission of the crimes of which he was charged (including those counts that were stricken and those on which he was acquitted), and his counsel conceded that the State Bar proceeding properly involved not only the convictions that were sustained, but also those that were reversed on appeal on statute of limitations grounds. (I R.T. p. 3; II R.T. pp. 16-20.) Respondent and two other witnesses (his wife and a former associate at Dotson & Stamper) testified on issues in mitigation and respondent introduced without objection over thirty letters and declarations under penalty of perjury from a broad spectrum of well-respected members of his community attesting to his good character, his high standing as a lawyer in the community and the aberrational nature of his misconduct.

The referee "reluctantly" recommended disbarment despite finding that respondent "enjoyed a reputation and was held in high regard for honesty, hard work, competence and community involvement" (decision, finding of fact 11) and despite concluding that respondent's actions "appear to be an aberration and totally contrary to the type of person he and all persons providing evidence on his behalf seem to indicate." (Decision at p. 8.) The referee adhered to the disbarment recommendation on reconsideration after taking additional evidence in the form of a forensic psychologist's report and testimony evaluating respondent as having an excellent prognosis for refraining from future illegal activity.[6]

DISCUSSION

[2] Like the Supreme Court and the former volunteer review department, this review department, in reviewing the findings, conclusions, and recommendation of a referee's decision in an attorney disciplinary matter, undertakes an independent examination of the record, but gives great deference to the referee's findings of fact and substantial weight to the referee's recommendation as to discipline. (See, e.g., *In re Ewaniszyk* (1990) 50 Cal.3d 543, 549; *In re Larkin* (1989) 48 Cal.3d 236, 244.)

5. The record does not contain any formal record of the sentence respondent received on remand. Respondent introduced a presentence report prepared for his resentencing, which included a sentencing recommendation (exh. A), but there is no evidence as to whether it was accepted by the court. The recommendation was for six months in work furlough, $6,254.23 in restitution divided equally between Dotson and an insurance company (which had not yet decided whether it was entitled to restitution), and three years probation. (Exh. A.) Respondent testified that he was not required to, and did not, pay any restitution to an insurance company. (II R.T. pp. 7-8.)

6. The witness, Dr. Friedman, was the same psychologist who had evaluated respondent in 1985 in connection with his criminal conviction. As indicated in the record (III R.T. p. 108) she is a forensic expert who has done evaluations for the superior and juvenile courts in San Diego for 12 years. She concluded her evaluation (exh. L) by stating: "It was this examiner's opinion in 1985 that Mr. Stamper's prognosis not to again engage in illegal behavior was very good. Today, it seems that not only is his prognosis excellent in terms of refraining from illegal activity, but that if Mr. Stamper's license to practice law is reinstated he will bring to his profession a sensitivity, compassion and concern for others that would be hard to equal."

[3] Nonetheless, the burden remains on the State Bar to prove its case by clear and convincing evidence.

A. Summary Disbarment Is Inapplicable.

[4] An attorney's commission of a crime involving moral turpitude is always a matter of serious consequence but does not always result in disbarment. (See, e.g., *In re Chernik* (1989) 49 Cal.3d 467, 473-474; *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111-112; *In re Mostman* (1989) 47 Cal.3d 725, 740-743; *In re Duchow* (1988) 44 Cal.3d 268, 269-270; *In re Chira* (1986) 42 Cal.3d 904, 909.) In the past and since 1955, the sanction imposed is determined by the Supreme Court in each case depending on the nature of the crime and the circumstances presented by the record before it. (See, e.g., *In re Mostman, supra*, 47 Cal.3d at p. 740; *In re Smith* (1967) 67 Cal.2d 460, 463-464.)

In 1985, the Legislature amended Business and Professions Code section 6102 (c) to provide for summary disbarment of an attorney convicted of certain felonies involving clients as victims or the practice of law.[7] The State Bar examiner argues on review that respondent must be disbarred under this statute, but respondent challenges its application to conduct occurring prior to its enactment. [5] The issue of retroactive application of section 6102 (c) has not been decided by the Supreme Court. (*In re Ewaniszyk* (1990) 50 Cal.3d 543, 550; *In re Ford* (1988) 44 Cal.3d 810, 816.) [6] We need not reach it here, because we agree with respondent's alternative argument that his misconduct did not meet the threshold for invoking section 6102 (c) since no client was a victim of the offenses and the crimes were not committed in the course of the practice of law. [7] In determining that the threshold was not met, we give great weight to the decision of the Court of Appeal which reviewed a voluminous record and considered the same issues very thoughtfully in its opinion.

[8] The Court of Appeal decision was issued for the purpose of deciding the propriety of respondent's criminal conviction. We have a different purpose here—to determine what disciplinary sanction is appropriate. In reaching that determination we must treat the decision of the Court of Appeal as conclusive with respect to respondent's guilt of the underlying crime. (See, e.g., *In re Young* (1989) 49 Cal.3d 257, 268.) However, for discipline purposes we must independently determine whether clients were victims of respondent's misconduct or whether the misconduct was committed by respondent in his capacity as an attorney.

We thus must carefully review the criminal record for this purpose. On appeal from his criminal conviction, Stamper contended a partner cannot commit embezzlement from his own partnership and that even if the crime was properly charged, the jury was improperly instructed that he breached his fiduciary duty as an attorney by embezzling funds from his law partnership.

[9a] As the Court of Appeal stated, "As to the issue whether any general partner can be convicted of embezzling wholly-owned funds of a partnership in which he has a partnership interest, the fact the partners are engaged in a law partnership or a cooperage appears to be of no significance, and the culpability of a partner who converts partnership monies fraudulently is unrelated to the fact the defrauding partner may be an attorney." (*People* v. *Stamper* (Nov. 5, 1987) D004871, typed opn. p. 6.) The Court of Appeal concluded that a partner may indeed be convicted of embezzlement under such circumstances. It agreed, however, with Stamper's contention that the jury instructions referring to Stamper's having breached his fiduciary duty *as an attorney* were given in error. "This theft was not of funds over which Stamper exercised a fiduciary relationship by virtue of his *attorney* status, but

7. The statute as amended effective January 1, 1986, provides as follows: "After the judgment of conviction of an offense [that involves moral turpitude or is a California or federal felony] has become final or ... an order granting probation has been made suspending the imposition of sentence, the Supreme Court shall summarily disbar the attorney if the conviction is a felony under the laws of California or of the United States which meets both of the following criteria: [¶] (1) An element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement. [¶] (2) The offense was committed in the course of the practice of law or in any manner such that a client of the attorney was a victim."

merely because under California law they were intrusted to him as a member of the partnership." (*Id.*, typed opn. p. 14 (emphasis original).)[8]

We agree with that analysis, which is consistent with the Supreme Court's analysis of the same issue in the context of attorney discipline. (*In re Utz* (1989) 48 Cal.3d 468, 482-483.) In *Utz*, the attorney had been convicted of mail fraud for participating (as a "silent partner," and not as counsel) in a real estate fraud scheme. [10] The Court was asked to interpret the meaning of the language in section 6102 (c) "offense committed in the course of the practice of law" which had been incorporated verbatim into standard 3.3. The Court held that when the attorney in that case "used his position as deputy attorney general to lend credibility to [his business partner's] financial status, he was essentially only acting as a credit reference." (*Id.* at 483.) The Court held that because the attorney in *Utz* acted as an attorney only in the circumstances related to his offenses, and not in the commission of the offenses directly, section 6102 (c) did not apply.[9]

[9b] The acts committed by Stamper in this case (issuing checks drawn on partnership funds in the client trust account; drafting and signing (undelivered) "letters" addressed to clients regarding non-existent "refunds" of purportedly unearned fees) were all internal to the law firm and for the purpose of deceiving a business partner. None of the forged documents were intended for dissemination outside the law firm nor were they so disseminated. They were discovered and brought to light by respondent's law partner.

It would appear that the purpose of section 6102 (c) was to address the conduct of attorneys acting as such in dealing with clients and the public and not to encompass crimes of the nature involved here. No authorities have been cited to this court by the examiner to support her position that 6102 (c) is applicable and we decline to find it applicable to these facts.

B. Findings and Conclusions.

1. Findings of Fact

The referee's findings of fact concerning the nature and circumstances of respondent's crimes (decision, findings of fact 1-9) are not in dispute, and we adopt them as our own without change.[10] They may be summarized briefly as follows.

On 17 occasions from 1978 to 1983, respondent took for himself money belonging to his law partnership. Typically, respondent did this by writing checks on his law partnership's trust account which were made out to clients, and which purportedly were for refunds of advanced attorneys' fees. The clients were not actually entitled to any refunds, and the money represented by the checks actually belonged to the partnership. Respondent forged the clients' endorsements on the checks and deposited them in his personal account. To conceal the diversion of funds, he placed in the clients' files copies of letters forwarding the refunds to them. (The originals of these letters apparently were destroyed rather than mailed.) The total amount which respondent thereby diverted from the partnership was $32,138.36 (of which half actually belonged to respondent, as an equal partner in the firm).

2. Aggravating Factors

The referee's decision contains several findings regarding aggravating factors which either are not properly considered in aggravation, or are not supported by clear and convincing evidence. (Decision, findings of fact 22, 24-26.) [11] First, finding of fact 22 ("Respondent's criminal conviction of forgery and grand theft are conclusive evidence of his guilt") is not a finding in aggravation, it is the basis of culpability.

8. The court concluded, however, that the error was harmless beyond a reasonable doubt, and thus upheld the embezzlement convictions that were not time-barred. (*Id.*, typed opn. pp. 14-15.)

9. However, the Court found it appropriate to disbar the attorney under the general provisions regarding crimes involving moral turpitude.

10. We note, however, that findings of fact 10 and 11 are more properly characterized as findings in mitigation than as findings regarding respondent's culpability.

Second, finding of fact 24 states that "No testimony was presented from any professional providing counselling [sic] to Respondent which would explain [the] purported aberration of Respondent's behavior" involved in this case. This finding was reaffirmed after respondent moved for reconsideration, despite the fact that, in the proceedings on respondent's motion for reconsideration, respondent presented the testimony on this precise subject by a forensic psychologist who had provided counseling to respondent. (Exh. L; III R.T. pp. 107-135.) Although the referee apparently did not find this testimony persuasive as to mitigation, even he admitted that it "help[ed] to shed light on Respondent's character." (Decision after reconsideration, ¶ 1.) **[12]** Thus, the finding that respondent presented no testimony of the sort described in finding of fact 24 is not supported by the record. It would not in any event constitute an aggravating factor.

Third, finding of fact 25 states that "Respondent has not explained his motive for his actions." This is not a statement that the referee did not *believe* respondent's explanation, but a finding that none was *offered*. This finding is not supported by the record. A good deal of the testimony presented by respondent (and, on reconsideration, by his psychologist) was devoted to explaining the motive for respondent's misconduct, namely, his belief that he was not getting a fair share of the partnership's income, and his desire to avoid confrontation with Dotson. (I R.T. pp. 63, 67; II R.T. pp. 2-3, 13-14, 38-43; III R.T. pp. 114-115, 125, 133.) **[13]** Again, even if respondent had failed to explain his motive, such failure would not properly constitute an aggravating factor.

Finally, finding of fact 26 states that "Respondent's claim that he intended to utilize the money be diverted for the eventual settlement with his partner is contradicted by his admission that none of the money was so used." This statement does not resolve the conflict and is thus not a true finding. It also does not accurately characterize the testimony. Respondent never testified that he intended to replace the money he misappropriated from his partnership. Rather, he stated that the last part of the money he misappropriated was taken as an advance offset against an anticipated unequal division of the partnership assets in Dotson's favor. Respondent testified without contradiction that such an unequal division occurred. Accordingly, this "finding" also is not supported by the record.

On review, the State Bar contends that there are additional aggravating factors shown by the record which were not set forth in the referee's decision. **[14]** First, the examiner argues that respondent's repeated thefts over a five-year period constitute a pattern of misconduct and/or multiple acts. Clearly, there were multiple acts. Such factor adds to the overall gravity of respondent's misconduct, but it does not preclude consideration of mitigation to reach a result short of disbarment. (See, e.g., *Rose* v. *State Bar* (1989) 49 Cal.3d 646.)

Second, the examiner argues that respondent gave "circuitous and dubious testimony" at the hearing. This contention is best addressed to the hearing referee who observed respondent's demeanor. No finding of lack of candor was made here, nor does our own review of the record permit such a finding. Respondent's explanation for his misconduct was coherent and internally logical, albeit misguided, and did not reflect evasion or deliberate untruth such as might appropriately be viewed as an aggravating factor.

[15] Third, the examiner argues that respondent has demonstrated indifference to the consequences of his act, and lack of remorse. This is based on respondent's testimony that he held the belief that his former partner was not harmed by his misconduct. The record does in fact show that Dotson received back more than the amount respondent took. While respondent officially made restitution only of the relatively small amount ($3,000) ordered by the court as part of respondent's criminal sentence, respondent also left Dotson with a far greater than half share of the partnership's accumulated assets, in-

cluding fees later collected in cases that respondent took with him when he left the partnership.[11] As a consequence, respondent's adherence to his contention that Dotson was not harmed economically is supported by the record and his failure to make additional restitution does not demonstrate a failure to appreciate the wrongfulness of his acts.

In short, the only aggravating factors found by the referee or offered by the examiner which we conclude are supported by clear and convincing evidence, and appropriately relied on in aggravation, are (1) that respondent's scheme was repeated on numerous occasions over a period of time, and thus consisted of multiple acts of misconduct (std. 1.2(b)(ii)), and (2) that respondent's misconduct was surrounded by concealment (decision, finding of fact 23; std. 1.2(b)(iii)).

3. Mitigating Factors

[16] In assessing the appropriate discipline we begin by looking to the provisions of standard 3.2, in light of the goals of the disciplinary system as set forth in standard 1.3, and in light of the guidance we have received from the Supreme Court. (*In re Young* (1989) 49 Cal.3d 257, 266-268.) The standards are guidelines, not mandatory sentencing provisions. (*Id.* at pp. 267-268 & fn. 11.) **[17]** Standard 3.2 contemplates the opportunity for the respondent to introduce evidence in mitigation which, if compelling, would justify a sanction short of disbarment.

Respondent introduced evidence to support findings of mitigation under standards 1.2(e)(i) (absence of prior discipline), 1.2(e)(iii) (lack of harm to victim), 1.2(e)(iv) (emotional difficulties), 1.2(e)(vi) (good character), 1.2(e)(vii) (remorse and restitution) and 1.2(e)(viii) (subsequent rehabilitation). The referee recited much of this evidence in his decision. (Decision, ¶¶ 10-21.) However, he introduced most of it (decision, ¶¶ 12-21) with the phrase "Respondent offers" (decision at p. 4), thus making it difficult to determine whether or not respondent's evidence was accepted as fact. There was no serious dispute, however, as to the truth of the factual evidence offered by respondent in this regard; the real dispute was as to its adequacy as mitigation. We therefore adopt the relevant portion of the referee's decision (findings of fact 12-21) as findings of fact.

The referee's findings, together with other undisputed evidence in the record, establish the existence of the following mitigating factors. First, respondent has no prior (or subsequent[12] **[18 - see fn. 12]**) disciplinary record, and had been in practice for over seven years prior to the commencement of his misconduct, and for nearly sixteen years by the date of his interim suspension. (Decision, findings of fact 2, 13; std. 1.2(e)(i).)[13] **[19 - see fn. 13]**

Second, as already noted, Dotson was more than compensated for his share of the money taken by respondent, due to respondent's voluntary restitution in the form of an uneven division of the

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11. As respondent's brief on review points out, respondent, as a 50 percent partner, would have been entitled to receive half of the $30,000 as legitimate distributions if he had not embezzled it. Thus, the net loss to respondent's partner Dotson (as opposed to the partnership) was about $15,000, of which Dotson was repaid $3,000 as a result of the criminal proceeding. The uncontradicted evidence adduced by the respondent at the hearing shows that respondent gave Dotson a library valued at $25,000 and almost all of the office furniture and equipment (I R.T. p. 66) as well as 50 percent of the gross fees to be earned on five contingencies which were being litigated by respondent. (I R.T. pp. 63-71, 76-88; exhs. H, I.) Respondent donated his services and paid all costs incurred out of his own pocket resulting in approximately $19,000 more fees paid to Dotson than to respondent. (Exh. H.) Thus, in compensation for his $15,000 loss, Dotson received at least $9,500 in cash plus an in-kind distribution in excess of $12,500 representing the value of respondent's share of the library, equipment and furnishings.

12. **[18]** Although not mentioned expressly in the standards, under the case law respondent's record of practicing without complaint *subsequent* to his misconduct is as valid a mitigating circumstance as his lack of a *prior* record. (*Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 316-317.)

13. **[19]** Under the express terms of standard 1.2(e)(i), a long record of practice without prior discipline is mitigating only if "coupled with present misconduct which is not deemed serious." Respondent's misconduct in this matter must be considered serious. However, standard 1.2(e)(ii) has been applied repeatedly by the Supreme Court to cases involving serious misconduct, and the limitation in the standard's language appears essentially to have been read out of it by case law. (See, e.g., *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at p. 317; *Cooper* v. *State Bar* (1987) 43 Cal.3d 1016, 1029 [absence of prior record will militate against disbarment of attorney who is culpable of pattern of serious misconduct, but only if attorney can show that misconduct is not likely to recur].)

partnership assets. Thus, Dotson, who was the only victim of respondent's crime, was not permanently harmed by respondent's conduct. (Decision, findings of fact 17, 19; stds. 1.2(e)(iii), 1.2(e)(vii).)

Third, respondent presented uncontroverted expert testimony, as well as his own testimony, establishing that his misconduct was related to emotional problems. (Std. 1.2(e)(iv).) These included respondent's traumatic separation from his first wife (decision, finding of fact 14), as well as psychological shortcomings that precluded respondent from confronting Dotson about the inequity respondent perceived in their partnership arrangement, and that led respondent to desire to create an appearance of financial advantage to Dotson upon the dissolution of their partnership. (Decision, findings of fact 15-16; I R.T. p. 63; II R.T. pp. 38-41; III R.T. pp. 111-115.)[14] **[20 - see fn. 14]**

With respect to respondent's general good character and reputation (standard 1.2(e)(vi)), the referee found that respondent was president of his county bar association in 1977, and that he "enjoyed a reputation and was held in high regard for honesty, hard work, competence and community involvement." (Decision, findings of fact 10, 11.) In addition, respondent introduced into evidence numerous letters (admitted collectively as exhibit C) attesting to his character, originating from a wide spectrum of very credible sources, which are very persuasive in this regard.[15] They constitute the "extraordinary demonstration of good character . . . attested to by a wide range of references in the legal and general communities . . . who are aware of the full extent of the member's misconduct" that is required by standard 1.2(e)(vi).

For example, a former client who had nothing but high praise for respondent (stating that "he put meaning in my life" through free legal assistance) and whose name was forged by respondent stated: "I know about the criminal charges against Mr. Stamper. I was required to testify for the prosecution at the preliminary hearing. They called me a victim. Nothing could be further from the truth." (Exh. C [letter signed under penalty of perjury by Chris McLaughlin].)

John Ryerson, a successful businessman in Imperial County for over thirty years, testified to his observation of respondent in a professional context as well as church and social settings. He characterized respondent's conduct as a lapse of judgment that had not recurred and attested to respondent's honesty and integrity despite Ryerson's familiarity with the facts of respondent's conviction and suspension. "In fact, I was interviewed by the Attorney General's Office and I understand that my case was one of those that resulted in a conviction. In spite of that, I feel that Richard Stamper has learned his lesson, is completely rehabilitated, and would present no threat to the community if he resumes practice. Actually, I believe the community would benefit from the services of such a lawyer." (Exh. C [letter signed under penalty of perjury by John Ryerson].)

Dwayne Peek was a client who went to respondent *after* criminal charges had been filed and substantial publicity had been generated thereby. This was before respondent was suspended. Peek stated that respondent was completely candid and completely trustworthy. (Exh. C [letter signed under penalty of perjury by Dwayne Peek].)

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14. Respondent's testimony demonstrated his remorse for his misconduct, and his growing insight into its sources. (II R.T. pp. 38-41.) Respondent's expert testified that he had made progress in ameliorating his psychological difficulties, and that his misconduct was not likely to recur. (III R.T. pp. 115-117.) Thus, some rehabilitation, during the considerable time that has passed since the misconduct, is established as required by standards 1.2(e)(iv) and (viii). **[20]** However, the expert also acknowledged that respondent still possesses personality traits that "need working on." (III R.T. p. 123; see also *id.* at pp. 123-124.) This testimony leads us to believe that the protection of the public requires that respondent remain on probation for a significant period of time following his return to active practice, with a condition requiring further psychological treatment, if needed. We have recommended the imposition of such a condition.

15. The sources included not only former clients whose names respondent had forged, but also his law partners after Dotson (at the firm he resigned from upon his conviction), the former dean of the University of San Francisco law school, a prosecutor and former sheriff, the county counsel, the most senior deputy probation officer in the county, respondent's current wife's ex-husband, his ex-wife's subsequent boyfriend, fellow attorneys, neighbors and a member of the school board.

One letter which we find most persuasive came from a source who should have been most leery about respondent's past misdeeds—Richard Hecht, the attorney who took over respondent's practice in 1986 when respondent was suspended and hired respondent as his paralegal. Hecht characterized respondent as being among the top 10 to 20 percent of the thousands of attorneys he had worked with or opposed in 28 years of practice. He explained that he had discussed respondent's conviction and character with a number of attorneys as well as respondent and that he considered respondent totally honest and candid as well as an involved and tenacious attorney of superior workmanship showing extraordinary dedication and compassion for his clients.[16] Hecht concluded by noting: "I can state my position no more forcefully than to say that I would not hesitate to enter into a partnership with [respondent]. . . . I feel the same about very few others." (Exh. C [letter from Richard Hecht].)

[21] On review, the examiner attempts to discount the letters, but this effort is not based on solid ground. The examiner stipulated to the admissibility of the letters at the hearing and thus chose not to require the declarants to be subjected to cross-examination. While not all of the more than 30 letters state the extent of the author's knowledge of respondent's misconduct, most of them convincingly recite their familiarity with the criminal conviction (see discussion *ante*) and some note that it enjoyed widespread publicity in the community. Thus, in light of the examiner's waiver of cross-examination, we have no basis for determining that the authors of the letters were not adequately familiar with respondent's misconduct. In any event, those few letters that do not expressly indicate such knowledge are far outweighed by the many that do.

C. Appropriate Discipline.

In seeking a recommendation of disbarment, the examiner relies in part upon *In re Rivas* (1989) 49 Cal.3d 794. *In re Rivas* is clearly distinguishable. It involved fraud upon the public by a candidate for election to a judgeship. Disbarment was required because of the extremely serious nature of the misconduct which was aggravated by Rivas's conduct during the hearing.[17] Moreover, the character evidence offered in mitigation was not based on any detailed personal knowledge, but largely upon Rivas's reputation. (*Id.* at pp. 801-802.)

In re Bloom (1977) 19 Cal.3d 175, 179 is likewise distinguishable. Bloom solicited a $150,000 bribe for purposes of personal gain. Respondent's motivation (albeit misguided) was not personal gain. It was to avoid confrontation over what he considered to be his fair share of the partnership, and respondent undisputedly gave up a portion of his half of the partnership assets to compensate his partner for the embezzled funds *before* any misconduct was discovered.

The principal recent case relied upon by the examiner is *In re Basinger* (1988) 45 Cal.3d 1348. Basinger gave his secretary authority to invest money on his behalf and write checks on his law partnership's accounts. To cover losses on the investments, the secretary improperly transferred money into respondent's operating account, including both partnership funds and client trust funds. Basinger first found out about the secretary's activity and failed to report it to his partners or investigate further. Instead, he became romantically involved with her. When thefts in excess of $240,500 were finally discovered, Basinger paid back part of the money, but refused to borrow additional funds in order to restore the rest of what had been taken. Basinger contended, with the support of expert testimony, that his misconduct was the aberrational product of situational stress, and was not likely to recur.

The Supreme Court held that these arguments were not sufficient when balanced against other factors: "We must still consider the enormity of the

16. This characterization was echoed by all of the other character references who were familiar with respondent's law practice.

17. The Court did note that, with credit for interim suspension, Rivas could apply for reinstatement two months after disbarment! (*Id.* at p. 802 fn. 8.) A similar result would occur here. If disbarment were ordered by the Supreme Court, it would not be effective for several months to a year following our decision, by which time respondent will have been on interim suspension for four to four and one-half years.

crime and its effect on the integrity, high professional standards, and public confidence in the legal profession." (*In re Basinger*, *supra*, 45 Cal.3d at p. 1360.) In so doing, the Supreme Court noted that the scheme only ended when the defalcations were discovered, that an unusually large amount of money was involved and the forged signatures in settled cases possibly compromised his clients' rights. (*Id.* at p. 1361.) The court also noted that petitioner "repaid" victims from funds converted from new victims and only made restitution after discovery of the crime and threatened police intervention. (*Id.* at p. 1364.)

We, too, must consider the effect of respondent's conduct on the integrity, high professional standards and public confidence in the profession. But we must also take into consideration that his crime is not of the enormity of Basinger's crime, that restitution was made *before* discovery, and that no clients were involved.

The examiner contends that a partner as victim should receive the same solicitude as a client as victim. Assuming that to be the case, respondent is nonetheless entitled to consideration of mitigating evidence. In *Weller* v. *State Bar* (1989) 49 Cal.3d 670, 677-678, for example, disbarment was rejected and three years actual suspension was ordered even though the respondent had a prior record of discipline and had misappropriated $14,000 from his clients which he repaid only after the client's wages were garnished by the creditor. There, as here, the respondent had numerous letters of recommendation which the court treated as a mitigating factor. (*Id.* at p. 677.)[18]

We find the evidence in mitigation introduced by respondent to establish the existence of "the most compelling mitigating circumstances" which "clearly predominate" over respondent's commission of crimes involving moral turpitude, and over the aggravating factors discussed *ante*. Under standard 3.2, therefore, a degree of discipline short of disbarment is appropriate.

In light of all the facts and circumstances, as noted at the outset of this opinion, we recommend to the Supreme Court that respondent be given five years' stayed suspension and four years' actual suspension, placed on probation for five years on conditions specified in our formal recommendation (*post*), and required to take and pass the Professional Responsibility Examination within one year. (See *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891 fn. 8.) In applying this recommendation, however, it is necessary to take into account the fact that respondent has already been suspended on an interim basis for over three and a half years.

D. Effect of Interim Suspension.

[22] If we had recommended disbarment, respondent would be entitled, in determining when he could apply for reinstatement, to receive full credit for all time served on interim suspension. (Rules Proc. of State Bar, rule 622; see *In re Young* (1989) 49 Cal.3d 257, 268 fn. 13.) If we follow the minimum actual suspension set forth in standard 3.2, we would have to make two years of the recommended suspension prospective. This could deprive respondent of his right to practice for more years than he might be removed for disbarment, even though he has made a showing of compelling mitigation. Such an inequitable result would stem from the length of respondent's interim suspension. The time spent on interim suspension was largely due to respondent's having taken an appeal from his conviction. Not only was this something respondent had every right to do, but in fact, his appeal proved to be meritorious in large part. Nearly all of his convictions were reversed and his contentions on the remaining convictions regarding erroneous jury instructions were accepted by the Court of Appeal (though the error was found to have been harmless). Respondent should not be penalized for his entirely proper exercise of his right to appeal by forfeiting his right to practice law for longer than would have been the case had he allowed his conviction to become final earlier. (*In re Young*, *supra*, 49 Cal.3d at p. 267.)

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18. In *Weller*, the attorney's character evidence was treated as mitigation, but was held to be "less persuasive than [it] otherwise might be" (49 Cal.3d at p. 677) because of lack of evidence that the character references knew the full extent of the attorney's misconduct. In the present case, as discussed *ante*, respondent's letters are entitled to more weight than those presented in *Weller*, because the authors generally were aware of respondent's criminal conviction.

[23] The Supreme Court in *In re Young* rejected the rigid application of the prospective provision of standard 3.2. The Court held that each case must be resolved on its own facts to avoid unfair and inconsistent results, taking into account all relevant evidence including whether the conduct was aberrational, testimony from character witnesses, cooperation, remorse and length of interim suspension. (*Id.* at pp. 267-268.) The Supreme Court determined upon mitigating circumstances similar to those found here that the public would be adequately protected by five years stayed suspension, with an actual suspension of four years, with credit for time spent on interim suspension, plus five years probation. Under the mandate of *In re Young*, therefore, we recommend that respondent be given credit, against the lengthy period of actual suspension which we have recommended, for all of the time he will have spent on interim suspension as of the date the Supreme Court's order in this matter becomes effective.

As in *In re Young*, to protect the public, we also recommend a five-year period of probation which will continue after respondent's return to the practice of law. To guard against any remaining uncertainty regarding respondent's rehabilitation from the psychological shortcomings that led to the commission of his crimes, we also recommend that respondent be required to obtain further psychiatric or psychological counseling and certification of his recovery. We also require that he have any client trust account monitored by a certified public accountant or public accountant for the duration of probation.

FORMAL RECOMMENDATION

It is therefore recommended to the Supreme Court that respondent RICHARD C. STAMPER be suspended from the practice of law for a period of five years, and that said suspension be stayed on the following conditions:

1. That respondent be placed on actual suspension for four years with credit for the time spent on interim suspension between October 17, 1986 and the effective date of the Supreme Court's order herein.

2. That respondent be placed on probation for five years, commencing on the effective date of the Supreme Court's order herein, on the following conditions:

(a) That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

(b) That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(i) in his first report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct since the effective date of said probation;

(ii) in each subsequent report, that he has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(iii) provided, however, that a final report shall be filed covering the remaining portionof the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

(c) That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish

such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

(d) That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

(e) That respondent shall promptly report, and in no event in more than ten days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

(f) That if respondent is in possession of clients' funds, or has come into possession thereof during the period covered by each quarterly report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(i) That respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(A) Money received for the account of a client and money received for the attorney's own account;

(B) Money paid to or on behalf of a client and money paid for the attorney's own account; and

(C) The amount of money held in trust for each client;

(ii) That respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "clients' funds account";

(iii) That respondent has maintained a permanent record showing:

(A) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof:

(B) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "clients' funds account(s)" as appears in monthly bank statements of said account(s);

(C) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held; and

(D) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences; and

(iv) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients; and

(g) That he shall obtain psychiatric or psychological help from a duly licensed psychiatrist or a clinical psychologist at his own expense and shall furnish evidence to the Office of the Clerk, State Bar Court, Los Angeles, that he is so complying with each report that he is required to render under these conditions of probation; provided, however, that should it be determined by said psychiatrist or psychologist that respondent has recovered from the mental infirmities concerning which he presented testimony at his criminal trial, he may furnish to the State Bar a written statement from said psychiatrist or psychologist so certifying by affidavit or under penalty of perjury, in which event, and subject to the approval of the court, no reports or further reports under this paragraph shall be required and he shall not be required to obtain such psychiatric or psychological help.

3. We further recommend that respondent be required to take and pass the Professional Responsibility Examination within one year from the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WILLIAM STORM BLEECKER

A Member of the State Bar

[No. 84-O-18464]

Filed July 17, 1990

SUMMARY

Respondent was found culpable of commingling personal funds with client trust funds, misappropriating funds advanced by a client for costs, failing to pay payroll taxes, and using his trust account to hold personal funds so as to avoid a tax levy. The hearing department recommended a two-year stayed suspension, two years probation, and a sixty-day actual suspension. (Jared Dreyfus, Edward D. Morgan, Arthur H. Bernstein, Hearing Referees.)

The examiner sought review, arguing that the recommended discipline was inadequate. On review, respondent asserted that he was not culpable of misappropriation. Respondent's arguments that he was not culpable of misappropriation or of moral turpitude were rejected. The evidence supported the finding that the funds misappropriated had been advanced for corporation filing fees and not, as respondent claimed, for advanced attorney's fees subsequently earned. On the issue of moral turpitude, the review department found that, at the very least, respondent's handling of his client's funds involved gross carelessness which amounted to moral turpitude under Supreme Court precedent. The review department also found respondent's deliberate use of his trust account to avoid a tax levy to be a basis for a separate finding of moral turpitude.

However, the review department dismissed the charge relating to respondent's failure to pay payroll taxes, because although the facts showed that respondent might have violated penal or civil statutes pertaining to payment of payroll taxes, the notice to show cause alleged only that the respondent had violated sections of the Business and Professions Code, and thus was insufficient to put the attorney on notice that he should prepare to defend against allegations of violating other statutes.

The review department adopted the hearing department's disciplinary recommendation. After considering the misconduct, weighing the factors in mitigation, and reviewing Supreme Court case law, the review department concluded that a deviation from the Standards for Attorney Sanctions for Professional Misconduct was justified.

COUNSEL FOR PARTIES

For Office of Trials: Donald R. Steedman

For Respondent: Tom Low

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **106.20 Procedure—Pleadings—Notice of Charges**
130 Procedure—Procedure on Review
192 Due Process/Procedural Rights
420.00 Misappropriation
Review department will not consider misappropriation implied by evidence but not charged in notice to show cause, and not mentioned at trial, in hearing department decision, or in briefs on review.

[2 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**
420.00 Misappropriation
Attorney's responsibility for maintaining entrusted funds on deposit in trust account does not end when checks purporting to distribute entrusted funds are issued; responsibility continues until the checks have cleared the account. Where attorney's trust account balance fell below amount of entrusted funds after checks were written but before they cleared, attorney thereby misappropriated funds and violated trust account rules.

[3] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Rule 453 of the Transitional Rules of Procedure of the State Bar requires the review department to independently review the record as to all matters brought before it. The review department accords great weight to findings of fact by the hearing department resolving testimonial issues. However, the review department has the authority to adopt findings, conclusions and recommendations that differ from those of the hearing department. Moreover, the scope of review is not limited to the issues raised by the parties.

[4] **802.30 Standards—Purposes of Sanctions**
The overriding concern of the review department is the preservation of public confidence in the legal profession and the maintenance of high professional standards.

[5] **159 Evidence—Miscellaneous**
161 Duty to Present Evidence
162.20 Proof—Respondent's Burden
165 Adequacy of Hearing Decision
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
Respondent's failure to substantiate with documentary evidence his claim that he had earned funds which he claimed were advanced legal fees was properly considered by hearing panel in determining that respondent was not credible on this issue, even though burden of proof was not respondent's. Giving great weight to hearing panel's credibility determination and resolution of conflicting facts against respondent, review department found no basis to reject panel's finding that funds were advanced costs which respondent misappropriated.

[6] **204.20 Culpability—Intent Requirement**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
The mere fact that the balance in an attorney's trust account falls below the amounts deposited and purportedly held in trust therein supports a conclusion of misappropriation. The rule regarding safekeeping of entrusted funds leaves no room for inquiry into the attorney's intent.

[7] **280.00 Rule 4-100(A) [former 8-101(A)]**
Respondent's admission that he used his trust account as an operating account and deposited his personal funds into his trust account when client funds were in the account supported finding of commingling in violation of rules governing use of trust accounts. Commingling is committed when a client's money is intermingled with that of the attorney and its separate identity lost so that it may be used for the attorney's personal expenses. Use of the trust account for personal purposes is absolutely prohibited, even if client funds are not on deposit.

[8] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
430.00 Breach of Fiduciary Duty
Although respondent's misappropriation of client funds was not intentional, and resulted from poor management and misuse of trust account, respondent's gross carelessness, at best, in management of client's entrusted funds constituted moral turpitude, as such conduct breached his fiduciary duty to his client.

[9] **169 Standard of Proof or Review—Miscellaneous**
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
Whether an attorney's misconduct involved moral turpitude is a question of law ultimately decided by the Supreme Court. The test is the same whether or not the act was a criminal offense. Where respondent failed to pay payroll taxes due to financial difficulty, such conduct did not constitute moral turpitude, because Supreme Court did not find moral turpitude in case involving similar but more egregious misconduct.

[10] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
194 Statutes Outside State Bar Act
213.10 State Bar Act—Section 6068(a)

Contention by State Bar that respondent violated attorney's duty to obey state and federal laws by failing to pay payroll taxes as required by penal and civil statutes was rejected by review department, despite respondent's admission that taxes were not paid, because notice to show cause did not charge violation of employer withholding statutes, and no evidence was introduced to prove they were violated, thus depriving respondent of opportunity to defend.

[11] **221.00 State Bar Act—Section 6106**
Respondent's admitted improper use of trust account as an operating account into which he deposited personal funds in order to avoid tax levy which he anticipated, involved concealment and dishonesty, and thus constituted moral turpitude.

[12] **745.10 Mitigation—Remorse/Restitution—Found**
791 Mitigation—Other—Found
Fact that respondent readily admitted misuse of client trust account and had taken steps to change business practices to alleviate pressures that led to the misuse constituted a mitigating circumstance.

[13] **750.10 Mitigation—Rehabilitation—Found**
Where respondent's misconduct occurred four years prior to disciplinary hearing, and five years prior to proceedings on review, and respondent had not committed misconduct since then, this constituted a mitigating circumstance.

[14] **801.30 Standards—Effect as Guidelines**
1091 Substantive Issues re Discipline—Proportionality
In assessing appropriate discipline, review department starts with Standards for Attorney Sanctions for Professional Misconduct, which serve as guidelines, and also considers whether recommended discipline is consistent with or disproportionate to prior decisions of the Supreme Court based upon similar facts.

[15] **801.20 Standards—Purpose**
802.30 Standards—Purposes of Sanctions
The Standards for Attorney Sanctions for Professional Misconduct must be viewed as a whole with the objective of achieving the primary purposes of disciplinary proceedings, namely, protection of the public, courts and legal profession; maintenance of high professional standards and preservation of public confidence in the legal profession.

[16 a, b] **745.10 Mitigation—Remorse/Restitution—Found**
750.10 Mitigation—Rehabilitation—Found
801.41 Standards—Deviation From—Justified
822.52 Standards—Misappropriation—Declined to Apply
822.53 Standards—Misappropriation—Declined to Apply
822.55 Standards—Misappropriation—Declined to Apply
822.59 Standards—Misappropriation—Declined to Apply
824.53 Standards—Commingling/Trust Account—Declined to Apply
824.54 Standards—Commingling/Trust Account—Declined to Apply
824.59 Standards—Commingling/Trust Account—Declined to Apply
Where respondent had no prior or subsequent discipline; respondent was not venal; respondent's misconduct was an aberration occurring over a short period of time and contributed to by respondent's poor business judgment at a time when he was under financial pressures; respondent accepted responsibility for his misconduct, taking objective steps to avoid further misconduct; and other mitigating factors existed, it was appropriate to recommend lesser sanction than minimum actual suspension indicated by applicable standards.

[17] **760.32 Mitigation—Personal/Financial Problems—Found but Discounted**
760.33 Mitigation—Personal/Financial Problems—Found but Discounted
Where respondent did not demonstrate that he suffered from such extreme personal pressures related to his financial difficulties that his misconduct could have been reasonably understandable as a desperate response to such pressures, respondent's financial difficulties were not considered a significant factor in mitigation.

[18] **801.41 Standards—Deviation From—Justified**
822.53 Standards—Misappropriation—Declined to Apply
1091 Substantive Issues re Discipline—Proportionality
Supreme Court has usually not dealt severely with misappropriations involving a relatively small amount for a relatively brief time when no intentional dishonesty was involved and the offense involved attorney's use of trust account as an operating account.

[19] **523 Aggravation—Multiple Acts—Found but Discounted**
802.61 Standards—Appropriate Sanction—Most Severe Applicable
833.20 Standards—Moral Turpitude—Suspension
1091 Substantive Issues re Discipline—Proportionality
1093 Substantive Issues re Discipline—Inadequacy
Fact that, in addition to unintentionally misappropriating client's funds, attorney had committed act of moral turpitude by concealing personal assets in trust account to avoid tax levy might, but would not necessarily, indicate greater discipline to be in order, based on Supreme Court precedent.

[20] **165 Adequacy of Hearing Decision**
179 Discipline Conditions—Miscellaneous
Probation conditions which were not set forth in language of standard conditions of probation utilized in disciplinary proceedings were inadequate.

[21] **172.19 Discipline—Probation—Other Issues**
179 Discipline Conditions—Miscellaneous
1099 Substantive Issues re Discipline—Miscellaneous
Where delay in commencement of disciplinary probation until end of actual suspension would not further rehabilitation objective of probation, review department recommended that probation commence on finality of Supreme Court's discipline order.

[22] **175 Discipline—Rule 955**
Where review department rejected examiner's contention that one-year actual suspension should be recommended, and instead recommended sixty-day actual suspension, requirement that respondent comply with rule 955, Cal. Rules of Ct., was rejected as unnecessary.

ADDITIONAL ANALYSIS

Culpability
Found
221.11 Section 6106—Deliberate Dishonesty/Fraud
221.12 Section 6106—Gross Negligence
280.01 Rule 4-100(A) [former 8-101(A)]
420.12 Misappropriation—Gross Negligence
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
Mitigation
Found
720.10 Lack of Harm
Standards
802.62 Appropriate Sanction
802.63 Appropriate Sanction
833.90 Moral Turpitude—Suspension
Discipline
1013.08 Stayed Suspension—2 Years
1015.02 Actual Suspension—2 Months
1017.08 Probation—2 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing

OPINION

NORIAN, J.:

A hearing panel of the State Bar Court[1] has recommended that William S. Bleecker ("respondent") be suspended from the practice of law in the State of California for two years, stayed, with conditions including sixty days actual suspension and probation for the balance of the two-year stayed suspension.

We review this matter at the request of the State Bar examiner ("examiner"). (Trans. Rules Proc. of State Bar, rule 450(a).)[2] The examiner contends that the recommended level of discipline is insufficient in view of the facts found in the hearing panel's decision, the panel's recommended conditions of probation are incomplete, and respondent should be ordered to comply with rule 955, California Rules of Court. We have concluded, based on our independent review of the record, that the hearing panel's decision should be modified to expand the findings of fact, to modify the conclusions of law, and to set forth the probation conditions in language customary in suspension matters. With these modifications we shall adopt the hearing panel's decision as our recommendation to the Supreme Court.

I. PROCEDURAL HISTORY

This proceeding was initiated by a notice to show cause filed February 18, 1988. Count one of the four-count notice alleged that respondent failed to perform the services for which he was hired in a client matter and failed to communicate with that client in violation of Business and Professions Code sections 6068 (a) and 6103,[3] and former Rules of Professional Conduct, rules 2-111(A)(2), 6-101(A)(2) and 6-101(B)(1).[4] Count two alleged that respondent commingled his personal funds with client funds, used his client trust account as a personal or business account and misappropriated client funds from the trust account in violation of sections 6068 (a), 6103 and 6106 and rule 8-101(A). Count three alleged that respondent wilfully failed to withhold and pay over payroll taxes on behalf of his employees in violation of sections 6068 (a), 6103 and 6106. Count four alleged that respondent's failure to withhold and pay over the payroll taxes was an attempt to evade a lawful levy of the taxing authorities in violation of sections 6068 (a), 6103 and 6106. Respondent's answer to the notice to show cause was filed February 29, 1988.

The parties entered into a stipulation as to facts and disposition which was approved by order of a former referee of the State Bar Court. The order approving the stipulation and the stipulation were both filed August 24, 1988. Our predecessor review department rejected the order approving the stipulation and the stipulation at its April 6, 1989, meeting on the ground that the discipline recommended appeared insufficient. Under rule 408(b) of the former Rules of Procedure of the State Bar, the parties were relieved of all effects of the stipulation upon its rejection by the review department and the matter was put back on the hearing department calendar for further proceedings. Accordingly, that stipulation is not part of the record of this proceeding and hence not the subject of our review.

The trial was held on July 13, 1989. Respondent appeared personally and was represented by counsel.

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1. The Rules of Procedure of the State Bar, in effect prior to September 1, 1989, govern the proceedings held before the hearing panel because the taking of evidence had commenced before that date. (Trans. Rules Proc. of State Bar, rule 109.) Under rule 558 of those Rules of Procedure, upon timely election by a party, a hearing panel consisting of three referees was assigned by the Presiding Referee to adjudicate the disciplinary matter. Such an election apparently occurred in this case, although the record before us does not so indicate.

2. The Transitional Rules of Procedure of the State Bar, effective September 1, 1989, apply to this review department, created by Business and Professions Code section 6086.65 and appointed by the Supreme Court, and to proceedings conducted by the hearing judges and judges pro tem after September 1, 1989.

3. All statutory references herein are to the Business and Professions Code unless otherwise stated.

4. All references to the rules herein, unless otherwise stated, are to the former Rules of Professional Conduct of the State Bar of California, in effect from January 1, 1975 to May 26, 1989.

At trial, count one was dismissed on motion of the examiner on the ground of insufficiency of evidence. The hearing panel, without elaboration, found culpability on counts two, three and four, and each Business and Professions Code section and Rule of Professional Conduct charged in each count.[5]

II. FACTS

Respondent was admitted to the practice of law in the State of California in January of 1979 and has no prior record of discipline.

Except for the misappropriation charge, the facts underlying count two are not disputed and were the subject of a stipulation as to facts entered by the parties at trial.[6] The stipulated facts demonstrate that:

As of October of 1985 respondent was engaged in the practice of law and maintained a client trust account. Prior to October 1985 respondent had deposited client funds into that account. On or about September 16, 1985, respondent began writing trust checks for personal and operating purposes. Respondent issued numerous trust account checks for the purpose of paying his office staff, personal and office bills, and advancing costs for clients. During the same period of time respondent made numerous deposits into the trust account of money belonging solely to him, including earned fees.

On October 2, 1985, respondent deposited a $1,000 check into his trust account from William Frye. The money was a retainer for services to dissolve a joint venture.[7] By October 17, 1985, the Frye funds were depleted. In January of 1986 respondent issued a trust check in the amount of $166.50 to Frye, which was a refund of fees.

The refund of the $166.50 came out of a retainer paid by a client named Gianotti. The trust account had a negative balance for much of the time between respondent's receipt of the $1,000 (October 2, 1985) and his return of the $166.50 (January 4, 1986).

In December of 1985[8] the respondent deposited $750 in cash into the trust account. Prior to that deposit the account had a negative balance of $209.38. After the deposit there was a positive balance of $528.15. The $750 was the retainer from the client named Gianotti.[9] **[1 - see fn. 9]**

On January 13, 1986, respondent deposited $172.78 into the trust account which were funds belonging to his client, Mary Maletti. On the same day respondent wrote a trust check to Maletti in the same amount. That check did not clear the account until January 17, 1986. During the period that the money was in the respondent's trust account (January 13-17, 1986), respondent had his own personal funds in the account.

The facts regarding the misappropriation charge in count two were disputed at trial. The hearing panel found that in May of 1985, respondent was hired by Dr. Harris Young ("Young") to incorporate Young's practice. Young gave respondent $270 which was deposited into respondent's trust account.[10] The par-

5. The hearing panel found culpability for each statute and rule charged on the record at trial. (R.T. p. 71.) However, it did not include those legal conclusions in the decision.

6. The stipulation as to facts was based on the allegations that were contained in the examiner's trial brief on culpability, filed July 13, 1989. The hearing panel's decision does not contain findings of fact based on the stipulated facts. However, the panel made conclusions based on the stipulated facts and we deem the panel intended to include the stipulated facts within the decision and we modify the decision to include our recitation of those stipulated facts contained in this opinion.

7. The stipulated facts indicate that the money "may have been a fee retainer." (Examiner's trial brief, filed July 13, 1989, p. 5.) However, respondent testified at trial that the money was a fee retainer to dissolve a joint venture (R.T. p. 28), and we so find.

8. The stipulated facts have December of 1986 as the date. (Examiner's trial brief, p. 7.) The bank records introduced in evidence indicate December of 1985 is the correct date (State Bar exh. 1, p. 138), and we so find.

9. [1] No mention is made in the notice to show cause, trial, decision or review briefs of possible misappropriation with regard to the Frye and Gianotti matters. As misappropriation allegations with regard to these matters were not charged in the notice to show cause, we have not considered them. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 928.)

10. The decision is silent on the date the money was deposited. However, the documentary evidence submitted at trial indicates the deposit was on May 13, 1985 (State Bar exh. 1, p. 4) and we so find.

ties stipulated that $270 was the total fee charged by California for incorporation in May of 1985.[11]

In September of 1985 respondent wrote two checks in the Young matter,[12] one to the Secretary of State for $70 and the other to the Franchise Tax Board for $200. Between the deposit of the client's check into the account in May of 1985 and September of 1985, the balance in the account fell below $270.[13] **[2a - see fn. 13]**

The hearing panel's decision made very limited findings of fact on counts three and four. (See decision, p. 2.) Because of that we find it necessary to make the following findings of fact on these counts. Our findings are derived primarily from respondent's admissions made during his testimony at trial herein. (See R.T. pp. 16-20.)

In count three, respondent employed a secretary and at times a paralegal in his law practice. The employees were paid on an hourly basis less deductions for state and federal withholding taxes. As of September of 1985 respondent owed the federal government approximately $5,000 in employee withholding taxes. (R.T. pp. 17-18.)

Prior to September of 1985 respondent had been unable to pay the withholding taxes when due many times. On some of these occasions, respondent contacted the taxing authorities and made arrangements to pay the amounts due in installments. On other occasions the Internal Revenue Service levied on his operating account. (R.T. p. 37.)

In count four, respondent began using his trust account as an operating account in September of 1985. (R.T. pp. 7-8.) He did so in order to avoid levy by the Internal Revenue Service for a short period of time so he could arrange to obtain the funds necessary to pay the tax obligations. Although there was no evidence that respondent was aware that a levy was imminent, he expected the federal government would levy on the operating account (R.T. pp. 19-20), and sought to conceal assets from such a levy by use of his client trust account as an operating account.[14]

III. CONTENTIONS ON REVIEW

The examiner sought review of this matter on three grounds: the discipline was insufficient (arguing that it should be five years stayed suspension, five years probation, one year actual); the probation conditions recommended were insufficient; and a rule 955, California Rules of Court, requirement should be imposed. The essence of the examiner's argument is that standard 2.2(a), Standards for Attorney Sanctions for Professional Misconduct ("standards"), provides for a minimum of one year actual suspension irrespective of mitigating circumstances.

The respondent's reply brief contends that there was no misappropriation proven in this case, that in any event the discipline recommended is sufficient to protect the public, and because sixty days actual suspension is sufficient, compliance with rule 955, California Rules of Court, should not be required.

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11. We modify the decision to make this stipulation a finding of fact.

12. Both checks bear the notation "Young Incorporation." (State Bar exh. 1, p. 76.) Both checks cleared respondent's trust account on October 17, 1985. (State Bar exh. 1, p. 69.) We modify the decision to add the date the checks cleared the account as a finding of fact.

13. **[2a]** The account balance fell to $32.58 on September 17, 1985, and remained at about that level until October 2, 1985. (State Bar exh. 1, pp. 60, 69.) We modify the decision to add this as a finding of fact. In addition, the hearing panel considered the date the checks were written as the operative date in terms of the misappropriation. As we explained in the previous footnote, the checks did not clear the trust account until October 17, 1985. Respondent was to have held Young's funds in trust until the checks cleared the account, not just until the date they were written.

14. The record is unclear as to the duration of the misconduct in this count. However, as the stipulated facts and evidence at trial do not cover a time period beyond January of 1986, we conclude respondent used his trust account as an operating account to avoid levy during September of 1985 through January of 1986.

Other than the misappropriation charge, which respondent disputes, the parties have not made a direct request that any of the findings of fact be modified.[15]

IV. STANDARD OF REVIEW

[3] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it, this review department, like the Supreme Court, must independently review the record. (See *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928.) We accord great weight to findings of fact made by the hearing department which resolve testimonial issues. (*In re Bloom* (1987) 44 Cal.3d 128, 134; rule 453(a), Trans. Rules Proc. of State Bar.) However, the review department has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar.) Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (*Id.*) [4] Our overriding concern is the same as that of the Supreme Court; the preservation of public confidence in the profession and the maintenance of high professional standards. (See std. 1.3; *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117.)

V. DISCUSSION

A. Misappropriation

Count two alleges that respondent (1) commingled personal funds with client funds, (2) used his trust account as an operating account, and (3) misappropriated client funds. As indicated above, except for the misappropriation allegation, respondent admits the charges of count two.

With respect to the misappropriation, respondent contends that since Young did not testify, the only evidence presented was respondent's testimony in which he claimed the $270 that was deposited into his account in May of 1985 was for past services rendered and therefore had been earned when paid, and the $270 paid in September to the Secretary of State and Franchise Tax Board was an advance of costs he made for Young. Respondent claims his testimony was uncontradicted and unimpeached and should not be disregarded.

This contention misstates the evidence in this matter. While it is true that Young did not testify, it is not true that respondent's testimony was uncontradicted. Respondent admitted he was hired by Young to form a corporation (R.T. p. 23); that $270 was the fee required to incorporate a business in California (R.T. p. 42); and that he placed the $270 in his client trust account (R.T. p. 23). These circumstantial facts contradict respondent's testimony.

In addition, respondent was not able to substantiate, with documentary evidence, his claim that he performed three hours of work for Young. No billings, statements, or work product were presented. [5] As respondent contends, he did not have the burden of proof on this issue, nevertheless the panel could appropriately consider the respondent's failure to produce documentary evidence as an indication that his testimony on this issue was not credible. The panel was also in a position to observe respondent's demeanor and determine credibility. The hearing panel resolved conflicting facts against respondent on this issue and we accord that resolution great weight. (Rule 453(a), Trans. Rules Proc. of State Bar.) Respondent has not directed our attention to anything in the record to overcome that great weight and our independent review has revealed no basis for rejecting the panel's finding.

[6] As the Supreme Court noted in *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 474, "[t]he mere fact that the balance in an attorney's trust account has fallen below the total amounts deposited in and purportedly held in trust, supports the conclusion of misappropriation." Moreover, "rule 8-101 leaves no

15. The examiner has noted the limited findings of fact, but has not requested they be modified.

room for inquiry into attorney intent. [Citation.]" (*Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 976.) Accordingly, we, like the hearing panel, conclude that respondent misappropriated Young's funds.

B. Modifications to Decision

Before we turn to the issue of the appropriate degree of discipline in this case, we find it necessary to modify the conclusions of law reached by the hearing panel on the record at trial. (R.T. p. 71.)

1. Count Two

The hearing panel found respondent culpable in this count of violating sections 6068 (a), 6103 and 6106 and rule 8-101(A). The essence of this count is respondent's misuse of his client trust account and misappropriation of Young's money.

We conclude the evidence clearly and convincingly supports the hearing panel's conclusions that respondent commingled his own funds with those of his clients and misappropriated client funds in the Young matter[16] and therefore violated rule 8-101(A).

[7] Respondent stipulated that he used his client trust account as an operating account and deposited his own funds into the trust account at a time when client funds were in the account. "[C]ommingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses.... [Citations.]" (*Clark* v. *State Bar* (1952) 39 Cal.2d 161, 167-168.) Rule 8-101(A) "absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." (*Doyle* v. *State Bar* (1982) 32 Cal.3d 12, 22-23.)

[2b] As we indicated above, the record also supports the hearing panel's conclusion that respondent misappropriated $240 from Young. Respondent was paid $270 by Young for costs to form a corporation. He placed that money in his trust account. The trust checks written for that money did not clear the trust account until approximately five months later. During that five-month period the balance in respondent's trust account fell well below $270. Respondent violated rule 8-101 by allowing his trust account balance to fall below the amount he was to have held in trust for Young. (*Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1365, citing *Giovanazzi* v. *State Bar*, *supra*, 28 Cal.3d at p. 474.)

[8] We deem the record before us supports the conclusion that respondent's misappropriation of Young's money was not intentional and resulted from his poor management and misuse of his trust account. At best, respondent's handling of Young's money involved gross carelessness. "Gross carelessness and negligence constitute violations of the oath of an attorney to faithfully discharge his duties to the best of his knowledge and ability, and involve moral turpitude as they breach the fiduciary relationship owed to clients. [Citation.]" (*Giovanazzi* v. *State Bar*, *supra*, 28 Cal.3d at p. 475.) We therefore conclude that respondent violated section 6106.

The remaining conclusions of law in count two were that respondent violated sections 6068 (a) and 6103. The recent Supreme Court cases of *Baker* v. *State Bar* (1989) 49 Cal.3d 804, and *Sands* v. *State Bar*, *supra*, 49 Cal.3d 919, are dispositive of these conclusions.

Both *Baker* and *Sands* involved attorneys who had been found culpable by the State Bar Court of misappropriation of clients' funds in violation of rule 8-101 and of committing acts of moral turpitude in violation of section 6106, as well as violations of sections 6068 (a) and 6103. The Supreme Court in both cases specifically found no violations of sections 6068 (a) and 6103. (*Baker*, *supra*, 49 Cal.3d at pp. 814-815; *Sands*, *supra*, 49 Cal.3d at p. 931.)[17] We

16. The hearing panel found without explanation that respondent misappropriated $240.00 instead of the $270.00 paid by Young. As the balance in the trust account fell to approximately $30, we conclude the record supports that finding.

17. The Supreme Court in *Sands* essentially found Sands culpable in one of the four client matters of violating his oath and duty as an attorney to support the law (Bus. & Prof. Code, § 6068 (a)) based on conduct which amounted to bribery. No such conduct occurred here.

likewise find no violation of either section 6068(a) or 6103 under the facts adduced in count two.[18]

2. Count Three

In count three, respondent was found culpable of failing to withhold and pay over payroll taxes on behalf of his employees in violation of sections 6068 (a), 6103 and 6106. The examiner contends that the facts underlying this count support these findings. We disagree.

The examiner relies on *In re Morales* (1983) 35 Cal.3d 1, to support his contention that respondent's conduct involved moral turpitude and therefore violated section 6106. The examiner argues that the misconduct herein is similar to *Morales* and the Supreme Court found moral turpitude there.

The examiner's reliance on *Morales* is misplaced. Morales had been convicted of 27 misdemeanor counts of failing to withhold and pay payroll taxes. (*Id.* at p. 3.) The State Bar Court hearing panel in *Morales* found the conduct involved moral turpitude. (*Id.* at p. 4.) Our predecessor review department modified that finding after determining the conduct involved other misconduct warranting discipline, rather than moral turpitude. (*Id.*) Based thereon, the review department recommended 18 months stayed suspension, 18 months probation, with no actual suspension. (*Id.*) Contrary to the examiner's assertion, the Supreme Court agreed with the review department that the misconduct did not involve moral turpitude but other misconduct warranting discipline and imposed the review department's recommended discipline. (*Id.* at p. 8.)

The present case is similar to *Morales*. In both cases, the respondents encountered financial difficulties and as a result failed to pay the payroll taxes. Instead, they paid their employees the "net" salary and used the money that should have been paid for taxes to meet other obligations. However, *Morales* differs from the present case in that the respondent there had been convicted of 27 misdemeanor offenses as a result of his failure to withhold and pay payroll taxes and unemployment insurance contributions. Here, respondent has not been the subject of a criminal prosecution. Thus, there has been no finding that respondent possessed any criminal intent required to violate any penal statute.

[9] We recognize that the question of whether respondent's misconduct involved moral turpitude is one of law to be determined ultimately by the Supreme Court (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 109) and that the "test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all." (*Id.* at p. 110.) Nevertheless, we are bound to find no moral turpitude based on the Supreme Court's holding in *Morales* on more egregious facts. Accordingly, we conclude that respondent's misconduct in count three did not involve moral turpitude and therefore did not violate section 6106.

[10] The remaining legal conclusions in this count were that respondent violated sections 6068 (a)

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18. We recognize that since the issuance of the *Baker* and *Sands* decisions, *supra*, the Supreme Court has issued other decisions finding attorneys culpable of violations of sections 6068 (a) and/or 6103. (See *Layton* v. *State Bar* (1990) 50 Cal.3d 889, 893, 898 [editor's note: mod. on den. rhg. July 18, 1990]; *Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1144, 1154.) However, it has done so without citing *Baker* or *Sands*, and without expressly overruling either decision.

Moreover, prior to *Layton* and *Hartford*, the Court reaffirmed in another case the holding in *Baker* that section 6103 does not define any duties of members of the State Bar. (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245.) Also, the Court presently has under reconsideration a petition for rehearing in *Layton* which may resolve the apparent conflict between *Layton* and *Baker*.

We are reluctant to assume the Court intended, in *Layton* or *Hartford*, to overrule, without comment, decisions which it had reached only a few months earlier. We therefore intend to follow *Baker* and *Sands*, as applied in text *ante*, pending further clarification from the Supreme Court.

In any event, the validity or invalidity of the findings of violations of sections 6068 (a) and 6103 in this matter does not affect our recommendation as to discipline. For that reason, we are reluctant to delay the resolution of this matter any further by awaiting further clarification of the issue from the Supreme Court.

and 6103. The examiner contends that respondent violated his duty to obey the laws of the United States and of the State of California (§ 6068 (a)). Although not clearly stated by the examiner, this contention appears to be that respondent failed to pay over the tax money as required by various penal and civil statutes and thereby failed to obey both state and federal laws. However, the employer withholding statutes were not charged in the notice to show cause (rule 550, Trans. Rules Proc. of State Bar; *Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at p. 928) and no evidence was introduced to prove they were violated. Thus, the record before us fails to support the conclusion that any penal or civil statute has been violated and therefore does not support the conclusion that respondent failed to obey the laws of this state or the United States. Even though respondent admits he failed to pay the taxes, without evidence that a specific statute was violated, not only was respondent deprived of an opportunity to defend, but we are without a record to support any statutory violations.

The conclusion of law that respondent violated section 6103 is likewise improper. This section "does not define a duty or obligation of an attorney." (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815.)[19]

In sum, we conclude, based on the charges in the notice to show cause and the record before us, that respondent is not culpable of violating any of the Business and Professions Code sections charged in count three.

3. Count Four

Respondent was found culpable in count four of using his trust account as an operating account in order to avoid levy by the Internal Revenue Service[20] in violation of sections 6068 (a), 6103 and 6106.

[11] Respondent testified that the Internal Revenue Service had levied on his operating account in the past (documentary evidence introduced by examiner supported this testimony [exh. 3]) and he started using the trust account as an operating account in order to avoid another levy and buy time to work out a payment arrangement with the Internal Revenue Service. (R.T. p. 20.) Thus, by respondent's own admission, the use of the trust account in that fashion was designed to conceal his assets from levy. Concealment is an act of dishonesty and supports a finding that respondent violated section 6106 in this count. (*Crane* v. *State Bar* (1981) 30 Cal.3d 117, 124.)

As in counts two and three, we conclude based on the record before us, that respondent is not culpable of violating sections 6068 (a) and 6103. (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815; *Sands* v. *State Bar*, *supra* 49 Cal.3d at p. 931.)[21]

In conclusion, based on our independent review of the record before us, we conclude that respondent is culpable in count two of mishandling his client trust account, which resulted in commingling and misappropriation of client funds, in violation of section 6106 and rule 8-101(A). In count four we conclude respondent is culpable of misusing his client trust account in order to conceal his assets from levy by the Internal Revenue Service in violation of section 6106. Finally we conclude that respondent is not culpable in count three of violating any of the charged Business and Professions Code sections.

4. Mitigation

The hearing panel's decision briefly discussed that various mitigating factors were considered without clearly specifying findings of fact. Those miti-

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19. See footnote 18, *ante*. We recognize that following *Baker* and *Sands* with regard to section 6103 has resulted in our conclusion that respondent is not culpable in this count. We note, however, that even if we were to conclude that respondent is culpable of violating the section, our recommended discipline would not change.

20. The notice to show cause alleged that respondent was attempting to evade levy by the United States and/or California taxing authorities. The hearing panel found that respondent was attempting to evade levy by the Internal Revenue Service. As the evidence presented was regarding levy by the Internal Revenue Service, the record supports the hearing panel's finding.

21. See footnotes 18 and 19, *ante*.

gating factors were that respondent was under financial pressures arising from his wife's unemployment and the burden of remodeling their home which, along with his deficient business practices, led to a cash shortage and forced respondent to choose between creditors; that respondent hired a business consultant to remedy his business practices; and that no clients were harmed. Our review of the records compels us to conclude that the mitigating circumstances the panel considered were established clearly and convincingly and we modify the decision to make them findings of fact.

In addition, the record reveals mitigating factors not found by the panel and we modify the decision to include the following additional findings of fact with regard to mitigation. (1) **[12]** Respondent readily admitted his misuse of his client trust account and had taken steps to change his business practices to alleviate the financial pressures that led to the misuse. We consider this a mitigating circumstance under standard 1.2(e)(vii) (objective steps promptly taken by the member spontaneously demonstrating remorse and recognition of the wrongdoing). (2) **[13]** The misconduct occurred in 1985 and the record reveals that respondent has not committed misconduct since then. We consider this a mitigating circumstance under standard 1.2(e)(viii) (passage of time since misconduct followed by proof of subsequent rehabilitation).

C. Discipline

We next turn to the issue of the degree of discipline we are to recommend to the Supreme Court based on our conclusions as to respondent's misconduct in this case. **[14]** In determining the appropriate degree of discipline to recommend, we start with the standards which serve as our guidelines. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We must also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts. (See, e.g., *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) In the present case we have concluded that respondent is culpable of misappropriation and commingling of funds in violation of rule 8-101 and of concealment of his assets in violation of section 6106.

Standard 2.2(a) provides for disbarment for misappropriation of entrusted funds unless the amount of funds misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case a minimum of one year actual suspension should be imposed. Standard 2.2(b) provides for a minimum actual suspension of 90 days for commingling of entrusted funds or any other violation of rule 8-101, not amounting to wilful misappropriation. Standard 2.3 provides for actual suspension or disbarment for offenses involving moral turpitude, depending on the degree to which the victim was harmed, the magnitude of the misconduct, and the degree to which it relates to the practice of law.

Pursuant to standard 1.6(a), if two or more acts of professional misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards, the sanction imposed should be the most severe of the different applicable sanctions. Thus in the present case, standard 2.2(a) is the most severe applicable sanction. However, our inquiry does not end with standard 2.2(a).

[15] The standards must be viewed as a whole with the objective of achieving the primary purposes of the disciplinary proceedings as set forth in standard 1.3: namely, the protection of the public, courts and legal profession; the maintenance of high professional standards; and the preservation of public confidence in the legal profession. We are further guided by standard 1.6(b) which provides that the sanction specified by the standards shall be imposed unless: (1) aggravating circumstances are found to surround the particular act of misconduct and the net effect of the aggravating circumstances, by themselves and in balance with any mitigating circumstances, demonstrates that a greater degree of sanction is required to fulfill the purpose of imposing sanctions as set forth in standard 1.3 or (2) mitigating circumstances are found to surround the particular act of misconduct and the net effect of the mitigating circumstances, by themselves and in balance with any aggravating circumstances, demonstrates that a lesser sanction should be imposed to fulfill the purposes set forth in standard 1.3.

[16a] In the present case the nature of respondent's misconduct combined with the mitigat-

ing factors indicates that imposing the sanction set forth in standard 2.2 would not further the purposes of standard 1.3. The record before us supports the conclusion that respondent is not a venal person and his misconduct was aberrational. Respondent does not have a prior or subsequent record of discipline. He made a very poor business decision brought on by financial pressures.[22] **[17 - see fn. 22]** The misconduct occurred over a relatively short period of time (late 1985 and early 1986), and respondent has taken steps to reform his conduct as evidenced by the business consultant he hired and by the lack of subsequent discipline since the misconduct herein. Respondent's "engagement of a management firm is not only a recognition of the seriousness of the misconduct and an acceptance of responsibility therefor, it is . . . an objective step taken to avoid misconduct in the future." (*Hipolito* v. *State Bar* (1989) 48 Cal.3d 621, 627, fn. 3.) These factors together with the other mitigating circumstances present in this case establish that a lesser sanction than that called for in standard 2.2(a) should be imposed to fulfill the purposes of attorney discipline.

[18] As indicated above, the misappropriation was of a relatively small amount for a relatively brief time, arising out of respondent's misuse of his trust account as an operating account. Moreover, the offense did not involve intentional dishonesty. A review of Supreme Court cases reveals that the Court has usually not dealt severely with a misappropriation of this character.

In *Giovanazzi* v. *State Bar, supra,* 28 Cal.3d 465, the respondent was found culpable of misappropriating client funds, misleading a court by filing a false pleading and conflict of interest by obtaining a $100,000 loan from his client without complying with rule 5-101. The misappropriation charge arose from the attorney's retention of approximately $2,450 from a settlement to pay an investigator's fee. The money was placed in the attorney's trust account, but not paid to the investigator or the client. During the three-year period following the deposit of the money, the trust account balance dropped to approximately $2,100. The Supreme Court held that the misappropriation resulted from respondent's poor management of his client trust account and careless supervision of his staff and was not intentional. (*Id.* at p. 475.) The Court imposed three years stayed suspension, and thirty days actual suspension.

In *Heavey* v. *State Bar* (1976) 17 Cal.3d 553, the respondent was found culpable of misappropriating client funds and commingling them with his own and of writing to a judge on the merits of a case without furnishing a copy of the letters to opposing counsel. The misappropriation charge arose out of the attorney's retention of approximately $350 from a settlement to satisfy a claim of a doctor for treatment of the client. The attorney deposited the money in his trust account and sent the doctor a check for that amount which was misplaced in the mail. As a result, the doctor did not receive the check for almost a year. During that one-year period of time the balance in the trust account fell below $350 several times. The Supreme Court found that none of the offenses involved intentional dishonesty. (*Id.* at p. 560.) Based on this misconduct and the significant mitigation (30 years of practice with no prior discipline), the Court imposed a two-year stayed suspension, two years probation and thirty days actual suspension.

In *Waysman* v. *State Bar* (1986) 41 Cal.3d 452, the respondent was found culpable of commingling and misappropriating $24,000 in client funds. The funds were received by the attorney's office when he was out of town, as a settlement. He had his secretary place them in his general account because the draft would clear the account sooner than if placed in his trust account. When he returned from out of town he discovered that his secretary had quit after having used several presigned checks written on the general account to pay various expenses. The entire $24,000 was spent. The Supreme Court found that one year probation with no actual suspension was appropriate in light of the facts that strongly suggested that respondent was simply negligent and had no specific intent to defraud his clients. (*Id.* at p. 458.)

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22. **[17]** Because respondent has not demonstrated that he "suffered from such extreme personal pressures related to his financial difficulties that his misconduct can reasonably be understood as a desperate response to such pressures" (*Amante* v. *State Bar* (1990) 50 Cal.3d 247, 255), we do not consider his financial difficulties a significant factor in mitigation. (*Id.*)

[19] The present misconduct also involved respondent's concealment of his assets from levy in violation of section 6106. This additional violation might suggest that greater discipline than imposed in the above cases is warranted herein. We note however that in addition to the misappropriation, Giovanazzi had been found culpable of misleading a court by filing a false pleading and Heavey had written to a judge on the merits of a case without furnishing a copy to opposing counsel. Further, as we noted earlier, the Supreme Court in *Morales, supra,* 35 Cal.3d 1, imposed no actual suspension on more egregious facts than are present herein.

[16b] In conclusion, our analysis of respondent's misconduct and the Supreme Court cases we deem comparable, coupled with the short duration of the misconduct, the passage of time since the misconduct and the steps taken by respondent to reform his conduct show that even the minimum discipline of 90 days actual suspension called for by standard 2.2(b) is unnecessary here. We conclude that the recommended discipline of 60 days actual suspension in this case is both consistent with prior decisions of the Supreme Court on similar facts and will adequately address the purposes of attorney discipline as set forth in standard 1.3. Accordingly, we shall adopt that recommendation as our recommendation to the Supreme Court.

D. Probation Conditions

[20] The examiner contends that the probation conditions recommended by the hearing panel are inadequate because they are not set forth in the language of our standard conditions of probation. We agree and set forth our recommended probation conditions at the end of this opinion.

[21] In addition, the hearing panel recommended 60 days actual suspension and probation for the balance of the stayed suspension. The result of this provision is to delay beginning the probation term for the period of the actual suspension and thereby delay respondent's compliance with the terms and conditions of his probation. Such a delay will not further the rehabilitation objective of probation in this case. Accordingly, we shall recommend a two-year probation term to commence on the finality of the Supreme Court's order, with actual suspension for the first 60 days.

E. Rule 955

[22] As a result of requesting one year actual suspension, the examiner contends that the respondent should also be required to comply with rule 955, California Rules of Court. As noted above, since we adopt the hearing panel's recommendation of 60 days actual suspension, a rule 955 requirement is not necessary.

VI. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law in this state for two (2) years; that execution of such order be stayed; and that respondent be placed on probation for two (2) years on the following conditions:

(1) That during the first sixty (60) days of said period of probation he shall be suspended from the practice of law in the State of California;

(2) That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

(3) That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

(4) That if he is in possession of client's funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) that respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) money received for the account of a client and money received for the attorney's own account;

(2) money paid to or on behalf of a client and money paid for the attorney's own account;

(3) the amount of money held in trust for each client;

(b) that respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

(c) that respondent has maintained a permanent record showing:

(1) a statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(2) monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(3) monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) that respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

(5) That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with the terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar.

(6) During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for the State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

(7) That, except to the extent prohibited by the attorney client privilege and the privileges against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, or designee, or to any probation monitor referee assigned under these conditions of probation, at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed

to him personally or in writing by said Presiding Judge, designee, or probation monitor referee, relating to whether respondent is complying, or has complied, with these terms of probation;

(8) That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective; and

(9) That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of two (2) years shall be satisfied and the suspension shall be terminated.

Finally, we recommend that respondent be required to take and pass the Professional Responsibility Examination within one (1) year of the effective date of the Supreme Court order and furnish satisfactory proof of such to the Probation Department of the State Bar Court.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WILLIAM S. MILLER III

A Member of the State Bar

[No. 87-O-17413]

Filed July 24, 1990

SUMMARY

Respondent was found culpable of failing to perform legal services and of withdrawal from employment without taking reasonable steps to protect his client from foreseeable prejudice. Respondent failed to file an action on behalf of a personal injury client, resulting in the expiration of the statute of limitations. Respondent also misrepresented the status of the matter to the client's husband on at least four occasions, and failed to communicate with the clients. The hearing referee recommended disbarment. (Dennis M. Hart, Hearing Referee.)

Upon its independent, ex parte review, the review department concluded that the referee's recommendation of disbarment was too severe. Although this was the third disciplinary proceeding against respondent since 1987, in light of the purposes of attorney discipline, the nature and extent of respondent's misconduct in the present proceeding, the chronology of respondent's prior discipline proceedings, and comparable Supreme Court precedent, the review department concluded that a three-year stayed suspension, three years probation, and one year of actual suspension constituted sufficient discipline.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: No appearance (default)

HEADNOTES

[1] **107 Procedure—Default/Relief from Default**
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
Although respondent's default precluded respondent from seeking review and the State Bar examiner did not request review, the review department had a duty to review on an ex parte basis a proceeding heard by a referee of the former volunteer State Bar Court, as part of the transition to the new State Bar Court system. (Trans. Rules Proc. of State Bar, rules 109, 452(a).)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Respondent's failure to complete the services he undertook for his client and his de facto withdrawal from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of his client were wilful, and violated applicable Rules of Professional Conduct.

[3 a, b] **221.00 State Bar Act—Section 6106**
Respondent's repeated misrepresentations to his client's husband were reprehensible conduct for an attorney and constituted dishonesty and moral turpitude.

[4] **801.30 Standards—Effect as Guidelines**
Although the Supreme Court has commended the use of the Standards for Attorney Sanctions for Professional Conduct to the State Bar Court, the standards are guidelines. It is thus inconsistent with the purpose of the standards to urge that they mandate a particular result.

[5] **511 Aggravation—Prior Record—Found**
The Supreme Court has long considered an attorney's prior record of discipline to be an aggravating circumstance.

[6] **801.90 Standards—General Issues**
802.30 Standards—Purposes of Sanctions
806.59 Standards—Disbarment After Two Priors
Standard 1.7(b) of the Standards for Attorney Sanctions for Professional Misconduct, which provides for disbarment of a respondent who has a record of two prior impositions of discipline, cannot be applied without regard to the other provisions of the standards, particularly standard 1.3, which describes the primary purpose of the standards as the protection of the public, the courts and the legal profession; the maintenance of high professional standards and the preservation of public confidence in the profession.

[7] **513.10 Aggravation—Prior Record—Found but Discounted**
801.41 Standards—Deviation From—Justified
806.59 Standards—Disbarment After Two Priors
1092 Substantive Issues re Discipline—Excessiveness
In order to properly fulfill the purposes of lawyer discipline, the review department must examine the nature and chronology of a respondent's record of discipline. Mere fact that attorney has three impositions of discipline, without further analysis, may not justify disbarment.

[8] **513.10 Aggravation—Prior Record—Found but Discounted**
Where misconduct in current proceeding occurred prior to imposition of discipline in prior proceeding, record of prior discipline does not carry with it as full a need for severity as if misconduct had occurred after respondent had been disciplined and had failed to heed the import of that discipline.

[9] **801.41 Standards—Deviation From—Justified**
806.59 Standards—Disbarment After Two Priors
1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness
Where no Supreme Court precedent would have justified disbarment for respondent's failure to perform services in two matters if both matters had been decided together, additional prior discipline for failure to pass Professional Responsibility Examination did not sufficiently add to severity of misconduct to justify imposing disbarment.

ADDITIONAL ANALYSIS

Culpability

Found

213.91 Section 6068(i)
221.11 Section 6106—Deliberate Dishonesty/Fraud
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2

Discipline

1013.09 Stayed Suspension—3 Years
1015.06 Actual Suspension—1 Year
1017.09 Probation—3 Years

Probation Conditions

1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, J.:

On our own motion, we review a recommendation of a referee of the former, volunteer State Bar Court, that William S. Miller, III ("respondent") be disbarred from the practice of law in this state.

Respondent was admitted to practice law in California in 1962.[1] This is his third disciplinary proceeding. As we shall discuss in more detail, respondent was publicly reproved in 1987 for wilfully failing in 1982 to complete services for a personal injury client. (Exh. 14.) Effective April 20, 1990, the Supreme Court suspended him for two years, stayed on conditions including sixty days actual suspension or until he passes the Professional Responsibility Examination, whichever is greater, for failure to timely pass that examination ordered in 1987 as part of his reproval. (Supreme Court S012452; see also exh. 15.) We review this third matter on a record showing that respondent performed some initial, minimal legal services for his client in a personal injury case, deceived her as to the status of the matter and then abandoned her. He also failed to participate in the State Bar investigation.

In this proceeding, respondent's default was entered after his failure to answer the formal charges, served on him by certified mail to his current address of State Bar record. (Bus. & Prof. Code, §§ 6002.1, 6088; rules 552 et seq., Trans. Rules Proc. of State Bar; exhs. 1, 3 and 4.)

[1] Although the respondent's default precluded his seeking our review and the State Bar examiner ("examiner") did not request our review, we nevertheless independently reviewed the record of this proceeding ex parte as is our duty to do as part of the transition to the new State Bar Court system. (Trans. Rules Proc. of State Bar, rules 109, 452(a).) Upon that ex parte review, we notified the examiner that we would set the matter for hearing on the question of whether the referee's disbarment recommendation was excessive.[2]

As we shall discuss below, upon careful consideration of the examiner's brief, oral argument and decisions of the Supreme Court we deem persuasive authority in this matter, we have concluded that the referee's disbarment recommendation is indeed excessive. We shall recommend, instead, that respondent be suspended for three years, concurrent to the probation imposed on him earlier this year in S012452 on conditions we shall set forth below including actual suspension for one year, consecutive to the suspension imposed in that recent order. We shall also recommend that if respondent is actually suspended for more than two years under our recommendation, that he be directed to comply with the requirements of standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct ("standards") (showing of fitness to practice before being allowed to end his suspension).

1. FACTS OF THE MATTER UNDER REVIEW.

In June of 1984, Ms. Jean R. Terry was injured and her automobile damaged when it struck the rear of a hay baling machine driven by another. The accident occurred on U.S. 95 near Blythe, California before dawn. The investigating highway patrol officer recommended that Terry be cited for violation of Vehicle Code section 21750 (failing to pass safely to the left of vehicle she was overtaking). (Exh. 10.)

In August of 1984, Terry hired respondent to represent her in seeking damages against the other driver. She paid respondent $150 as a "retainer." His fee was to be 25 percent of any recovery. (Exhs. 8, 9.)

On September 5, 1984, respondent wrote to the driver of the hay baler advising that he had been retained by Terry to press a claim for her personal

1. The notice to show cause admission date of 1982 is wrong and was corrected at the hearing. (R.T. pp. 6-7.)

2. We invited the State Bar examiner, the only party entitled to appear before us, to address the issue "Whether the hearing referee's recommendation of disbarment is excessive, particularly in view of decisions of the Supreme Court? (See, e.g., *Gold* v. *State Bar* (1989) 49 Cal.3d 908; *Blair* v. *State Bar* (1989) 49 Cal.3d 762; *Segal* v. *State Bar* (1988) 44 Cal.3d 1077.)"

injuries and recommended that the driver contact his insurer. (Exh. 10.)[3]

In November of 1984, Terry and her husband met with respondent at his offices. He told them he was working on Terry's case and would contact them as soon as the case was settled. (Exhs. 8, 9.)

On December 27, 1984, respondent's secretary sent the other driver's insurer Terry's authorization to release medical information. (Exh. 10.)

The State Bar introduced in evidence the entire file of the insurance company in the Terry matter. That file shows that respondent communicated no further with the insurer after sending his December 27 letter. (Exh. 10.) A State Bar investigative assistant checked court records in the appropriate Superior and Municipal Courts and found no suit filed on behalf of Terry. (Exhs. 11, 12.) This comports with what the insurance company file showed, for the insurer closed its file on September 27, 1985, noting that the statute of limitations on bodily injury had run with "nothing from [respondent] since Dec. 27 letter." (Exh. 10.)

Despite doing nothing further on the case, respondent did misrepresent its status to Terry's husband on four occasions during 1985 and 1986. Respondent told Terry that the insurance company had agreed to settle out of court; that the check was sitting on the insurer's vice president's desk waiting for signature, that the insurer had lost the check and finally, that the insurer had misplaced the entire file and respondent "could not do anything in [the] case." (Exh. 8.) Terry and her husband had each experienced difficulty in contacting respondent in 1984. After 1986, the Terrys were unable to contact him further despite many phone calls and messages left on his answering machine. (Exhs. 8, 9.)

Respondent also failed to respond to two letters sent him in summer 1988 by a State Bar investigator. Neither letter was returned by the postal service. Each of these letters directed respondent's attention to Business and Professions Code section 6068 (i) (duty to cooperate and participate in State Bar investigation). (Exh. 13.)

The hearing referee recited the facts generally as set forth above, but did not make specific findings related to his conclusions that respondent violated the following sections[4] of the State Bar Act: 6068 (a), 6068 (i), 6103 and 6106 and the following (former) Rules of Professional Conduct: 2-111(A)(2) and 6-101(A)(2).[5] (See, e.g., *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 968.)

[2] From the above facts, we conclude that respondent's failure to complete the services he undertook for Terry and his de facto withdrawal from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of his client was wilful and violated rules 2-111(A)(2) and 6-101(A)(2). (See *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 903.) [3a] We also conclude that respondent's misrepresentations to Terry's husband in 1985 and 1986 constituted dishonesty and moral turpitude and thus violated section 6106. Respondent's failure to participate in the State Bar investigation violated section 6068 (i). On the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815, we decline to conclude that respondent wilfully violated sections 6068 (a) or 6103 as found below.

2. RESPONDENT'S PRIOR RECORD OF DISCIPLINE.

As noted *ante*, although respondent has been admitted to practice for 28 years, in recent years he has been disciplined twice. In 1987 he was publicly

3. Liability was questionable since the other driver maintained that his hay baler had adequate rear lights which were working when rear-ended by Terry; and, as noted, the highway patrol officer recommended citing Terry. (Exh. 10.)

4. Unless noted otherwise, all references to "sections" are to the provisions of the State Bar Act. (Bus. & Prof. Code, §§ 6000 et seq.)

5. Unless noted otherwise, all references to "rules" are to the former Rules of Professional Conduct in effect up to May 27, 1989.

reproved and ordered to pass the Professional Responsibility Examination within one year. The stipulated facts upon which that reproval rested show that in one matter in 1982, respondent wilfully failed to complete services in a personal injury case, resulting in the client's cause of action being time-barred. The stipulation stated that there was not sufficient evidence that respondent wilfully misrepresented the status of the matter to his client; and the parties stipulated to mitigating circumstances: respondent's lack of a prior disciplinary record, his cooperation with the State Bar and his offer to prove that a law office move and a departing secretary caused chaos in his office resulting in the misconduct. Respondent stated that he since improved office procedures. (Exh. 14.)

Respondent's suspension earlier this year for failure to timely pass the Professional Responsibility Examination rested on findings showing that respondent received communications from the State Bar advising him of the requirement to take that examination and he readily admitted his failure to take it. In mitigation, the findings showed that respondent was cooperative with the State Bar, candid and remorseful. He was a busy practitioner and one of only two attorneys in the sparsely populated geographical area he serves and that the illness of his father during the time diverted respondent's attention from other important matters. (Exh. 15.)

3. THE APPROPRIATE DEGREE OF DISCIPLINE TO NOW RECOMMEND.

The only issue before ns is that of the appropriate degree of discipline to recommend.

In urging that we follow the hearing referee's decision recommending disbarment, the examiner's central point is that "Standard 1.7 Mandates Disbarment." We reject that argument. [4] Although our Supreme Court has commended to us the standards (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11, 268), they are *guidelines*. (E.g., *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 198, fn. 14.) It is thus inconsistent with their purpose to urge that these guidelines "mandate" a particular result. Moreover, the examiner's brief is devoid of any citation of Supreme Court authority in support of the referee's disbarment recommendation. Instead, the examiner's only citations of Supreme Court decisions are in an attempt to distinguish the cases we cited when directing a hearing on the ground that it appeared that disbarment is too severe a discipline in this matter.

Since the examiner has urged disbarment based primarily on standard 1.7(b), we examine that standard as it applies here. [5] The Supreme Court has long considered an attorney's prior record of discipline to be an aggravating circumstance. (*Sevin* v. *State Bar* (1973) 8 Cal.3d 641, 646; *Marsh* v. *State Bar* (1934) 2 Cal.2d 75, 78-80.) [6] Standard 1.7(b) provides, "If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of two prior impositions of discipline . . ., the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate." However, standard 1.7 cannot be applied without regard to the other provisions of the standards, particularly standard 1.3 which describes the primary purposes of the standards as "protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession". [7] To properly fulfill these purposes of lawyer discipline, we must examine the nature and chronology of respondent's record of discipline. (Compare, e.g., *McCray* v. *State Bar* (1985) 38 Cal.3d 257, 274.) Merely declaring that an attorney has three impositions of discipline, without more analysis, may not adequately justify disbarment in every case.

Respondent's first disciplinary misconduct arose in 1982 after 20 years of discipline-free practice. It resulted in a public reproval in 1987. [8] This discipline was imposed after respondent's misconduct in the current, *Terry*, matter. While the first matter was indeed the imposition of prior discipline (cf. *Lewis* v. *State Bar* (1973) 9 Cal.3d 704, 715), it does not carry with it as full a need for severity as if the misconduct in the *Terry* matter had occurred after respondent had been disciplined and bad failed to heed the import of that discipline. [9] If respondent's first prior and the present *Terry* matter were to have been decided together, no Supreme Court case could have been

cited to justify the recommendation of disbarment for the failure to perform services in two matters, coupled with deceit and failure to participate in the *Terry* matter. Respondent's intervening discipline for failure to timely pass the Professional Responsibility Examination, while inexcusable, does not sufficiently add to the severity to justify imposing disbarment.

Our conclusion is fortified by the Supreme Court's recent decision in *Arm* v. *State Bar* (1990) 50 Cal.3d 763. In that matter, a majority of the Court declined to disbar the attorney who had been found culpable in a fourth disciplinary proceeding. We find a number of similarities between *Arm* and this matter. In both, the individual matters did not warrant severe discipline and there was not a pattern or common thread to all the matters of discipline.

That we consider disbarment too severe here neither excuses respondent's acts nor signals that attorneys found culpable of repeated misconduct can escape appropriate discipline for their acts. Indeed, we are deeply concerned that, after two decades of discipline-free practice, respondent has engaged in misconduct in recent years which appears to be getting more serious. In this most recent matter, it was joined by his failure to participate either in the State Bar investigation or in these formal proceedings. [3b] Moreover, his misconduct in the present, *Terry* matter included repeated acts of deceit to Terry's husband—conduct which is reprehensible for an attorney. (*Stanley* v. *State Bar* (1990) 50 Cal.3d 555, 567; *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1146-1147.)

We believe that cases like *Blair* v. *State Bar* (1989) 49 Cal.3d 762 and *Carter* v. *State Bar* (1988) 44 Cal.3d 1091 serve as better guides from the Supreme Court bearing on this matter than would be achieved by following literally standard 1.7(b). In the *Blair* case, the attorney had three prior suspensions for misappropriation of trust funds imposed between 1979 and 1981. He had also been suspended for almost a year during that period for failure to pass the Professional Responsibility Examination. In his fourth disciplinary proceeding which the Supreme Court reviewed, Blair was found culpable in three separate client matters in which he had acted dilatorily and had failed to perform legal services competently. In *Blair*, the attorney participated and urged mitigating circumstances. Even with his serious prior record of discipline, the Supreme Court did not disbar, but suspended him for five years, stayed on conditions including a two-year actual suspension.

In *Carter*, the attorney was admitted to practice in 1956. He had one prior public reproval in 1986 for two matters of misconduct in which he wilfully failed to inform the client of the status of the case or to use the requisite skill in handling the cases. In his second disciplinary case reviewed by the high Court, Carter was found to have committed several types of misconduct in handling two different matters for a client, including abandonment and misrepresentations of fact. The Court concluded that no mitigating circumstances existed and suspended Carter for two years, stayed on conditions including six months actual suspension.

Considering that respondent's prior record is less severe than *Blair* but more severe than *Carter*, coupled with his failure to appear in these proceedings, we conclude that the appropriate discipline here is a three-year suspension, stayed, concurrent to his pending stayed suspension, on conditions including actual suspension for the first year, consecutive to his recently-imposed actual suspension. We also recommend that he be required to perform the other duties specified in the following recommendation.

4. FORMAL RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, William S. Miller III, be suspended from the practice of law in the State of California for a period of three (3) years, concurrent to the suspension ordered in S012452; that execution of the order for such suspension be stayed; and that respondent be placed upon probation for a period of three (3) years concurrent to that previous suspension, upon the following conditions:

1. Respondent shall be actually suspended for the first year of probation, consecutive to the actual suspension served in S012452;

2. If respondent is actually suspended for an uninterrupted period of two years or greater as a

result of condition 1 above (including the actual suspension served in S012452), he shall be required to show proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, in order to terminate his actual suspension; and

3. During the period of this probation, respondent shall comply with the other conditions of probation ordered by the Supreme Court in S012452.

We further recommend that the Supreme Court direct respondent to comply with the provisions of rule 955, California Rules of Court, that the respondent comply with the provisions of paragraph (a) of said rule within 30 days of the effective date of the Supreme Court order herein and to file the affidavit with the Clerk of the Supreme Court provided for in paragraph (c) of the rule within 40 days of the effective date of the order showing his compliance with said order.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT DANIEL CRANE AND
BRIAN DAVID DEPEW

Members of the State Bar

[Nos. 84-O-14252 and 84-O-14253 (consolidated)]

Filed August 3, 1990

SUMMARY

Crane engaged in a scheme to induce a video game manufacturer, Crane's employer, to license two video games for home computer use to a company which, unbeknownst to the video game manufacturer, was owned by Crane. DePew served as president and general counsel of Crane's company. Crane was found to have committed numerous acts of deceit and violated an ethical rule governing attorneys' business transactions with their clients. DePew was found culpable of two counts of deceit. The hearing referee recommended discipline including three years actual suspension for Crane and two months actual suspension for DePew. (Hon. Harry T. Shafer (retired), Hearing Referee.)

The review department concluded that neither respondent had violated the statute prohibiting attorneys from making misrepresentations to a tribunal in seeking to further a client's interests. Nor had either respondent violated the rule against representing clients with conflicting interests. Moreover, although Crane committed multiple acts of misconduct, the review department held that these acts did not rise to the level of a "pattern of misconduct," a characterization reserved only for the most serious instances of misconduct over a prolonged period of time.

Neither Crane nor DePew had realized that their enterprise was wrongful. When advised of their error by counsel, they made full disclosure of the facts to the video game company and disgorged the funds they had received from their activities. In light of the mitigating evidence and of the discipline imposed by the Supreme Court in cases involving comparable misconduct, the review department reduced the hearing department's recommended actual suspensions to two years for Crane and forty-five days for DePew.

COUNSEL FOR PARTIES

For Office of Trials: Stephen J. Strauss

For Respondent Robert D. Crane: David A. Clare

For Respondent Brian D. DePew: Gert K. Hirschberg

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
The review department has an obligation to conduct an independent review of the entire record and make its own determinations of fact and conclusions of law; its findings are not limited to issues raised by the parties, and it has the power to correct errors in the hearing department's decision even when not requested to do so by the parties. (Rule 453, Trans. Rules Proc. of State Bar.)

[2 a, b] **273.00 Rule 3-300 [former 5-101]**
273.30 Rule 3-310 [former 4-101 & 5-102]
When an attorney and his wholly-owned company, which the attorney did not represent as counsel, engaged in a deceptive business transaction with a company that employed the attorney as its counsel, the attorney violated the ethical rule regarding adverse interests between attorneys in their personal capacities and their clients, but did not violate the ethical rule prohibiting representation of clients with conflicting interests.

[3 a, b] **106.90 Procedure—Pleadings—Other Issues**
162.90 Quantum of Proof—Miscellaneous
165 Adequacy of Hearing Decision
The State Bar Court must make appropriate findings as to the manner in which an attorney's conduct violated charged rules and statutes. Conclusory language in an examiner's papers indicating that the factual findings supported a conclusion of culpability under a given statute or rule was inadequate and did not promote meaningful review. The conduct proved under each count which supports culpability of particular charged violations must be identified.

[4 a, b] **213.40 State Bar Act—Section 6068(d)**
221.00 State Bar Act—Section 6106
By acts of dishonesty in deceiving a corporation in a business transaction, attorneys violated the statute which prohibits attorneys from committing acts of moral turpitude whether committed in the capacity of an attorney or not, but did not violate the statute prohibiting attorneys from making misrepresentations to a tribunal in seeking to further a client's interests.

[5] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
213.40 State Bar Act—Section 6068(d)
221.00 State Bar Act—Section 6106
Where all of attorneys' acts of dishonesty were encompassed in charge of committing acts of moral turpitude, there would be no added value in straining to find in the same conduct a violation of another statute prohibiting misrepresentations to tribunals.

[6] **273.00 Rule 3-300 [former 5-101]**
430.00 Breach of Fiduciary Duty
Attorney violated ethical rule governing business transactions with clients where he acquired (through his wholly-owned company) a licensing agreement for a product of his client-employer, without disclosing his ownership interest in the licensee; the licensee's incapacity to fulfill the terms of the license; or his negotiations for sublicenses on more profitable terms. The true identity of the licensee was a material fact which the attorney had a fiduciary duty to disclose, even though the terms of the license were revealed and may not have been unfair.

[7] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
139 Procedure—Miscellaneous
162.20 Proof—Respondent's Burden
Even if it were established that examiner had sent complaining witness's letter to hearing referee, respondent had waived any claim of prejudicial misconduct by his counsel's failure to preserve the objection at trial, and in any event no identifiable prejudice resulted from the referee's exposure to the letter's hearsay statements where the referee heard five days of testimony, including testimony on the same subject by the letter's author and by persons with personal knowledge.

[8] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
162.20 Proof—Respondent's Burden
Where respondent failed to identify any specific prejudice resulting from delay of approximately three and one half years in filing of notice to show cause after client's initial complaint, and merely made generalized reference to fading memories, delay was not a basis for the dismissal of charges.

[9 a-d] **750.10 Mitigation—Rehabilitation—Found**
755.10 Mitigation—Prejudicial Delay—Found
A delay of approximately three and one half years in the filing of a notice to show cause after the client's initial complaint, and a period of more than six years of unblemished practice between the misconduct and the disciplinary hearing, were properly considered mitigating factors.

[10] **521 Aggravation—Multiple Acts—Found**
535.10 Aggravation—Pattern—Declined to Find
Although an attorney committed multiple acts of misconduct, these acts did not rise to the level of a "pattern of misconduct," a characterization reserved only for the most serious instances of misconduct over a prolonged period of time.

[11] **582.10 Aggravation—Harm to Client—Found**
Where attorney caused client corporation to enter into mutually inconsistent licenses without its knowledge, harm to client in being forced to hire counsel and pay money to resolve its conflicting obligations to licensees outweighed any profit client may have obtained from royalties paid by licensees.

[12] **159 Evidence—Miscellaneous**
615 Aggravation—Lack of Candor—Bar—Declined to Find
Court's rejection, based on documentary and other evidence, of respondent's testimony regarding his knowledge and state of mind six years earlier, did not result in finding that such testimony lacked candor or was offered in bad faith.

[13] **165 Adequacy of Hearing Decision**
Hearing referee's failure to make express findings specifying aggravating factors was not interpreted as evidence that he ignored those factors that were obvious from the record.

[14] **710.53 Mitigation—No Prior Record—Declined to Find**
750.10 Mitigation—Rehabilitation—Found
Where respondents had been in practice without prior discipline for approximately four years before the commission of their misconduct, their records were far too short to constitute significant mitigation, but it was appropriate to consider their prior clean records in conjunction with their subsequent good conduct to demonstrate the aberrational nature of their misconduct.

[15] **765.10 Mitigation—Pro Bono Work—Found**
765.59 Mitigation—Pro Bono Work—Declined to Find
795 Mitigation—Other—Declined to Find
Medical volunteer work demonstrated community service and was properly relied on in mitigation, but artistic activities were not mitigating factors.

[16] **162.20 Proof—Respondent's Burden**
740.31 Mitigation—Good Character—Found but Discounted
765.10 Mitigation—Pro Bono Work—Found
A respondent's own testimony regarding the respondent's community service may be considered as some evidence in mitigation notwithstanding that it does not meet the requirement that good character be established by a wide range of references.

[17] **725.59 Mitigation—Disability/Illness—Declined to Find**
760.52 Mitigation—Personal/Financial Problems—Declined to Find
Fact that an attorney was undergoing therapy at the time of the disciplinary hearing did not constitute relevant mitigation where attorney did not present expert testimony establishing psychological problems at time of misconduct, and did not demonstrate recovery from such problems such that they would no longer affect his fitness to practice.

[18] **715.10 Mitigation—Good Faith—Found**
730.10 Mitigation—Candor—Victim—Found
745.10 Mitigation—Remorse/Restitution—Found
It was an important mitigating factor that respondents, due to youth and inexperience, honestly believed their conduct was not wrongful, and intended no harm; were very remorseful once they realized they had acted wrongfully, and thereafter candidly discussed the facts with their principal victim and disgorged the money they had received as a result of their acts.

[19 a, b] **833.40 Standards—Moral Turpitude—Suspension**
Lengthy suspension was called for based on multiple acts of fraud, dishonesty and concealment, even though attorney did not recognize at the time that his behavior was wrongful. However, attorney's immediate restitution, clear remorse, and cooperative behavior after he realized his conduct was wrong, and his good conduct thereafter, justified imposing substantial suspension in lieu of disbarment.

[20] **1091 Substantive Issues re Discipline—Proportionality**
In conducting its review and making its own disciplinary recommendation, the review department must consider the proportionality of the recommended discipline in relation to other cases.

[21 a, b] **172.15 Discipline—Probation Monitor—Not Appointed**
175 Discipline—Rule 955
Compliance with rule 955 is customary for suspensions of two years, but is discretionary, and neither rule 955 order nor probation were necessary where respondent had not lived in California for several years, did not practice law, and had not committed any misconduct for over six years.

[22] **221.00 State Bar Act—Section 6106**
490.00 Miscellaneous Misconduct
Honesty is one of the most fundamental rules of ethics for attorneys.

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106—Deliberate Dishonesty/Fraud
273.01 Rule 3-300 [former 5-101]

Not Found

213.15 Section 6068(a)
213.35 Section 6068(c)
213.45 Section 6068(d)
220.15 Section 6103, clause 2
273.35 Rule 3-310 [former 4-101 & 5-102]
291.05 Rule 4-210 [former 5-104]

Aggravation

Found

541 Bad Faith, Dishonesty

Declined to Find

525 Multiple Acts

Standards

802.30 Purposes of Sanctions
881.20 Business Transaction with Client—Suspension

Discipline

1015.02 Actual Suspension—2 Months
1015.08 Actual Suspension—2 Years

Probation Conditions

1021 Restitution
1022.50 Probation Monitor Not Appointed
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)

Other

106.40 Procedure—Pleadings—Amendment
142 Evidence—Hearsay

OPINION

PEARLMAN, P.J.:

This case involves an elaborate deception of a corporation, SEGA Corporation, an affiliate of Paramount Pictures, by one of its house counsel, aided by another lawyer, for personal profit in the marketing of video games for home use. Respondent Robert Daniel Crane ("Crane") had earlier been unsuccessful in interesting his employer, SEGA, to market one of its video games itself for home use. With the assistance of his friend, respondent Brian David DePew ("DePew"), Crane formed a corporation, Universal Licensing, Inc. ("Universal"), which Crane deceived SEGA into believing was an independent player in the field of marketing computer games. Crane succeeded in getting SEGA to license a video game to Universal which it in turn sublicensed for profit to another company. All of the profits went to Crane. DePew was paid a total of $3,500 by Universal for acting as its "house counsel." During the entire time, DePew was employed full time as an associate doing personal injury work for a private law firm in Los Angeles.

Trouble came when Crane thereafter sublicensed an enhanced version of the same game to a different company, just prior to leaving SEGA's employ. DePew, acting as Universal's counsel and at Crane's direction, compounded the earlier deception in an attempt to obtain SEGA's consent to the new sublicense. Shortly thereafter, at DePew's suggestion, Crane and DePew met with a copyright lawyer to seek his assistance with the copyright problem posed by the two potentially conflicting sublicenses. The lawyer they consulted dramatically changed the focus of their concern. He advised them that the deception they had perpetrated posed grave problems and advised them to come forward and divulge the scheme to SEGA. Apparently, until then neither Crane nor DePew realized the seriousness of their deception and the consequences that might ensue to their licenses to practice law.

The events in question occurred in the fall of 1983 and early spring of 1984. Since then both respondents entered into a settlement agreement with SEGA and Paramount which has apparently been fully complied with to date. SEGA and Paramount reserved the right to pursue the matter criminally or in disciplinary proceedings. Thereafter, general counsel for Paramount complained to the State Bar. Meanwhile, Crane moved out of state and is currently not working as an attorney and DePew went on to become a partner in his Los Angeles law firm with no further incidents of misconduct.

We review here the recommendation of retired judge Harry T. Shafer sitting as referee over a five day hearing involving several witnesses and extensive exhibits.[1] The referee recommended that Crane receive an actual suspension of three years as part of a longer stayed suspension and that DePew receive an actual suspension of two months for his role in the scheme also as part of a longer stayed suspension. Both the State Bar examiner and DePew seek review—the examiner contending, among other things, that the recommended discipline is too lenient and that both respondents should be disbarred and DePew contending, among other things, that the discipline recommended for him is too harsh because he only played a minor role in the deception perpetrated by Crane. Crane does not seek review, but opposes the examiner's request for disbarment.

We make a number of changes in the findings of facts and conclusions of law, and, in light of case law involving comparable offenses, reduce the recommended actual suspension for Crane to two years and of DePew to forty-five days. Our exposition of the procedural history and facts follows.

I. PROCEEDINGS BELOW

The consolidated notice to show cause filed on February 25, 1988, contained 12 detailed counts, each incorporating by reference the allegations in the preceding counts and all relating to the same course

1. The volumes of reporter's transcripts in this matter are not consistently numbered. We have adopted the following convention for citing them: I R.T. = December 9, 1988; IIA R.T. = March 28, 1989; IIB R.T. = March 29, 1989; III R.T. = March 30, 1989; V R.T. = March 31, 1989; VI R.T. = June 2, 1989. (There is no volume IV.)

of conduct. All 12 counts charged Crane with violating Business and Professions Code sections 6068 (a), 6068 (c), 6068 (d), 6103 and 6106.[2] In counts one, three, four, six, seven, eight, ten, eleven and twelve Crane was also charged with violating former Rules of Professional Conduct rules 5-101 and 5-102(A).[3] DePew was charged only in counts four, nine, eleven and twelve with violating the same provisions of the Business and Professions Code as Crane was charged with violating.

In his decision, the referee did not expressly correlate his conclusions as to statutory and rule violations with particular factual findings, but concluded that Crane violated Business and Professions Code sections 6068 (a), 6068 (d), 6103 and 6106 and Rules of Professional Conduct 5-104 [sic] and 5-102(A) and that DePew violated sections 6103, 6106 and 6108 [sic] of the Business and Professions Code and rules 5-104 [sic] and 5-102(A) of the Rules of Professional Conduct. The referee made no finding of a violation of Business and Professions Code section 6068 (c), charged in all counts. His factual findings with respect to each count will be set forth after a summary of the charged misconduct.

The Charges and Findings

Count One

The factual allegations in count one charged Crane with convincing his employer SEGA to license Universal to manufacture and distribute one of SEGA's more popular games, "Zaxxon", for use with a Commodore home computer system in return for a $5,000 advance and additional $5,000 guaranteed payment against a 6 percent per unit royalty. Crane was charged with wilfully failing to disclose to SEGA that he owned Universal and that Universal did not have the ability to pay the down payment or the capability of manufacturing and distributing the disks. The first count further alleged that Crane had simultaneously undertaken preliminary discussions with a number of computer software companies and knew or had reason to know that the "Zaxxon" property had significantly more value than that represented by the Universal-SEGA agreement. In performing such acts, Crane was charged with knowingly acquiring pecuniary interests adverse to a client and thereby entering into unfair business transactions with his client; failing to disclose fully in writing the terms of the business transactions in a manner and in terms which should have been reasonably understood by the client; failing to give the client an opportunity to seek the advice of independent counsel and failing to obtain informed written consent. (Notice to show cause, pp. 2-4.)

With respect to count one, the referee expressly or impliedly found that Crane committed all of the misconduct alleged except the charge of failure to disclose that Universal did not have the ability to pay the down payment or manufacture and distribute the disks. (Decision pp. 3-4.) The implied findings that Crane failed to give the client an opportunity to seek the advice of independent counsel and to obtain informed, written consent, both follow from the finding that "[b]y failing to disclose orally or in writing to SEGA that Crane owned Universal, Crane knowingly acquire[d] pecuniary interests adverse to his employer and client, SEGA and therefore the transactions he entered into were unfair to his employer and client and in a conflicting stance with the interests of SEGA." (Decision pp. 3-4.)

Count Two

Count two charged Crane with modifying SEGA's standard form licensing agreement without SEGA's knowledge in order to permit sublicensing by Universal. By such acts, Crane was alleged to have wilfully sought to deceive and defraud SEGA of the maximum value of its licensing rights and to have wilfully deceived and defrauded the sublicensee, Synapse Software, Inc. ("Synapse") by failing to reveal that Universal did not lawfully have the right

2. The original notice to show cause alleged violation of section 6108 (d) in counts eleven and twelve, which apparently was the result of a clerical error. The examiner amended the notice to show cause during trial to substitute section 6068 (d) for section 6108 (d) in these counts.

3. All references to the Rules of Professional Conduct herein are to the former rules in effect from January 1, 1975, through May 26, 1989.

to sublicense "Zaxxon". (Notice to show cause, pp. 4-5.)

With respect to the allegations of count two, the referee found that Crane sought to defraud and deceive SEGA of its corporate interests in obtaining the maximum value of its interests in the video game. He further found that Synapse was deceived but failed to find that Crane wilfully sought to deceive Synapse as charged. (Decision p. 4.)

Count Three

Count three charged Crane with using the pseudonym "Steve Kness" in acting as a representative of Universal in negotiating the sublicense between Universal and Synapse. It further charged him with misrepresenting to SEGA in October of 1983 that Universal had reported to him its inability to manufacture the "Zaxxon" disks and that Crane had "saved the deal" by finding a sublicensee, thereby obtaining SEGA management's approval of the sublicense. Finally, count three charged that Crane then documented the sublicense with a letter from Universal, written by himself, using the name "Steve Kness" and addressed to himself at SEGA. (Notice to show cause, pp. 5-6.) The referee found that the essential allegations of count three were proved. (Decision pp. 4-5.)[4]

Count Four

Count four charged Crane with subsequently enlisting the services of DePew to pose as general counsel of Universal at a meeting with Synapse and charged both Crane (using the pseudonym of Steve Kness) and DePew with negotiating an agreement between Synapse and Universal by which Universal received an advance of $50,000 against a per unit royalty of 16 percent for the sublicense. They were both charged with deceiving and defrauding SEGA by arranging to have SEGA approve the sublicense in October of 1983 without informing SEGA of its financial terms. (Notice to show cause, pp. 6-7.)

The referee's findings on count four are the greatest focal point of dispute among the parties and read as follows: "Crane solicited the services of DePew who agreed to act as General Counsel and President of UNIVERSAL and indicia of same, including printing and distribution of business cards evidencing same happened. DePew accompanied Crane to visit SYNAPSE in the San Francisco area and was paid $1,000 by Crane for making said trip and attending a meeting with SYNAPSE representatives. Thereafter, SYNAPSE entered into a sublicensing arrangement with UNIVERSAL. DePew had expressed reservations to Crane about the concept of usurpation of corporate opportunity as being involved in the proposal by Crane about his subterfuge in concealment from SEGA of the inherent conflict of interest involved as well as the unfairness of [sic] SEGA. However, these expressions by DePew were more by way of 'devil's advocacy' rather than an attempt to dissuade Crane. DePew's claimed assumption that Crane had the consent of SEGA to sublicense to UNIVERSAL and subsequent sublicense to SYNAPSE is not supported in any way and is entirely unrealistic and at the least indicated gross negligence." (Decision p. 5.)

Count Five

Count five charged Crane with delaying the $5,000 down payment to SEGA from Universal until after receipt of the $50,000 down payment from Synapse to Universal in November of 1983, using the pseudonym of Steve Kness and backdating the letter of transmittal to make the payment appear timely. It further charged him with wilfully creating the false impression at SEGA that the check had been received in the ordinary course of business and thereafter arranging for assistance from SEGA to Synapse in the development of the "Zaxxon" floppy disk without revealing the terms of Synapse's sublicense agreement with Universal. (Notice to show cause, pp. 7-9.) The referee found that Crane used the pseudonym Steve Kness but made no findings with

4. The referee made one specific finding which appears in error. He found that Crane "misrepresented to SEGA that Universal did not have the ability to manufacture ZAXXON, but had found a sublicensee." (Decision p. 4.) There is no evidence in the record that such representation was, in fact, a misrepresentation. The alleged deception was in his initial representation that Universal did have the capability of manufacturing Zaxxon itself as charged in count one.

respect to the allegation of backdating. He did find that Crane received the sum of $50,000 from Synapse which was never disclosed to SEGA until the scheme unraveled. (Decision p. 5.)

Count Six

Count six charged Crane with defying the express disapproval of SEGA in preparing a November 1983 letter amendment to the Universal License which added "Super Zaxxon" to the license which Crane signed under his own name on behalf of SEGA and under the pseudonym "Steve Kness" on behalf of Universal. (Notice to show cause, pp. 9-10.) The referee found these allegations to be true. (Decision p. 6.)

Count Seven

Count seven charged Crane with using a second pseudonym "Bruce Blumberg" in negotiating the sublicense of "Super Zaxxon" by Universal to Human Engineered Software Corporation ("HES") for a $100,000 advance against a 16 percent royalty all without SEGA's knowledge or consent; and signing the sublicense with two fictitious signatures after he had been laid off by SEGA in January of 1984. Crane allegedly knew or should have known that the HES sublicense conflicted with the Synapse sublicense. (Notice to show cause, pp. 10-11.) The referee found that HES paid $25,000 as a down payment to Universal for a sublicense negotiated by Crane using the pseudonym Bruce Blumberg in January of 1984 after Crane had left SEGA and without SEGA's knowledge or approval. The referee further found that Crane had knowledge of the similarity of "Super Zaxxon" with "Zaxxon." (Decision p. 6.)

Count Eight

Count eight charged Crane with using the pseudonym "Bruce Blumberg" in a letter from Universal to SEGA falsely stating that Universal had received SEGA's approval of the HES sublicense agreement; and falsely informing SEGA attorney Bob Kupec that Crane had approved the HES sublicense before he left SEGA's employ. (Notice to show cause, p. 12.) The referee found these allegations to be true. (Decision p. 6.)

Count Nine

Count nine charged Crane with hiring DePew and paying him a $2,500 fee to make telephone calls and write letters to SEGA demanding its approval of the HES sublicense. It charged Crane with misrepresenting that he had previously communicated SEGA's willingness to approve the HES sublicense to "Blumberg" of Universal and that "Blumberg" had in turn assured Crane that Universal had acquired the rights to "Super Zaxxon" under the November 21, 1983 agreement. It charged both Crane and DePew with conspiracy to defraud SEGA of its interest in "Super Zaxxon" and to defraud HES into continuing to pay Universal for an unauthorized sublicense to "Super Zaxxon." (Notice to show cause, pp. 12-14.)

The referee found as follows: "Crane engaged DePew (for a fee of $2,500) to make phone calls and to write letters to SEGA demanding approval of HES sublicense. DePew's arguments that his participation at that time (re: HES sublicense) was solely as an attorney seeking to validate a copyright issue, while not conspiratorial, betray either a naivete (not accepted by the Hearing Officer) or is another manifestation of deeper involvement amounting to gross negligence." (Decision p. 7.)

Count Ten

Count ten charged Crane with amending the SEGA-Universal license on his last day of work at SEGA to include two other games, "Carnival" and "Turbo", without the knowledge or approval of the management of SEGA. No sublicense was alleged to have been entered into pursuant thereto. (Notice to show cause, pp. 14-15.) On this count, the referee found that "Crane continued his efforts, up to the date of his departure from the employ of SEGA, to amend Sega-Universal license to include other games, all without the knowledge and/or consent of Sega." (Decision p.7.)

Counts Eleven and Twelve

Count 11 charged Crane and DePew with "failing to employ only such means as are consistent with the truth" and wilfully seeking to deceive and deceiving and defrauding SEGA, Synapse and HES by acts

of artifice, omissions and false statements of material facts. Count 12 charged Crane and DePew with an ongoing conspiracy to defraud SEGA, Synapse and HES to the financial detriment of such companies. (Notice to show cause, pp. 15-16.) With respect to both counts, the referee found that "The acts of Crane were wilful, untruthful and designed to deceive Sega. The acts of DePew were tantamount to gross negligence." (Decision p. 7.)

Findings in Mitigation

The referee found as factors in mitigation that neither Crane nor DePew had any prior instances of professional misconduct; that Crane has been promptly meeting his repayment obligations in accordance with his settlement agreement with SEGA, that Crane has handled monies and other responsibilities for his subsequent employer, Delta Airlines, had suffered family losses and is presently undergoing therapy in an endeavor to maintain his marriage. With respect to DePew, the referee found that he has maintained his relationship with the same law firm since his admission to the State Bar in 1979 and is now a partner; he has written plays and does volunteer work for medical convalescent facilities and has no civil judgments or (criminal) convictions against him. (Decision p. 8.)

II. FACTS

Most of the facts are undisputed except as to the state of mind of both respondents in committing the acts of misconduct and the state of knowledge of DePew. With the exception of the finding below as to DePew's state of mind and knowledge, we agree with all of the referee's essential findings of fact and restate the facts here in somewhat more detail. Crane and DePew met and became friends while both were in law school and were working as law clerks for the same Los Angeles firm. (IIA R.T. pp. 82-85.) DePew was admitted to the California bar in November 1979, and Crane in December 1980. After their respective graduations from law school, DePew stayed with the firm and Crane did not, but the two men remained friends and continued to see one another socially. (IIA R.T. p. 82.)

In 1982, after working for a year attending depositions in asbestos cases, Crane went to work for SEGA Corporation, an affiliate of Paramount Pictures and subsidiary of Gulf & Western. (IIA R.T. pp. 76-77, 83-85.) SEGA's principal business was the development and marketing of video arcade games, but it also licensed its arcade game properties to home video game companies, and to manufacturers of other types of goods such as novelty clothing. (IIA R.T. p. 97.) Although Crane was employed in SEGA's legal department, he spent a considerable part of his time marketing the license opportunities offered by SEGA to novelty manufacturers. (IIA R.T. p. 97.)

Perceiving what he believed to be a good business opportunity for his employer, Crane attempted to interest SEGA's management in marketing licenses for its arcade games to companies that could produce versions of the games on floppy disks and distribute them for use on home computers. (IIA R.T. p. 145.) His efforts were firmly rebuffed. (*Id.*)

Crane thereupon decided to form his own business for the purpose of selling licensed SEGA games to the home computer market, in order to exploit a business opportunity which he perceived his employer to have abandoned. (IIA R.T. pp. 149-155.) He hired an attorney to form a corporation, Universal Licensing, Inc. ("Universal"), of which he was to be the sole stockholder and only employee. (IIA R.T. pp. 121-126.)[5] On September 13, 1983, while the formalities of the incorporation were in process, and without revealing that Universal was his own company, Crane submitted a proposal from Universal to SEGA to license the SEGA games "Zaxxon" and "Carnival" for use on home computers. (Exh. 46.) SEGA accepted the proposal, as to Zaxxon only, on September 15, 1983. (Exh. 12.) Under the SEGA-Universal license agreement, Universal agreed to pay SEGA a guaranteed minimum compensation of $10,000, with a $5,000 down payment against future royalties of 6 percent. (Exh. 12B.)

5. Originally, the corporation was to be called Universal Marketing, Inc. This was changed to Universal Licensing, Inc. when it was discovered that the other name was already reserved with the California Secretary of State's office.

Crane had already succeeded in obtaining the Zaxxon license before DePew became directly involved in the matter, although they did discuss it before then. (IIA R.T. pp. 139-143.) There is a sharp dispute (as discussed in more detail below) between Crane and DePew concerning whether Crane told DePew, when they first discussed the licensing idea, that Crane had concealed from SEGA the fact that its licensee, Universal, was Crane's company. There is also some dispute (again, discussed below) concerning other aspects of Crane and DePew's initial conversations regarding Crane's venture. It is uncontroverted, however, that DePew ultimately agreed to serve as incorporator, agent for service of process, president, secretary, and general counsel of Universal. (See exhs. 6, 7; IIA R.T. pp. 202-205.) DePew received no equity interest in Universal, and had no real operating responsibility or authority as to the company; however, he was compensated for the time he devoted to Universal's affairs. (IIA R.T. pp. 165-166, 245-249.)

Soon after beginning to formulate his new venture, Crane determined that it would not be economically or practically feasible for him (as Universal) to produce and distribute the computer game disks directly. (IIA R.T. pp. 217-222.) He therefore decided to proceed by sublicensing the Zaxxon game to an existing computer software company, a procedure which was permitted under the terms of Universal's license from SEGA. (IIA R.T. p. 221.)[6] He located a potential sublicensee, Synapse Software, Inc. ("Synapse"), which was located in the San Francisco Bay Area. (IIB R.T. p. 53.)

In order to reach agreement on the terms of a sublicense, it was necessary for a representative of Universal to meet with the Synapse management in person. (IIB R.T. pp. 60-61.) For this purpose, Crane and DePew travelled together to the Bay Area. On the way, Crane briefed DePew concerning the video game industry and the sublicense negotiations. (IIB R.T. pp. 252-253; *see id.* p. 72.) In meeting with Synapse, DePew had no real negotiating authority; his task was simply to convey Crane's proposal to Synapse, and to ascertain Synapse's response for later transmission to Crane.[7] (IIB R.T. pp. 69-70, 173-175, 244; III R.T. pp. 80-82.) DePew gave Synapse a business card, provided to him by Crane, describing him as Universal's general counsel, and he saw himself as acting as Universal's counsel in meeting with Synapse. (IIB R.T. pp. 61, 244; III R.T. p. 90.)

The payment terms of the Universal-Synapse sublicense were significantly more favorable than the payment terms of the SEGA-Universal license. Crane did not reveal this fact to SEGA. (IIB R.T. pp. 14, 55.) After receiving Synapse's initial $50,000 advance royalty payment, Crane used a cashier's check to pay SEGA the $5,000 advance owed to SEGA by Universal, and prepared a backdated letter to make it appear that the payment had been made earlier. (IIA R.T. pp. 238-240; exh. 44.) He deposited the remainder of Synapse's payment in Universal's bank account, and used some of the money to pay Universal's expenses.

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6. Exhibits 12A and 12B contain a clause (numbered 12(g)) which permitted sublicensing with SEGA's prior approval. Such approval was granted with respect to the Synapse sublicense. (Exh. 24.)

7. There is a factual dispute concerning what Crane told Depew concerning why Crane himself could not attend the meeting with Synapse. Crane testified that he simply waited in a restaurant while the meeting took place, and that he made it clear to Depew that he was staying away from the meeting in order to conceal his identity, because he did not want Synapse to know that the owner of Universal also worked for SEGA. (IIB R.T. pp. 68-72.) Depew denied knowing this, and testified that his understanding was that Crane did not attend the Synapse meeting simply because he had other business to attend to in the area. (III R.T. pp. 67-73.)

The referee did not make a specific factual finding on this issue. However, the significance of this factual dispute is marginal at best, because Depew *admitted* that he knew Crane was using pseudonyms in dealing with *sublicensees*; he only denied knowing that Crane had used pseudonyms and concealed his identity in dealing with *SEGA*. (Compare IIB R.T. pp. 229-236 with III R.T. pp. 4-6, 10-11.) Thus, even if the referee believed Depew's version of why Depew thought Crane did not attend the Synapse meeting, this still does not absolve Depew of knowing acquiescence in Crane's deception of Synapse regarding Crane's connection with Universal. However, as we discuss *post*, Depew's testimony denying that he had knowledge in March of 1984 of Crane's concealment of his identity from Sega must be disbelieved in light of the documentary evidence.

DePew signed the sublicense agreement with Synapse on behalf of Universal, and sent related correspondence to Synapse on October 14, 1983. (Exhs. 13, 24.)[8] After that date, DePew did not become involved with Universal again until March 20, 1984, and did not hear about its affairs from Crane in the interim.[9] (III R.T. pp. 32-35, 38-40, 55-56, 92-94.)

Meanwhile, Crane decided he wanted to add to the SEGA-Universal license the rights to another game, "Super Zaxxon," which was an enhanced version of Zaxxon. In order to do so, Crane prepared a letter dated November 21, 1983, which was addressed to himself and purportedly authored by "Steven Kness" at Universal, requesting that Super Zaxxon be included in the existing license agreement. He then signed the letter under his own name as SEGA's representative, indicating acceptance of Universal's request. (Exh. 36.) Crane did not tell SEGA until much later that he had amended the SEGA-Universal license to include Super Zaxxon. (IIB R.T. pp. 83-85, 91.)

Crane left his job at SEGA on January 14, 1984. (IIB R.T. p. 103.) Just prior to leaving his employment, on January 13, 1984, Crane prepared a letter from himself at SEGA to "Steven Kness" at Universal, purportedly forwarding proposed amendments to the SEGA-Universal license agreement that would add the rights to the games "Carnival" and "Turbo." (Exh. 32.) Crane's plan was to seek to sublicense these games as well, but he was not successful in locating a sublicensee. (IIB R.T. pp. 97-102.) Thereafter, on behalf of Universal, he reached an agreement to sublicense Super Zaxxon to Human Engineered Software Corporation ("HES"). Crane used the pseudonym "Bruce Blumberg" in forwarding proposed sublicense agreements to HES. (Exhs. 25, 27.) Crane did not tell HES that SEGA was unaware of his connection with Universal, or that no one at SEGA apart from himself had been aware of or approved the sublicense of Super Zaxxon to HES. (IIB R.T. pp. 114-115.)

The executed sublicense agreement between Universal and HES was dated February 14, 1984. (Exh. 64.) Shortly thereafter, Crane received a $25,000 advance royalty payment from HES, which he deposited in Universal's bank account. (IIB R.T. pp. 112, 114.)

Crane then tried to coerce SEGA into consenting to the HES/Super Zaxxon sublicense through the artifice of writing a letter on Universal letterhead to himself at SEGA, dated February 22, 1984, which he signed using the pseudonym "Bruce Blumberg." (Exh. 30.) The letter purported to memorialize earlier conversations between "Blumberg" and Crane in which Crane, while still a SEGA employee, had given SEGA's approval to the Super Zaxxon license and the HES sublicense. In the letter, "Blumberg" requested that SEGA formally signify its consent to the Universal-HES sublicense for Super Zaxxon by returning an executed copy.

Some time after signing the sublicense agreement in mid-February, HES apparently became concerned as to the status of SEGA's consent. Accordingly, on March 20, 1984, a representative of HES called Universal's telephone number, which was actually an answering service, and ended up speaking with DePew as a result. (III R.T. pp. 129-131.) DePew immediately called Crane, who explained the situation to him; this was the first time DePew had heard that Crane had obtained the rights to Super Zaxxon. (III R.T. p. 131.)

On Crane's advice, DePew then called Robert Kupec, Crane's former supervising attorney at SEGA, who told him that SEGA was refusing to consent to the Super Zaxxon sublicense on the ground that Zaxxon and Super Zaxxon were too similar to be sublicensed to two different sublicensees without

8. Depew was paid $1,000 for his services to this point, although there is a dispute as to how the amount of this fee was determined. (IIA R.T. pp. 247-250; III R.T. p. 22.)

9. Crane had the only key to Universal's post office box, which was its only address. (IIA R.T. pp. 194-96, 199.) He evidently received the executed sublicense agreement returned to Universal by Synapse, and on November 2, 1983, he forwarded a copy to himself at SEGA, authoring the cover letter under one of his pseudonyms (Steven Kness). (Exh. 26.)

creating copyright problems. (III R.T. pp. 133-137, 161.) DePew requested that Kupec send copies of the Zaxxon and Super Zaxxon copyright registration papers to Universal, at the post office box address. (III R.T. pp. 136-137.)[10]

Two days later, on March 22, 1984, Kupec and DePew each wrote to the other. (Exhs. 18, BB.) After these letters crossed in the mail, DePew heard nothing further from Kupec. (III R.T. p. 161.) DePew's letter was prepared jointly by Crane and DePew, typed on Universal letterhead, and signed by DePew. (IIB R.T. pp. 119-120, 124-125; III R.T. pp. 137-143.) It stated, among other things, that Crane, while at SEGA, had consented to Universal's sublicensing Super Zaxxon as a separate property from Zaxxon. (Exh. 18.) Around this time, DePew received an additional $2,500 from Crane as an advance fee for his services in connection with the HES/Super Zaxxon matter.

When Kupec did not forward copies of the Zaxxon and Super Zaxxon copyright documents as requested, DePew became concerned that the matter might lead to litigation involving copyright issues which he would not be competent to handle. He therefore suggested to Crane that they consult Michael Sullivan, a business litigation attorney with experience in copyright matters whom DePew knew and respected. (IIB R.T. pp. 193-194, 213-214; III R.T. pp. 101-104.) They arranged to meet with Sullivan at a local Hamburger Hamlet restaurant; the meeting took place in late March 1984. (VI R.T. pp. 64-65.)

Both Crane and DePew testified that the purpose of their consultation was to obtain Sullivan's assistance in enforcing Universal's rights under its license; neither of them thought that they might need Sullivan's help in defending themselves against the consequences of any wrongdoing. (IIB R.T. pp. 121-122, 194, 213-214.) However, when Sullivan learned that Crane had obtained the license from SEGA without disclosing that Universal was Crane's company, he made it clear to Crane and DePew that there was a serious problem with what had happened, and that his mission would have to be "containment" (of liability exposure) rather than enforcement of Universal's supposed rights. (VI R.T. pp. 66-69.) Sullivan testified that Crane appeared to be genuinely shocked and deeply distressed when he was finally made to understand the wrongfulness of what he had done, and that DePew also appeared surprised. (VI R.T. pp. 74-75, 102-103, 106-107.)

Sullivan persuaded Crane to reveal the facts fully to SEGA and to Paramount, its affiliated company. Crane and DePew met separately with attorneys for SEGA and Paramount and each gave extensive statements concerning the Universal, Synapse, and HES transactions. In the resulting settlement, Crane agreed to disgorge to SEGA all the money that remained in Universal's bank account (some $47,000), and to pay SEGA $250.00 per month for five years; as of the time of trial, he had made all the payments thus far. (IIB R.T. pp. 132-133, 166.) DePew paid over to SEGA the $3,500 he had received from Crane in payment for his services to Universal. The problem created by the conflicting licenses of Zaxxon to Synapse and Super Zaxxon to HES was resolved by an agreement among SEGA, Synapse, and HES whereby SEGA agreed to pay $200,000 to HES in exchange for its agreement to withhold Super Zaxxon from the market for a specified time period so that Synapse could have priority in attempting to market Zaxxon. (Exhs. 21, 22, 23.)

After the settlement was reached, on October 1, 1984, Paramount's senior in-house counsel wrote a letter of complaint to the State Bar. The bar apparently first contacted both Crane and DePew about the complaint sometime between October 1984 and August 1985, but did not file the notice to show cause in this matter until February 25, 1988.[11]

After receiving the decision from the referee below, the examiner filed a request for reconsidera-

10. There is a direct conflict in the testimony regarding whether Crane was present in Depew's office when Depew made the call to Kupec. (Compare III R.T. pp. 53-54, 67 with IIB R.T. pp. 127-130.) However, this conflict is not material to any of the issues which we are called upon to resolve in this proceeding.

11. The record in this proceeding contains neither the State Bar's letters of inquiry to respondents nor their replies, but DePew's counsel represented these facts to the State Bar Court both at the hearing level and on review, and the State Bar examiner has not denied them.

tion on September 5, 1989, which was opposed by respondent DePew in its entirety as untimely. The referee denied reconsideration except for a minor modification of the heading on page one, which was changed to read "Finding [sic] of Fact" instead of "Preliminary Observations."[12]

III. DISCUSSION

Pursuant to rule 450 of the Rules of Procedure of the State Bar, respondent DePew has sought review of the referee's decision on the grounds that (1) the recommended level of discipline is excessive; (2) the referee did not give due consideration to the evidence in mitigation; (3) the referee's culpability findings exceeded the charges, and (4) the examiner engaged in prejudicial misconduct. The examiner has sought review pursuant to rule 450 upon the following grounds: (1) the referee erroneously found culpability as to certain violations that were not charged or proved; (2) the decision does not consider aggravating factors; (3) there is no clear and convincing proof of compelling mitigating circumstances, and (4) the recommended discipline does not comply with the Standards for Attorney Sanctions for Professional Misconduct (Rules Proc. of State Bar, div. V; hereafter "standard(s)" or "std.") and is insufficient to protect the public. **[1a]** It is our obligation to conduct an independent review of the entire record and make our own determinations of fact and conclusions of law. (Rule 453, Rules Proc. of State Bar; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 9.) Our findings are not limited to issues raised by the parties. (*Id.*) We have already described most of the facts in great detail and will proceed to identify which facts support culpability with respect to each count.

First, the referee found both respondents culpable of violating section 6103 of the Business and Professions Code, and found Crane culpable of violating section 6068 (a). As Crane points out, these findings are invalid under *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815 and *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931.[13] Moreover, at least as to count one of the notice to show cause, the section 6068 (a) charge was dismissed by the examiner during trial. (VI R.T. p. 9.)

Second, the referee found both respondents culpable of violating former rule 5-104, which prohibits payment of clients' expenses. As the examiner notes, violation of this rule was not charged in the notice against either respondent and no evidence was introduced on this subject. All of the parties agree that this finding must be stricken as to both respondents. **[2a]** Indeed, it appears obvious that the referee must have intended to find a violation of former rule 5-101 instead of 5-104. The decision of the referee otherwise fails to find Crane culpable of violating former rule 5-101 (business transactions with client), even though Crane's obvious violation of this rule

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12. While the examiner sought disbarment of Crane and at least lengthy suspension of DePew he also sought to relate the findings to the statutory and rule violations charged in each count and to correct the decision by deleting the findings that each respondent violated rule 5-104 and that DePew violated rule 5-102(A), since such conduct was not charged. Crane's counsel joined in the request to delete the determination of culpability under rule 5-104.

13. We recognize that since the issuance of the *Baker* and *Sands* decisions, *supra*, the Supreme Court has issued other decisions finding attorneys culpable of violations of sections 6068 (a) and/or 6103 of the Business and Professions Code. (*Layton* v. *State Bar* (1990) 50 Cal.3d 889, 893, 898; *Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1143-1144, 1154.) However, it has done so without citing *Baker* or *Sands*, and without expressly overruling either decision.

Moreover, prior to *Layton* and *Hartford*, the Court reaffirmed in other cases the holding in *Baker* that section 6103 does not define any duties of members of the State Bar. (*Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 903; *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245.)

We are reluctant to assume that the Court intended, in *Layton* or *Hartford*, to overrule sub silentio decisions which it had reached only a few months earlier. We therefore intend to follow *Baker* and *Sands*, as applied in text *ante*, pending further clarification from the Supreme Court.

In any event, the validity or invalidity of the findings of violation of Business and Professions Code sections 6068 (a) and 6103 in this matter does not affect our recommendation as to discipline. For that reason, we are reluctant to delay the resolution of this matter any further by awaiting further clarification of the issue from the Supreme Court.

constitutes the very heart of his misconduct.[14] **[1b - see fn. 14]**

Third, the referee found that both respondents had violated former rule 5-102(A), prohibiting the representation of clients with conflicting interests. As to DePew, violation of this rule was neither charged nor proven. While DePew undoubtedly committed misconduct of other kinds, it is beyond dispute that his only attorney-client relationship in this matter was with Crane and his wholly-owned company, Universal, which obviously did not have conflicting interests. Thus, the finding must be stricken as to DePew.

[2b] We also strike it against Crane. A violation of rule 5-102(A) *was* charged against Crane in all but three counts without any indication of how his alleged misconduct came within the ambit of that rule. Nor does it appear applicable. Rule 5-101 covers adverse interests between attorneys in their personal capacities and their clients; rule 5-102(A) covers an attorney's representation of conflicting client interests. Crane did not *represent* Universal as its attorney, Depew did. Crane's adverse interests are covered by a determination of culpability under rule 5-101.

Fourth, the referee found DePew culpable of violating section 6108 of the Business and Professions Code. Section 6108 deals with the format for complaints to the State Bar, and does not set forth any requirement for proper professional conduct. The examiner explained that the reference to section 6108 in counts 11 and 12 of the original notice to show cause was a typographical error, and during the trial, he amended it in both places to refer to section 6068 (d), which requires attorneys to employ ouly means consistent with truth. (VI R.T. pp. 10-11.) The examiner sought to have such finding stricken on reconsideration but was unsuccessful.

Finally, although the referee did not find DePew culpable of violating section 6068 (d), he did find Crane so culpable.

[3a] The examiner has not offered any assistance to this court in making appropriate findings as to the manner in which the respondents' conduct allegedly violated any of the charged rules or statutory provisions.[15] Nothing in either of his briefs on review addresses the specific evidence which supports a finding of culpability under any of the charges. His request for reconsideration below merely asked the referee to state in conclusory fashion that "the findings in count one" support culpability under sections 6068 (a), 6068 (d), 6103 and 6106, "the findings in count two" support culpability under section 6068 (a), and so on. As repeatedly explained by the Supreme Court, most recently in *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 816, such conclusory language is inadequate and does not promote meaningful review.

[3b] We must nonetheless undertake the task of identifying what conduct proved under each count supports culpability of the particularly charged statutory or rule violations. First, we reject culpability under sections 6068 (a) and 6103 based on the holdings in *Baker* v. *State Bar, supra*, 49 Cal.3d at p. 815, and *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931. Although Sands was found culpable of rule violations and violation of Business and Professions Code section 6106, the Supreme Court specifically rejected Sands's culpability for willful violation of his oath and duties as an attorney to support the law within the meaning of Business and Professions Code section 6068 (a) on three of four counts.[16] **[4a]** Also, we do not find Crane or DePew culpable of violating section 6068 (d) on any of the charges. That section appears directed at attorneys who make mis-

14. **[1b]** Under rule 453(a) of the Rules of Procedure we have the power to make this determination even though the examiner has not requested that the referee's erroneous finding of an uncharged and unproven violation of former rule 5-104 be construed as (or modified to) a finding of a violation of former rule 5-101 as to Crane. We do not make such a finding as to DePew since DePew was neither charged with nor found culpable of violating former rule 5-101. His only client was Universal.

15. On review, the examiner does repeat his prior request to the referee that the erroneous section 6108 finding be stricken. We strike that finding.

16. The only count in *Sands* on which section 6068 (a) was held to be violated was the count which involved a prior felony conviction of a hearing officer for accepting bribes. Based on the convicted hearing officer's testimony, Sands was found to have violated his oath and duties by passing concealed $100 bills to the hearing officer over lunch on four occasions at which they discussed matters regarding his clients. The charges here are far more comparable to the other three counts in which no violation of section 6068 (a) was found.

representations to a tribunal in seeking to further a client's interests.[17] [4b - see fn. 17] No case has been cited to us which would make it applicable here and the examiner has failed to articulate what conduct of either respondent violates 6068 (d) as opposed to section 6106. [5] Indeed, since all of the acts of dishonesty are covered by section 6106, we see no added value in attempting to strain to find a section 6068 (d) violation by some unspecified part of the same conduct.

Crane's Culpability

We conclude that Crane violated Business and Professions Code section 6106, as charged in count one, by his deceit of SEGA in failing to disclose his ownership of Universal and its inability to carry out its obligations as a licensee. [6] He also violated former rule 5-101 by causing a licensing agreement to be entered into between his client-employer SEGA and his wholly owned company, Universal, by which Crane knowingly acquired a pecuniary interest adverse to SEGA without disclosing his ownership interest in Universal or its incapacity to fulfill the terms of the license agreement or his negotiations for sublicensing by Universal on more profitable terms. Even though the terms of the license were revealed and may not have been unfair in and of themselves, the true identity of the licensee was itself a material fact which Crane had a fiduciary duty to disclose. (See, e.g., *Bate* v. *Marsteller* (1959) 175 Cal.App.2d 573, 580-581, 583 [brokers who indirectly purchased majority interest in property from sellers without fully disclosing nature and extent of their participation breached fiduciary duty and were not entitled to commission even though terms of sale were revealed to and accepted by sellers].)

On count two, we likewise determine that Crane violated section 6106 by wilfully deceiving the sublicensee into believing that Universal had the right to sublicense Zaxxon before any permission was obtained from SEGA to do so.

On count three, we determine that Crane violated 6106 by his deceptive use of the pseudonym "Steve Kness" in dealing with Synapse and with SEGA.

On count four we determine that Crane violated section 6106 by arranging for DePew to pose as general counsel of Universal as well as president and secretary of Universal, thereby concealing from all parties with whom he interacted the lack of any employees and Crane's involvement as sole principal. The examiner failed to prove that SEGA was defrauded into approving the sublicense without having its financial terms disclosed. SEGA agreed to approve the sublicense without knowing its terms.

On count five we determine that Crane committed an act of dishonesty in violation of section 6106 by backdating the documentation of the $5,000 down payment to SEGA.

On count six we determine that Crane violated section 6106 by deceiving HES into believing Universal had SEGA's authorization to add "Super Zaxxon" to its license and by using the pseudonym "Steve Kness" in signing the letter amendment on behalf of Universal.

On count seven we determine that Crane committed acts of dishonesty in violation of section 6106 by using the pseudonym "Bruce Blumberg" in negotiating the sublicense of "Super Zaxxon" by Universal to HES and by entering into the sublicense on behalf of Universal with knowledge that SEGA had not authorized Universal to add "Super Zaxxon" to its license.

On count eight we determine that Crane committed an act of dishonesty in violation of section 6106 by again using the pseudonym "Bruce Blumberg" in a letter from Universal to SEGA falsely indicating that Blumberg, on behalf of Universal, had negotiated with "Crane" and thereby had received SEGA's approval of the HES sublicense, failing to disclose that Blumberg and Crane were one and the same person.

17. Section 6068 (d) requires an attorney "[t]o employ, *for the purpose of maintaining the causes confided to him or her* such means only as are consistent with truth, *and never seek to mislead the judge or any judicial officer* by an artifice or false statement of fact or law." (Emphasis added.) [4b] Section 6106, by contrast, expressly covers acts of moral turpitude whether committed in one's capacity as an attorney or not.

On count nine we similarly find that Crane committed acts of dishonesty in violation of section 6106 by misrepresenting to Kupec of SEGA that Crane made actual representations to Universal that SEGA would approve the sublicense without revealing that Crane was the owner of Universal and that the documents relied on were signed by Crane, acting on both sides of the transaction, hiding his dual role with pseudonyms.

On count 10 we determine that Crane committed an act of dishonesty in violation of section 6106 by altering the Universal-SEGA license without knowledge or consent of SEGA management, to include two additional games, "Carnival" and "Turbo" when he knew he was not authorized to do so.

We dismiss counts 11 and 12 as unsupported by the facts. As to count 12, we find that there was no conspiracy to defraud.

In sum, we conclude that Crane violated section 6106 by acts of dishonesty charged and proved in counts one through ten as set forth above, and violated former rule 5-101 by failing to disclose fully and obtain written consent of his client to his adverse business interest and to permit the client to obtain independent legal advice, proved in counts one, three, four, six, seven, eight and ten.

DePew's Culpability

The single most difficult issue raised by this proceeding is the question of the degree of DePew's culpability, as measured by the extent of his contemporaneous awareness of Crane's wrongdoing. On this point, the testimony of the two respondents is in direct and irreconcilable conflict, yet each adhered to his version of the story even after hearing the other's testimony.

Crane maintained very positively that he had explained to DePew all along, from their first conversation about Crane's licensing venture, that SEGA did not know and must not find out that Universal was Crane's company. DePew maintained equally positively that Crane never told him this, and that he had believed until the Hamburger Hamlet meeting that SEGA was aware of Crane's connection with Universal.[18]

Regrettably, the referee did not expressly resolve this evidentiary conflict in his decision although the referee's decision reflects skepticism regarding some of DePew's more self-serving testimony about his state of mind. (See decision p. 5, lines 17-20; *id.* p. 7, lines 4-8.)

The referee's decision also contains findings, repeated in several places, that DePew was "at least" culpable of gross negligence. (Decision, findings of fact, counts 4, 9, 11, and 12.) We take the referee's skepticism one step further. We find that DePew must have been aware that Crane had concealed his connection with Universal from SEGA. DePew had a full-time job elsewhere with no expertise in handling business transactions, video game licensing or any other matters involving copyright law. At Crane's request he pretended to be house counsel, president and secretary of Universal, an entity in which he had no beneficial interest. DePew also admitted he knew sublicensees were to be deceived. (IIB R.T. pp. 229-36, 239-240.) The deception of SEGA had to be known to him as well.

By his own admission, DePew repeatedly discussed with Crane the propriety of Universal taking a corporate opportunity from SEGA which SEGA had turned down. It strains credulity that Crane and DePew would have repeatedly discussed this subject if Depew thought Crane had SEGA's informed consent to take the rejected opportunity by forming

18. There is a similar dispute concerning whether Depew overtly agreed with Crane's conclusion that his plan was not wrongful because Sega had voluntarily passed up the opportunity Crane was pursuing, and would profit from Crane's efforts. Crane's position was that he expressly sought out Depew for his advice on the matter, and that after some discussion, Depew seemed to agree with Crane that it would be all right to proceed. Depew's testimony was essentially that he repeatedly told Crane that his plan was probably tortious, but that Crane refused to be talked out of it, and eventually Depew gave up. This evidentiary conflict is less important, however, because it is undisputed that Depew did eventually agree to assist Crane in his activities; in light of that decision on Depew's part, any mental reservations he may have had are of little consequence.

Universal. There would have been no need for DePew to play "devil's advocate" if SEGA knew and consented to Crane forming a new company to license "Zaxxon".

We find irrefutable evidence that DePew must have known SEGA was ignorant of Crane's involvement in Universal in the March 22, 1984 letter which Crane and DePew jointly prepared and DePew alone signed and sent to Crane's former supervising attorney at SEGA, Robert Kupec. (Exh. 18.) At oral argument, DePew's counsel insisted that DePew was still unaware as of writing the letter that SEGA knew nothing of Crane's relationship to Universal. In the letter, DePew repeatedly refers to prior negotiations between Universal and SEGA, referring to Universal as "we" and SEGA as represented by "Mr. Crane," and stating: "Mr. Crane indicated that Sega had no intentions of marketing Super Zaxxon . . . . [¶][W]e then began discussions on sublicensing Super Zaxxon to a third party with Mr. Crane's assurances that he would consent to our sublicensing . . . . [¶]In late December we again spoke to Sega . . . . Mr. Crane again assured us that any sublicense agreement ultimately consummated by Universal would receive the approval and consent of Sega . . . . It was on the basis of this reassurance and several conversations and communications with Sega that Universal proceeded . . . . [¶]By the time this agreement was consummated, Universal learned that Mr. Crane was no longer with Sega, and that Universal was now required to deal with an entirely different individual . . . . [N]umerous assurances [were made] from Sega through its legal counsel, Mr. Crane . . . . [¶]Mr. Crane has indicated to us that Super Zaxxon and Zaxxon are separately copyrighted . . . . [¶]As your own records will no doubt reflect, Sega, through Robert Crane, has already provided consent by means of representations to Universal by Mr. Crane that we, Universal, had the 'go ahead' to negotiate with third parties for the sublicensing of Super Zaxxon."

This letter only makes sense if DePew thought Kupec was *unaware* of Crane's ownership and control of Universal. Only under such circumstances could the letter accomplish its stated aim of convincing Kupec to grant written consent to Universal to sublicense "Super Zaxxon" based on Universal's detrimental reliance on "Mr. Crane's repeated assurances" purportedly binding SEGA. We conclude that DePew violated section 6106 by acts of dishonesty alleged and proved in counts four and nine.

We further conclude that the examiner failed to prove any violation by Crane or DePew of sections 6068 (a), 6068 (c), 6068 (d) or 6103. He also failed to prove any violation of rule 5-102(B).

Other Issues Raised by DePew

1. Alleged Prejudicial Misconduct of Examiner

DePew argues that this entire matter should be dismissed with prejudice because the examiner allegedly attached the complaining witness's original letter to the State Bar to his motion to continue trial and notice in lieu of subpoena, and sent them to the referee, without including the letter in his service of those documents on Crane's and DePew's counsel. This argument is unavailing for several reasons.

First, the record does not establish that the document in question in fact was attached to the examiner's motion.[19] [7] Second, even if we assume the examiner did send the letter to the referee, DePew's counsel waived any objection to its use.[20] Moreover,

19. The examiner denied including it with the set of motion papers sent to the clerk for transmittal to the referee. (It is not attached to the copy of those papers that is included in the copy of the file sent to the review department.) The document was part of the discovery file in the case, having been produced to DePew's counsel in response to a request for production of documents. However, it is entirely unclear from the record how it found its way into the papers transmitted to the referee.

20. As the examiner points out, the subject of the letter came up at several points during the proceedings, and although DePew's counsel expressed objections to the means by which he believed the letter had reached the referee, he at no point moved to strike the letter from evidence, moved to disqualify the referee because he had read it, or took any other steps to preserve the argument for review. When the letter was offered in evidence, DePew's counsel did not object to its admission. (V R.T. p. 142; exh. 121.)

DePew's counsel argues that his waiver of the point was "coerced" or "forced" because the referee had already read the document before the problem came to light. DePew's counsel could still have made an objection that would have protected his record.

the referee's familiarity with the letter did not result in any identifiable prejudice to DePew. DePew's counsel has not pointed to any specific finding which he asserts is based on the letter rather than on the evidence introduced at trial. By the time the referee had listened to five days of trial testimony, during which he actively and repeatedly questioned the witnesses himself, it is difficult to believe that his view of the case remained seriously affected by hearsay statements in a letter he had read months earlier. The letter merely contains hearsay statements by the general counsel of Paramount concerning what Paramount learned about Crane and DePew's conduct during its interviews with them. This same subject matter was testified to at length by the author of the letter at the hearing—without any objection by DePew's counsel. (V R.T. pp. 4-142.) Indeed, we have determined upon de novo review that all of the referee's findings of fact are amply supported by documentary evidence and/or by Crane's and/or DePew's own sworn testimony, based on personal knowledge.

2. Laches

[8] The State Bar did not file the notice to show cause in this proceeding until about three and a half years after receiving the initial complaint. DePew therefore argues that laches compels dismissal of this proceeding. However, other than a generalized reference to fading memories, DePew does not point to any *specific* prejudice to DePew that he claims resulted from the delay.

Absent a showing of specific prejudice, delay in State Bar disciplinary proceedings is not a basis for dismissal of the charges. (*Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at p. 310; *Yokozeki* v. *State Bar*, *supra*, 11 Cal.3d at p. 450.) **[9a]** As noted *post*, the delay in this case may be considered as a mitigating factor, as can respondents' period of practice without further complaint prior to the institution of this proceeding. (*Rodgers*, *supra*, 48 Cal.3d at pp. 316-317; *Yokozeki*, *supra*, 11 Cal.3d at p. 450.) But DePew's argument that the proceeding should be entirely dismissed due to the delay is without merit.

Aggravation

Unfortunately, as the examiner's brief points out, the referee's decision fails to contain any specific findings and conclusions one way or the other as to aggravating circumstances. The examiner argues that the following types of aggravating circumstances are supported by the record:

(1) multiple acts/pattern of misconduct (standard 1.2(b)(ii));

(2) acts surrounded by dishonesty, concealment, and other disciplinary violations (standard 1.2(b)(iii));

(3) lack of candor in the State Bar proceeding (DePew only) (standard 1.2(b)(vi));[21] and

(4) significant harm to a client, the public, or the administration of justice (standard 1.2(b)(iv)).

With respect to item one, the examiner treats each count of the notice to show cause as a separate violation, and argues on that basis alone that this matter involves multiple violations or a pattern of misconduct. This argument puts too much emphasis on the examiner's own discretion in drafting the notice to show cause. The examiner could have chosen to charge only count 10 which incorporates the rest of the counts by reference and still have obtained the same result. **[10]** The evidence in this matter clearly shows multiple acts of misconduct by Crane, assisted at two separate junctures by DePew. Crane's fraud does not rise to the level of a pattern of misconduct under Supreme Court precedent. The Supreme Court has limited this characterization to "'only the most serious instances of repeated misconduct over a prolonged period of time.'" (*Young* v. *State Bar* (1990) 50 Cal.3d 1204, 1217, quoting *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1367; see also *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14; *Olguin* v. *State Bar* (1980) 28 Cal.3d 195, 201.)

However, with respect to item two, the examiner is correct. Crane's acts were surrounded by

21. The examiner's reference to standard 1.2(b)(v) appears to be a typographical error.

dishonesty and concealment. The examiner is also correct in pointing out evidence to support a finding under standard 1.2(b)(iv). [11] SEGA, which was Crane's client, was seriously harmed by Crane's misconduct; because of Crane's actions in creating mutually inconsistent licenses without SEGA's knowledge, SEGA was forced to hire counsel to deal with the situation, and to pay a considerable sum of money to resolve its conflicting obligations to Synapse and HES. This harm appears to outweigh any profit SEGA may have obtained from the royalties paid it by Synapse and HES. The examiner has not proved the amount of financial harm since he has not offset SEGA expenditures by the royalties it received.

[12] With respect to item three, we hesitate to make a finding that DePew lacked candor in his testimony before the referee when the referee himself declined to do so. Nor are we inclined to remand for this purpose. The issue of candor relates only to the part of his testimony which involves his recollection of his knowledge and state of mind at the time of the events six years ago. Thus, while we reject his recollection in light of documentary and other evidence, we decline to assume that it was offered in bad faith. This does not affect our finding that at the time of the events in question, he acted dishonestly in violation of section 6106.

[13] Finally, although we accept the examiner's arguments concerning specification of aggravating factors, we do not interpret the referee's failure to make such express findings as evidence that he ignored the aggravating factors that were obvious from the record. In any event, we have taken such factors into account in arriving at our recommended degree of discipline.

Mitigation

The referee's findings in mitigation include some factors that are not properly considered mitigating, and omit factors that should have been considered.

Crane was admitted to practice in 1980, and DePew in 1979. The relevant events occurred in late 1983 and early 1984. [14] Respondents' records of practice without prior discipline, cited by the referee, were far too short to constitute significant mitigation in and of themselves under Supreme Court precedent. (See, e.g., *In re Demergian* (1989) 48 Cal.3d 284, 294 [misconduct began about four years after admission; "A blemish-free record of such relatively short duration is entitled to little weight in mitigation."].) However, it is appropriate to consider such prior blemish-free record in conjunction with subsequent conduct to demonstrate the aberrational nature of the misconduct. [9b] Thus, the referee properly considered DePew's career since his misconduct, during which time DePew's partner testified that DePew has become a valued partner in his firm (VI R.T. p. 60) and DePew has practiced law actively without experiencing any civil judgments, criminal convictions, or further disciplinary complaint. (Standard 1.2(e)(viii); see *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 316-317; *Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 450 [noting in mitigation that "[Respondent] has successfully continued his practice, . . . after the transaction in question, without additional charges being lodged against him, and apparently has the confidence of his colleagues in his current practice."].) [15] DePew's medical volunteer work was also properly relied on as demonstrating a record of community service. DePew's artistic activities are not mitigating factors recognized by the standards or Supreme Court precedent.[22] **[16 - see fn. 22]**

[17] We also do not consider as a relevant mitigating factor the fact that Crane "is presently undergoing therapy in an endeavor to maintain his marriage." (Decision p. 28.) As noted by the examiner, Crane neither established psychological problems at the time of the events in question by expert testimony, nor demonstrated that he had

22. [16] As the examiner points out, DePew's community service was established only by his own testimony (which the examiner neglects to mention was uncontroverted). This is apparently a reference to the requirement in standard 1.2(e)(vi) that good character be established by a "wide range of references." However, DePew's testimony regarding his community service may be considered as some evidence in mitigation notwithstanding that it does not meet the criteria for character evidence set forth in the standard.

recovered from them to the point where they would no longer affect his fitness to practice law. On the other hand, the referee properly considered as a factor in mitigation Crane's agreement (to which he had adhered) to make restitution of his profits to SEGA. (*Waysman* v. *State Bar* (1986) 41 Cal.3d 452.)

[9c] There are other mitigating factors established in the record and not mentioned in the referee's decision. Crane testified that since his misconduct, he had performed satisfactorily as in-house counsel for an airline, handling transfers of tens of thousands of dollars without incident. (He ultimately had to leave his legal employment, however, after a transfer to Atlanta, due to his inability to obtain admission to the Georgia bar during the pendency of these proceedings.) As with DePew, this evidence of post-misconduct rehabilitation is properly considered in mitigation, as is the State Bar's unexplained delay in bringing these proceedings.[23] **[9d - see fn. 23]** Also, the referee failed to mention DePew's voluntary restitution to SEGA of the $3,500 he had received from Crane for his services to Universal.

[18] Most importantly, both respondents, and most notably Crane, testified repeatedly and convincingly that while they recognized afterwards that what they had done was wrong, they honestly believed at the time that it was not, and they did not intend to do any harm; rather, they believed SEGA would benefit from their conduct by receiving royalties from Universal. SEGA had previously declined to market the games for home use and would not have entered that market on its own initiative. Both respondents were very remorseful once they realized they had acted wrongfully. (See standard 1.2(e)(vii).) Both respondents' original lack of appreciation for the wrongfulness of their acts might be attributed to their youth and inexperience. Their subsequent understanding and regret was confirmed by the testimony of Michael Sullivan, the attorney DePew brought in for consultation, who originally persuaded them to come forward with their story. Crane in particular demonstrated great remorse for his misconduct. In addition, promptly upon Sullivan's intervention, both respondents candidly discussed the facts with the principal victim of their misconduct, reached a settlement with the parties involved, and disgorged the money they had received as a result of their acts. (See standard 1.2(e)(vii).)

Recommended Discipline

[19a] Crane committed multiple acts of fraud, dishonesty and concealment which under standard 2.3 shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law. Lengthy suspension is clearly called for based on the magnitude of his scheme and the harm which it caused. Even giving weight to Crane's apparent lack of recognition of his wrongdoing until the Sullivan meeting followed by his prompt corrective steps, we believe substantial discipline is warranted for Crane because of his very serious acts whether or not known to be wrong.

Crane does not disagree. His counsel argues only that mitigating factors ought to justify a three-year suspension instead of disbarment. His counsel likens Crane's actions to those of Donald Segretti in his Watergate crimes. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 888.) Segretti received two years' actual suspension after he was found to have engaged in multiple "acts of deceit designed to subvert the free electoral process." (*Id.* at pp. 887-888.) He was 30 at the time, had no prior record of misconduct, showed remorse and cooperated with investigating agencies. One similarity between the two cases is the misguided attitude with which the wrongful acts were performed. Segretti, at the time he acted, utterly failed to appreciate the magnitude of his misconduct, treating his misdeeds as if they were college pranks. Crane, likewise, "was incredibly naive" (VI R.T. p. 124) and apparently thought his deception was not

23. **[9d]** Respondents' misconduct occurred during a limited period of time more than six years ago. Delay in prosecution is a factor to consider in determining appropriate discipline. (See *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 132; see also standards 1.2(e)(viii), 1.2(e)(ix).)

outside the scope of permissible business practice. He learned otherwise when Sullivan advised him of the seriousness of his acts. As with Segretti, Crane belatedly came to the realization that his acts were contrary to the fundamental honesty that is required of all attorneys. While Segretti's acts affected the public at large, Segretti did not have a profit motive and was not acting as an attorney when he committed the election crimes for which he was convicted. Here, in contrast, Crane did act as an attorney defrauding his own client for profit. The number of people affected by Segretti's misconduct was far greater; the relationship of Crane's misconduct to the practice of law was far greater.

[19b] To Crane's credit, however, when he realized that it was wrong, he disgorged all profits, candidly disclosed all of his misconduct and made all payments in accordance with his settlement agreement. His immediate restitution and clear remorse coupled with his cooperative behavior and good conduct thereafter amply justify imposing a substantial suspension in lieu of disbarment.

[20] In conducting our review and making our own recommendation of discipline it is likewise our duty to consider the proportionality of the recommended discipline in relation to other cases. (*Snyder* v. *State Bar* (1989) 49 Cal.3d 1302, 1310.)[24] In *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, the California Supreme Court had before it a similar undisclosed conflict-of-interest for personal gain compounded by active deceit of both opposing counsel and the probate court in connection with the handling of a conservatorship. The former Review Department of the State Bar Court recommended disbarment. The Supreme Court noted that "No act of concealment or dishonesty is more reprehensible than Rodgers's attempts to mislead the probate court." (*Id.* at p. 315.) Nonetheless, after balancing all of the mitigating and aggravating factors it imposed two years actual suspension. The court noted in mitigation Rodgers's lengthy blemish-free prior record of practice and his subsequent continued practice "without suffering additional charges of unethical conduct, thus demonstrating an ability to adhere to acceptable standards of professional behavior. . . . [¶] Balanced against these mitigating factors are a host of aggravating circumstances." (*Id.* at p. 317.) The aggravating circumstances were significant harm to the conservatee; consistent attempts to conceal his wrongful acts and evasive testimony at the hearing demonstrating lack of candor and insight into the wrongfulness of his actions. (*Id.*) The Supreme Court compared the case to others noting that violation of rule 5-101 had on one occasion in the past resulted in discipline as severe as two years' actual suspension (*Beery* v. *State Bar* (1987) 43 Cal.3d 802) but that in most cases the Court considered comparable, it had imposed less discipline. In no comparable case had it ordered suspension longer than two years or disbarment. (*Rodgers*, *supra*, 48 Cal.3d at p. 318.)

We deem Crane's misconduct equally reprehensible to that of Rodgers, but his mitigation to be stronger. No justifiable basis appears for imposing a lengthier suspension on Crane than was imposed in *Rodgers*. We are unaware of any case of similar nature which has resulted in three years' suspension. Nor do we consider the additional year to be necessary here. Indeed, three years' actual suspension is not commonly ordered by the Supreme Court for any offense. In *Weller* v. *State Bar* (1989) 49 Cal.3d 670 the Court did impose that sanction on an attorney with a record of two prior disciplinary offenses who once again misappropriated client trust funds. The *Segretti* and *Rodgers* facts are far more comparable to the current facts than those in *Weller*. Like those respondents, Crane had no prior record of misconduct. The likelihood of his repeating the misconduct is low. Recently, in *Friedman* v. *State Bar* (1990) 50 Cal.3d 235 the Supreme Court ordered three years' actual suspension of an attorney with no prior record. However, his lack of prior discipline was offset by repeated untruths in the course of the State Bar investigation and an attempt

24. As indicated above, Crane has not argued the three-year actual suspension recommended by the referee is excessive. We decline to speculate whether this is due to Crane's present circumstances as a nonresident of the state employed in a nonlegal capacity. The appropriate length of actual suspension is nonetheless an issue before us as part of our de novo review of the record.

to manufacture evidence—none of which is true of Crane. To the contrary, the record shows Crane to have been cooperative and truthful throughout the proceeding. We also are able to protect the public by requiring a standard 1.4(c)(ii) hearing prior to Crane's resumption of practice. We therefore recommend two years of actual suspension as sufficient discipline.

In addition to two years' actual suspension, we recommend that Crane be required to take and pass the Professional Responsibility Examination ("PREX"), comply with standard 1.4(c)(ii), and complete restitution if he has not already done so prior to resuming the practice of law. **[21a]** Neither compliance with California Rules of Court, rule 955[25] **[21b - see fn. 25]** nor probation terms appear warranted since Crane has not lived in the state for several years and does not practice law. Nor has he committed any acts of misconduct in over six years. Compliance with standard 1.4(c)(ii) in our view will sufficiently protect the public.

With respect to DePew, as all parties recognize, his acts of misconduct were far more limited. He was liable for two counts of deceit in agreeing to front for Crane as house counsel, president and secretary of Universal (count four) and in misrepresenting the nature of the negotiations between Crane and Universal to Kupec (count nine). He did not deceive any client, but he did act deceptively on behalf of a client for remuneration ($3,500) which he disgorged to SEGA immediately upon being advised by his own consultant, Sullivan, that his conduct was wrongful. Moreover, it is undisputed that Crane dictated all of DePew's actions which were performed for Crane's benefit.

Had DePew acted only out of gross negligence, as the referee concluded, in view of his clean prior and subsequent record no actual suspension might be warranted. But this finding of the referee is puzzling in light of DePew's admission that he knew Synapse and HES were deceived by Crane's pseudonyms. DePew also had to know that SEGA was being tricked by Crane's pseudonyms and use of self-authorized sublicensing agreements. He clearly did not act out of mere negligence. Neither the examiner's call for lengthy suspension or disbarment, nor DePew's counsel's argument for no suspension is warranted under such circumstances. We undertake a balanced consideration of the relevant factors. (See *McCray* v. *State Bar* (1985) 38 Cal.3d 257, 293.) This takes into account the lengthy delay in prosecution and the opportunity it provided DePew to continue practicing without further incident. We also take into account the need to protect the integrity of the bar and retain public confidence. (See standard 1.3.)

[22] Honesty is one of the most fundamental rules of ethics for attorneys. (*Tomlinson* v. *State Bar* (1975) 13 Cal.3d 567, 577; *Gold* v. *State Bar* (1989) 49 Cal.3d 908, 914.) In *Gold*, an attorney made misrepresentations as to two different matters, in one case fabricating a settlement. The Supreme Court concluded, inter alia, that he committed acts of moral turpitude in violation of section 6106. It nonetheless reduced the recommended 90-day actual suspension to 30 days based on mitigating circumstances, including absence of a prior record of discipline over many years of practice.

Here, the length of practice is much shorter than in *Gold* but DePew does have other mitigation including prompt return of all fees earned in the misguided venture. In *Wren* v. *State Bar* (1983) 34 Cal.3d 81, the Court likewise found Wren to have violated section 6106 by serious misrepresentations to a client and by fabricating the status of an unfiled lawsuit. Wren's conduct was compounded by attempting to mislead the State Bar by giving false and misleading testimony before the hearing panel. The court ordered 45 days actual suspension.

Here, we do not have a finding of false and misleading testimony, but we do have highly questionable recollection of the extent of his knowledge of wrongdoing at the time. We also have evidence that to this day respondent does not fully appreciate

25. **[21b]** We recognize that compliance with rule 955 is customary for suspensions of this length but the rule does make such an order discretionary. From these facts, it appears unnecessary.

the significance of his misbehavior. (See, e.g., *Carter* v. *State Bar* (1988) 44 Cal.3d 1091, 1100 [Supreme Court noted respondent's "apparent lack of insight into the wrongfulness of his actions" and found that one prior imposition of discipline and several aggravating factors justified six months suspension].) Here, DePew had some insight and remorsefulness but not complete understanding of the impropriety of his conduct. Consideration of the integrity of the profession, the need to maintain high professional standards and public confidence in the legal profession warrants actual suspension even if DePew no longer poses a danger to the public. (Cf. *In re Basinger* (1988) 45 Cal.3d 1348, 1360.)

Forty-five days suspension will afford DePew the opportunity to reflect on his professional obligations and gain insight into the wrongfulness of his past conduct. We also recommend that he take and pass the PREX within one year, but do not consider probation necessary in light of the isolated nature of the offense and his satisfactory conduct over more than six years following its occurrence.

IV. FORMAL RECOMMENDATION

For the reasons stated above, we recommend as follows. First, as to respondent Robert Daniel Crane, we recommend: (1) that he be suspended from the practice of law in this state for a period of two years from the effective date of the Supreme Court's order herein, and until he (a) has completed the restitution to SEGA required by the settlement agreement (exhs. 21, 22, 23) and has provided satisfactory evidence of said restitution to the Probation Department, State Bar Court, Los Angeles, and (b) has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct; and (2) that prior to the expiration of his actual suspension, he take and pass the Professional Responsibility Examination, and furnish satisfactory proof thereof to the Probation Department, State Bar Court, Los Angeles.

Second, as to respondent Brian David DePew, we recommend (1) that he be suspended from the practice of law in this state for a period of forty-five (45) days from the effective date of the Supreme Court's order herein, and (2) that he be required to take and pass the Professional Responsibility Examination, and furnish satisfactory proof thereof to the Probation Department, State Bar Court, Los Angeles, within one year of the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HENRY L. GLASSER

A Member of the State Bar

[No. 86-O-18495]

Filed September 11, 1990

SUMMARY

In this matter, the hearing judge dismissed the notice to show cause without prejudice on motion of the respondent, on the ground that the notice was so vague that it did not provide respondent with sufficient notice of his alleged misconduct. (Hon. Jennifer Gee, Hearing Judge.)

The State Bar examiner sought review, and the review department affirmed. The review department held that the notice to show cause did not give the respondent adequate notice of any specific alleged misconduct. The notice broadly referred to a series of loans made by respondent over an unspecified period of time commencing in 1982, by respondent as trustee for twelve unidentified client family trusts, to one or more of three limited partnerships of which respondent was general partner. None of the loans were identified by lender, borrower, amount or date. The notice to show cause did not specify which loans were challenged as improper, nor did it tie the misconduct charged in any paragraph of the notice to the elements of an offense proscribed by any particular statute or rule. Instead, it concluded with a catch-all paragraph charging that respondent had "committed the above-described acts in wilful violation of your oath and duties as an attorney and in particular," specified sections of the Business and Professions Code and Rules of Professional Conduct.

In affirming the order granting respondent's motion to dismiss, the review department emphasized that in order to defend against disciplinary charges, a respondent needs to be adequately apprised of the precise nature of the charges. It is thus incumbent upon the Office of Trial Counsel not only to determine which specific conduct of the respondent is at issue, but also to articulate the nature of the challenged conduct with particularity in the notice to show cause, correlating the alleged misconduct with the rule or statute allegedly violated thereby.

COUNSEL FOR PARTIES

For Office of Trials: Starr Babcock, Mara Mamet

For Respondent: Ephraim Margolin, Bradford L. Battson

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **106.20 Procedure—Pleadings—Notice of Charges**
139 Procedure—Miscellaneous
192 Due Process/Procedural Rights
A motion to dismiss a notice to show cause for failure to provide the respondent with sufficient notice of the alleged misconduct is available where appropriate to assure adequate notice of charges in compliance with statutory mandate and due process.

[2] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
In order to defend against charges, a respondent needs to be adequately apprised of the precise nature of the charges.

[3] **192 Due Process/Procedural Rights**
194 Statutes Outside State Bar Act
Neither civil nor criminal rules of procedure govern State Bar disciplinary proceedings. However, the right to practice one's profession is sufficiently precious to be surrounded by a panoply of legal protection, including invocation of civil and criminal procedural rules when necessary to insure administrative due process.

[4 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
Adequacy of notice is an essential element of due process, in order that the accused may have a reasonable opportunity to prepare and present a defense and not be taken by surprise by evidence offered at trial. The respondent in a disciplinary proceeding is entitled to reasonable notice of the specific charges, which is the purpose of the notice to show cause.

[5 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
The principle that due process requires notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, applies with equal force in State Bar proceedings. The right to practice law is a valuable one which should be suspended or revoked only on charges alleged and proved and as to which full notice and opportunity to defend have been accorded. Thus, the charges in the notice to show cause should relate individual facts to specific statutory and rule violations.

[6 a, b] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
165 Adequacy of Hearing Decision
192 Due Process/Procedural Rights
It is important for decisions of the State Bar Court to identify with specificity both the rule or statutory provision that underlies each charge and the manner in which the conduct allegedly violated that rule or statutory provision. This specificity is essential to the respondent's due process right to adequate notice, as well as to meaningful Supreme Court review of the recommendation of the State Bar Court. The notice to show cause must be sufficient to support the charges relied upon in the decision, because the findings of the State Bar Court must rest on the charges filed.

[7] **106.20 Procedure—Pleadings—Notice of Charges**

Shortcomings of notice to show cause were manifest, where such notice did not give respondent notice of any specific alleged misconduct, but broadly referred to a series of loans made over an unspecified period of time from twelve unidentified family trusts to one or more of three limited partnerships; none of the loans was identified by lender, borrower, amount or date; and the notice did not specify which of the loans were challenged as improper.

[8] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment

Examiner's offer to amend notice to show cause to name twelve trusts from which respondent (as trustee) was alleged to have made loans was inadequate to remedy deficiencies of notice to show cause which did not identify loans by borrower, date or amount and did not specify which of series of many loans were alleged to have been improper.

[9] **106.10 Procedure—Pleadings—Sufficiency**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

In pleading a violation of the ethical rule requiring payment of client trust finds on demand, there must be an allegation that the respondent was in possession of identified funds, securities or other property of a client; that the client was entitled to receive the funds, securities or property, and that there was a request by the client that the respondent pay or deliver the funds, securities or other property.

[10] **106.10 Procedure—Pleadings—Sufficiency**
280.20 Rule 4-100(B)(1) [Former 8-101(B)(1)]
280.50 Rule 4-100(B)(4) [Former 8-101(B)(4)]

Reference in notice to show cause to undisclosed loans made from client trust funds would appear to charge violation of rule requiring disclosure of receipt of client funds, but not of rule requiring payment of funds to client on demand, since clients would not be in a position to demand funds which they were unaware were transferred out of trust.

[11] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
135 Procedure—Rules of Procedure

Inadequacies in pleading not only made notice to show cause insufficient under rule 550, Trans. Rules Proc. of State Bar, but also caused questions as to whether notice met requirements of rule 554.1, providing that a notice to show cause may be dismissed on ground that it fails to state a disciplinable offense as a matter of law.

[12] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]

If State Bar intends to charge violation of rule of professional conduct regarding duty of competence, there must be an allegation that respondent intentionally or with reckless disregard or repeatedly failed to perform legal services competently, and notice should state what particular conduct is characterize as violating this standard.

[13] **106.20 Procedure—Pleadings—Notice of Charges**
273.00 Rule 3-300 [former 5-101]
Where the first sentence of a paragraph in a notice to show cause referred to a single transaction and the rest of the same paragraph referred to multiple transactions, and where it was unclear whether some or all of the loans described earlier in the notice were alleged not to have been fair or reasonable, there was unnecessary ambiguity in the alleged misconduct with respect to the charge of improper business transactions with clients.

[14] **162.11 Proof—State Bar's Burden—Clear and Convincing**
In every disciplinary proceeding it is the State Bar's burden to prove specific charged misconduct by clear and convincing evidence.

[15 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
113 Procedure—Discovery
192 Due Process/Procedural Rights
The opportunity for permissive amendment of the notice to show cause at a later stage in the proceedings on adequate notice of new factual allegations does not negate the State Bar's obligation in the first instance to provide adequate notice of the original charges. While developments during discovery may lead to augmentation or modification of the charges by amendment, the ability to amend does not affect the requirement of particularity in the original charges. Informal sharing of source material on which charges are based, while highly desirable, is no substitute for formal charges.

[16] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
192 Due Process/Procedural Rights
1099 Substantive Issues re Discipline—Miscellaneous
The State Bar cannot impose discipline for any violation not alleged in the original notice to show cause. If the evidence produced before the hearing department shows the attorney has committed an ethical violation that was not charged in the original notice, the State Bar must amend the notice to conform to the evidence adduced at the hearing.

[17 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
162.20 Proof—Respondent's Burden
192 Due Process/Procedural Rights
Unless the respondent demonstrates that the respondent's defense was actually compromised, a slight variance in the evidence that relates to the noticed charge does not, in itself, deprive the respondent of adequate notice. This situation, however, is patently different from one in which ambiguity and lack of specificity in the notice to show cause make it unclear which aspect of the respondent's conduct over a number of years allegedly violated the rules and statutes cited in the notice.

[18] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
106.90 Procedure—Pleadings—Other Issues
135 Procedure—Rules of Procedure
Charges should only be filed when the Office of Trial Counsel ascertains that reasonable cause exists to charge that particular conduct occurred which violated a particular regulatory provision. (Rule 510, Rules Proc. of State Bar.)

[19] **106.20 Procedure—Pleadings—Notice of Charges**
135 Procedure—Rules of Procedure
The State Bar has the duty to distill from sources available to it whether reasonable cause exists for charging a member with statutory or rule violations. It is not only incumbent upon the Office of Trial Counsel to determine which specific conduct of the respondent is at issue, but to articulate the nature of the conduct with particularity in the notice to show cause, correlating the alleged misconduct with the rule or statute allegedly violated thereby. (Rules 510, 550, Rules Proc. of State Bar.)

[20] **106.90 Procedure—Pleadings—Other Issues**
162.20 Proof—Respondent's Burden
192 Due Process/Procedural Rights
The scope of the respondent's defense is determined by the scope of the notice to show cause.

[21] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
106.40 Procedure—Pleadings—Amendment
192 Due Process/Procedural Rights
The degree of specificity required in a notice to show cause does not necessitate lengthy detailed pleading. A notice to show cause does not have to include explicit details of a respondent's alleged misconduct, nor does it have to match the subsequent proof at the hearing as long as the difference is immaterial or the pleading is amended and the respondent is given an opportunity to respond to the additional allegations.

[22] **106.20 Procedure—Pleadings—Notice of Charges**
165 Adequacy of Hearing Decision
192 Due Process/Procedural Rights
Increased specificity in articulating the charged misconduct in the notice to show cause will enable the respondent to prepare to meet the charges; provide the hearing judge with a proper framework for findings and conclusions; and make it easier for the review department and the Supreme Court to conduct meaningful de novo review of the hearing judge's decision.

ADDITIONAL ANALYSIS

Culpability
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2

OPINION

PEARLMAN, P.J.:

The issue before us is the sufficiency of the notice to show cause in this proceeding against respondent Glasser. The notice to show cause was dismissed without prejudice by Judge Jennifer Gee of the hearing department at the request of the respondent, whose counsel contended that the notice violated rules 550 and 554.1 of the Transitional Rules of Procedure of the State Bar, Business and Professions Code section 6085, the due process clause of the Fourteenth Amendment of the United States Constitution, the Sixth Amendment of the United States Constitution and article I, section 7(a) of the California Constitution. The State Bar examiner has sought our review.

[1] A motion to dismiss of the type before us has rarely been made in State Bar proceedings, but it is available where appropriate to assure adequate notice of charges in compliance with statutory mandate and due process. We adopt Judge Gee's October 30, 1989 Order Granting Motion to Dismiss in this case, concluding, as did Judge Gee, that "the Notice as currently drafted is so vague that it does not provide Respondent with sufficient notice of his alleged misconduct." (Order p. 5.)

DISCUSSION

[2] In order to defend against charges, a respondent needs to be adequately apprised of what the precise nature of the charges is. Rule 550 of the Transitional Rules of Procedure of the State Bar[1] so provides: "The notice to show cause shall cite the statutes, rules, or court orders alleged to have been violated . . . *and the particular acts or omissions, or other acts, constituting the alleged violation or violations*, or the basis for the action proposed. . . ." (Emphasis added.)

[3] While neither civil nor criminal rules of procedure govern State Bar disciplinary proceedings (*Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 225-226), "[t]he right to practice one's profession is sufficiently precious to be surrounded by a panoply of legal protection." (*Id.* at p. 226.) This includes invocation of civil and criminal procedural rules when necessary to insure administrative due process. (*Id.*, citing *Werner* v. *State Bar* (1944) 24 Cal.2d 611, 615.)

[4a] Adequacy of notice is an essential element of due process. "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*People* v. *Thomas* (1987) 43 Cal.3d 818, 823.) [5a] "No principle of procedural due process is more clearly established than that the notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Id.* at p. 823, citing *Cole* v. *Arkansas* (1948) 333 U.S. 196, 201.)

[5b] This principle applies with equal force in State Bar proceedings. (*Woodard* v. *State Bar* (1940) 16 Cal.2d 755, 757 ["The right to practice law is a valuable one which should be suspended or revoked only on charges alleged and proved and as to which full notice and opportunity to defend have been accorded"].) Thus, even when no objection has been raised by the respondent, the Supreme Court has in recent years criticized the failure of the charges in the notice to show cause to relate individual facts to specific statutory and rule violations. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 816; *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 968; *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 931.)

In *Guzzetta* the Supreme Court was critical of State Bar actions where the link between the alleged misconduct and specific charges is not evident from the record, finding that "[n]either the charges, nor the ultimate findings and conclusions in the instant record relates the conduct charged as violations of

1. Hereafter "Rules of Procedure of the State Bar" or "Rules Proc. of State Bar."

petitioner's duties as an attorney to the statutes or Rules of Professional Conduct that the State Bar concludes have been violated." (*Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 968.) The Court went on to note, "Not only does this failure make the work of this court more difficult since we are forced to determine the basis for the recommended discipline by deductive reasoning, but it also brings into question the adequacy of the notice given to an attorney of the basis for the disciplinary charges. (See *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 420; *Woodard* v. *State Bar* (1940) 16 Cal.2d 755, 757.)" (*Guzzetta* v. *State Bar*, *supra*, at p. 968, fn. 1.) The same concerns were raised in *Maltaman*, and the same language from *Guzzetta* was quoted by the court to emphasize its point. (*Maltaman* v. *State Bar*, *supra*, 43 Cal.3d at p. 931, fn. 1.)

[6a] Last fall, in *Baker*, the Supreme Court again addressed the issue of adequacy of notice: "Once again we are constrained to call to the attention of the State Bar Court the importance of identifying with specificity both the rule or statutory provision that underlies each charge and the manner in which the conduct allegedly violated that rule or statutory provision. While petitioner here does not complain of any due process violation in lack of notice, this specificity is also essential to meaningful review of the recommendation of the State Bar Court." (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 816.)

[6b] The Supreme Court's immediate concern in *Baker* was its ability to conduct meaningful review of the decision of a referee of the prior voluntary State Bar Court. However, the reference to respondent's due process rights to adequate notice clearly refers to the sufficiency of the notice to show cause to support the charges relied upon in the decision. "[T]he findings must rest on the charges filed." (*Irving* v. *State Bar* (1931) 213 Cal. 81, 85; see also *Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1153-1154 [charges held to have given respondent full notice of the specific conduct at issue].)

[7] We turn now to the charges filed against respondent Glasser in the instant proceeding. The charges of the notice to show cause are contained in a single count of less than two pages, a copy of which is attached as an exhibit to this opinion. Its shortcomings are manifest. It does not give the respondent notice of any specific alleged misconduct, but broadly refers to a series of loans made by respondent, over an unspecified period of time commencing in 1982, as trustee for 12 unidentified client family trusts to one or more of three limited partnerships of which respondent was general partner.[2] **[8 - see fn. 2]** None of the loans are identified by lender, borrower, amount or date. The notice merely alleges that the gross amount of all of the loans when added together is "in excess of $2,000,000." The notice also alleges that the loans were "frequently undocumented," "many" were allegedly not disclosed to the clients and some were allegedly made after knowledge that the limited partnerships were likely to fail. The notice to show cause does not specify which loans are challenged as improper: all of the loans, only those that were undocumented, only those that were allegedly not disclosed, or some combination or subset of the above. Nor does it tie the misconduct charged in any paragraph of the notice to the elements of an offense proscribed by any particular statute or rule, instead concluding with a catch-all paragraph charging that: "You committed the above-described acts in wilful violation of your oath and duties as an attorney and in particular, California Business and Professions Code Sections 6068(a), 6103 and 6106; and former Rule 6-101(2) (pre-October 1983) and former Rules 5-101, 6-101(A)(2), 8-101(B)(3) and 8-101(B)(4) (pre-May 27, 1989)."

The Office of Trial Counsel's brief before the review department belatedly seeks to correlate specific paragraphs of the notice to show cause with the alleged violation of rules 8-101(B)(3) and 8-101(B)(4), asserting without explanation that "by implication these same facts would be sufficient to support the factual bases for the additional charges."

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2. **[8]** In the proceedings below, the examiner offered to amend the notice to show cause to name the 12 trusts, but refused to make any further clarifying amendments. The hearing judge properly rejected this offer as inadequate to remedy the deficiencies of the notice. (Order p. 4.)

Thus, the examiner contends that the notice alleges, in paragraphs two through four, that respondent was under a duty to provide an accounting and failed to do so in violation of rule 8-101(B)(3). Contrary to the examiner's assertion, the duty to account is not expressly pleaded in paragraphs two through four, or anywhere else in the notice, but must be inferred from the allegation that respondent acted as the "trustee" for unnamed client trusts. There are likewise no express allegations of a failure to account, but only allegations that respondent made many loans which were "frequently undocumented" and "many" were not disclosed to his clients.

[9] There is *no* allegation anywhere as required by rule 8-101(B)(4) that respondent was, at *any* time, in possession of "*any* identified funds, securities or other properties" of *any* client; that any client "was entitled to receive" any funds, securities or other properties or "that there was a request" by *any* client "to pay or deliver" *any* funds, securities or other properties.

The examiner's brief does not address the requirement of relating the charges to specific conduct, but states that "[t]o properly allege a violation of 8-101(B)(4), the State Bar must allege sufficient facts to establish that respondent was (1) in possession of client funds, and (2) during the time he had possession of client funds he used them for his own use or benefit." No citation is supplied for this formulation of the required pleading of a rule 8-101(B)(4) violation which omits the identification of particular client funds and lacks the essential element of client demand. Moreover, the only allegation of use of funds for respondent's own benefit is in paragraph five of the notice to show cause, which states: "You were aware of the substantial depreciation of the trusts and of the likelihood of the failure of the limited partnerships, but continued to make loans from the trusts to the limited partnerships. You misappropriated *these* funds to your own use and benefit." (Emphasis added.) The placement of the allegation of misuse in paragraph five and the limiting adjective, "these", makes it appear that only the loans made after knowledge of the risk of non-repayment were allegedly misappropriated.

The examiner states that in paragraphs one through four he likewise sought to allege that respondent used earlier loaned funds for respondent's own use and benefit. No such allegation is contained in these paragraphs. Thus, if the Office of Trial Counsel intended the section 6106 charge to apply to conduct alleged in paragraphs one through four as well as paragraph five, it has not pleaded a basis for such charge. Also, as noted above, the examiner fails to acknowledge the requirement of an allegation that the client requested such funds as a basis for a rule 8-101(B)(4) violation. No such allegation is contained anywhere in the notice. [10] On the other hand, the notice refers to failure to disclose loans made from the trust account. An allegation of undisclosed receipt of client funds would appear to charge a violation of 8-101(B)(1), but not 8-101(B)(4), since clients would not be in a position to demand funds which they were unaware were transferred out of trust.

[11] The inadequacies in pleading not only make the notice insufficient under rule 550, but also cause questions as to whether the notice meets the requirements of rule 554.1, which provides that a notice to show cause may be dismissed on the ground that it fails to state a disciplinable offense as a matter of law.

The Supreme Court in *Baker* specifically addressed problems with respect to alleged violation of Business and Professions Code sections 6068 (a) and 6103. (See *Baker* v. *State Bar*, *supra*, 49 Cal.3d at pp. 814-815; *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931.) Here, as in *Baker* and the first three counts in *Sands*, there are no charged violations of any specific laws outside the Business and Professions Code. The notice to show cause does not specify in what manner, and by which conduct, respondent failed to support the laws of this state within the meaning of section 6068 (a), or violated section 6103, which the

Supreme Court has held does not define any duties. (*Baker, supra*, 49 Cal.3d at p. 815; *Sands, supra*, 49 Cal.3d at p. 931.)[3]

[12] A similar problem exists with the alleged violation of former rule 6-101(A)(2). There is no allegation that respondent "intentionally or with reckless disregard or repeatedly failed to perform legal services competently." If the State Bar intends to characterize particular conduct as violative of former rule 6-101(A)(2), it should so state in its notice. If his entire handling of each of the 12 client trusts is intended to be charged as violative of this rule, then it is no great burden on the examiner to articulate that. However, it is unfair to leave it open for the respondent to conjecture whether seven years of handling twelve trusts is at issue if the State Bar possesses reasonable cause only to challenge specific conduct over a shorter time period.

[13] Again, with respect to former rule 5-101, there is unnecessary ambiguity in the alleged misconduct. Paragraph four states that "you entered into *a business transaction* and acquired *an* interest adverse to your clients and beneficiaries, the terms of which were not fair or reasonable." (Emphasis added.) It then refers to failure to disclose the terms of *all transactions* and manner of acquisition of adverse *interests*. The first sentence refers to the unfairness of a single transaction and the rest of the paragraph refers to multiple transactions. The reader is left to infer that "transactions" in paragraph four is intended to refer to loans described in earlier paragraphs and is left to guess whether all of the loans are intended to be characterized as not fair or reasonable, or only some loans or categories of loans.

[14] In every disciplinary proceeding it is the State Bar's burden to prove specific charged misconduct by clear and convincing evidence. (*Arden* v. *State Bar* (1987) 43 Cal.3d 713, 725; *Golden* v. *State Bar* (1931) 213 Cal. 237, 247.) **[4b]** The respondent is entitled to reasonable notice of the specific charges. (Bus. & Prof. Code, § 6085.) That is the purpose served by the notice to show cause—putting the respondent on notice of the specific misconduct the State Bar intends to prove.

The examiner brushes aside issues of vagueness, contending that the notice meets both civil and criminal pleading requirements—which it clearly does not.[4] He asserts that the State Bar's only duty is to put respondent on notice of the particular statutes and rules allegedly violated, but not to specify the particular conduct. The examiner contends that the respondent can ascertain the precise factual allegations during the course of discovery and trial. This argument is misconceived. **[15a]** The opportunity for permissive amendment at a later stage in the proceedings on adequate notice of new factual allegations does not negate the State Bar's obligation in the first instance to provide adequate notice of the original charges.

The examiner mistakenly relies on *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929, as authority in

3. We recognize that since the issuance of the *Baker* and *Sands* decisions, *supra*, the Supreme Court has issued other decisions finding attorneys culpable of violations of section 6068 (a) and/or 6103 of the Business and Professions Code. (E.g., *Layton* v. *State Bar* (1990) 50 Cal.3d 889, 893, 898, rehg. den. July 18, 1990; *Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1144, 1154.) However, it has done so without citing *Baker* or *Sands*, and without expressly overruling either decision. Moreover, prior to *Layton* and *Hartford*, the court reaffirmed in other cases the holding in *Baker* that section 6103 does not define any duties of members of the State Bar. (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245; *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 903.) We are reluctant to assume that the Court intended, in *Layton* or *Hartford*, to overrule sub silentio decisions which it had reached only a few months earlier. We therefore intend to follow *Baker* and *Sands*, as applied in the text *ante*, pending further clarification from the Supreme Court.

4. In civil cases a demurrer will be sustained for uncertainty of the complaint. (Code Civ. Proc., § 430.10, subd. (f); see generally 5 Witkin, *California Procedure* (3d ed. 1985) Pleading, § 926, pp. 363-364.) Examples include failure to specify the date of occurrence of material events (*Corum* v. *Hartford Acc. & Indem. Co.* (1945) 67 Cal.App.2d 891, 894) and the date of indebtedness. (*Miller* v. *Brown* (1951) 107 Cal.App.2d 304, 307.) As pointed out by the examiner in his brief, the bare essentials in a criminal accusatory pleading include the approximate date, identification of the victim and a statement of the act or omission constituting the offense. (See also 4 Witkin, *California Criminal Law* (2d ed. 1989) Proceedings Before Trial, § 2059.)

support of his position. To the contrary, the Supreme Court in *Van Sloten* stated that **[16]** "the State Bar cannot impose discipline for any violation not alleged in the original notice to show cause. [Citation.] If the evidence produced before the hearing panel shows the attorney has committed an ethical violation that was not charged in the original notice, the State Bar must amend the notice to conform to the evidence adduced at the hearing." The examiner relies on the next sentence in the opinion, "Yet adequate notice requires only that the attorney be fairly apprised of the precise nature of the *charges* before the proceedings commence. [Citation.]" (*Id.*, emphasis in original.) The Court then explained that, **[17a]** "Unless the petitioner demonstrates that his defense was actually compromised, *a slight variance in the evidence that relates to the noticed charge does not, in itself, deprive him of adequate notice.* (See Rules Proc. of State Bar, rule 556.)" (*Van Sloten*, *supra*, 48 Cal.3d at p. 929, emphasis added.)

In *Van Sloten*, the sole charge was abandonment of a single, named client in a divorce proceeding. There was simply no colorable argument asserted by Van Sloten that he could not prepare an adequate defense to abandonment of an identified client in an identified proceeding because the dates charged in the notice differed by a few months from the dates found by the referee. The Supreme Court therefore held that Van Sloten made no showing that the four-month variance in the dates specified in the notice to show cause and the referee's findings prejudiced his defense or prevented him from adequately responding to the charge.

[17b] The situation here is patently different from that in *Van Sloten*. Here, we are not faced with a potentially slight variation in proof from specific allegations of a single incident of misconduct in the notice. Rather, the examiner has put at issue a large but unspecified number of transactions, has failed to allege *any* particular transactions or *any* particular dates, and has included in the charges ambiguous and confusing references, making it unclear which aspect of respondent's conduct, over a number of years violates the rules and statutes cited in the notice.

[15b] While developments during discovery may lead to augmentation or modification of the charges by amendment, the ability to amend does not affect the requirement of particularity in the original charges. **[18]** Charges should only be filed when the Office of Trial Counsel ascertains that reasonable cause exists to charge that particular conduct occurred which violated a particular regulatory provision. (Rule 510, Rules Proc. of State Bar.) In the instant case, the Office of Trial Counsel does not claim it did not have more specific information which it could have drawn upon in drafting the notice. Indeed, according to the declaration filed by the examiner in the proceedings below, the State Bar had in its possession, prior to preparing the notice to show cause, an independently prepared, 200-page report concerning the respondent's activities as trustee. This report allegedly sets out a chronology of the trust accounts with great specificity.

The examiner points out in his declaration that respondent and his counsel have been shown a copy of that report. **[15c]** Such informal sharing of source material, while highly desirable, is no substitute for formal charges, nor does it clarify which transactions are the subject of the charges. At oral argument, the examiner acknowledged that the report was done for a different purpose than a disciplinary proceeding and that not all of the report relates to potentially disciplinable conduct. Thus, the examiner argues, it would not have been appropriate to incorporate the report into the notice to show cause. We agree. **[19]** The State Bar has the duty to distill from sources available to it whether reasonable cause exists for charging a member with statutory or rule violations. (Rule 510, Rules Proc. of State Bar.) It is not only incumbent upon the Office of Trial Counsel to determine which specific conduct of the respondent is at issue, but to articulate the nature of the conduct with particularity in the notice to show cause, correlating the alleged misconduct with the rule or statute allegedly violated thereby. (Rule 550, Rules Proc. of State Bar; *Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 968; *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d at p. 931; *Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 816.) This was not done here.

[20] The scope of the respondent's defense is determined by the scope of the notice to show cause. It is improper to require the respondent to justify every loan transaction for every one of 12 clients

over a seven-year period if the Office of Trial Counsel did not consider itself to have reasonable cause to charge each and every such transaction as violative of a statute or rule of professional conduct. If less than all such loan transactions for all client trusts are at issue, then the notice to show cause should specify which are challenged, and in what manner the charged statutes and rules were violated. If, on the other hand, the Office of Trial Counsel did consider reasonable cause to exist for all loan transactions between every client trust and the three limited partnerships to constitute charged misconduct, the Office of Trial Counsel should so articulate and also specify whether all of such conduct violated each of the statutes and rules cited, or which alleged misconduct was violative of which statute or rule.

[21] The degree of specificity required does not necessitate lengthy detailed pleading. As noted by Judge Gee, a notice to show cause does not have to include explicit details of a respondent's alleged misconduct, nor does it have to match the subsequent proof at the hearing as long as the difference is immaterial or the pleading is amended (*Van Sloten* v. *State Bar*, *supra*, 48 Cal.3d at pp. 928-929) and the respondent is given an opportunity to respond to the additional allegations (*Marquette* v. *State Bar* (1988) 44 Cal.3d 253, 264-265).

The examiner contends that dismissing for lack of sufficient specificity would invite an extensive motion practice equivalent to a criminal bill of particulars hitherto foreign to disciplinary proceedings. Given the cost of a motion to dismiss, and the fact that if granted it is without prejudice to the Office of Trial Counsel refiling a more specific notice, there is little incentive for respondents to make such motions where they are not legitimately confused by the notice. Nor is there any reason to suppose such motions would be granted unless the Office of Trial Counsel has, in fact, failed to satisfy the requirements of rule 550 and due process.

[22] More specificity in articulating the charged misconduct should enable the respondent to prepare to meet the charges and also provide the hearing judge with a proper framework for findings and conclusions in compliance with *Maltaman*, *Guzzetta* and *Baker*. It additionally will make it easier for the review department and the Supreme Court to conduct meaningful de novo review of the hearing judge's decision.

The order of dismissal is therefore adopted.

We concur:

NORIAN, J.
STOVITZ, J.

EXHIBIT

PUBLIC MATTER

FILED

JUL 12 1989

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

OFFICE OF TRIAL COUNSEL
STATE BAR OF CALIFORNIA
STARR BABCOCK, No. 63473
Attorney at Law
555 Franklin Street
San Francisco, California 94102

415/561-8200

THE STATE BAR COURT

THE STATE BAR OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	
HENRY L. GLASSER, No. 29836	86-0-18495
A Member of the State Bar	NOTICE TO SHOW CAUSE

TO: HENRY L. GLASSER, Respondent herein:

IF YOU FAIL TO FILE AN ANSWER TO THIS NOTICE WITHIN THE TIME ALLOWED BY STATE BAR RULES, INCLUDING EXTENSIONS, YOU MAY BE ENROLLED AS AN INVOLUNTARY INACTIVE MEMBER OF THE STATE BAR AND WILL NOT BE PERMITTED TO PRACTICE LAW UNTIL AN ANSWER IS FILED.

You were admitted to the practice of law in the State of California on January 12, 1960. Pursuant to Rule 510, Rules of Procedure of the State Bar of California, reasonable cause has been found to conduct a formal disciplinary hearing, commencing at a time and place to be fixed by the State Bar Court (NOTICE OF THE TIME AND PLACE OF HEARING WILL BE MAILED TO YOU BY THE STATE BAR COURT CLERK'S OFFICE), by reason of the following:

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COUNT ONE

1. On or about 1981 you were a partner in the law firm of Bancroft, Avery & McAllister, Attorneys at Law, 601 Montgomery Street, San Francisco, California.

2. While acting in your duties as an attorney, fiduciary and member of your law firm, you occupied the position of trustee for client trusts, which were grouped into twelve family groups.

3. Beginning in 1982, while serving as trustee for the above-referenced trusts and their attendant fiduciary concerns, you made a series of unsecured and rrequently undocumented loans from these trusts to three limited partnerships, IDA Associates, Los Banos Shopping Center Association and Rubimar Associates, in which you were the general partner. The gross amount of said loans was in excess of $2,000,000. Many of the specific individual loans were not disclosed to your clients.

4. You entered into a business transaction and acquired an interest adverse to your clients and beneficiaries, the terms of which were not fair or reasonable. You failed to fully disclose and transmit to them in writing the terms of all the transactions, and manner of the acquisition of the adverse interests, in a way which should reasonably have been understood by them. You failed to give your clients a reasonable opportunity to seek the

advice of independent counsel and failed to obtain your clients' written consent to the transactions.

5. As a result of subsequent limited partnership losses, the above-referenced trusts were either completely or substantially depleted. You were aware of the substantial depreciation of the trusts and of the likelihood of the failure of the limited partnerships, but continued to make loans from the trusts to the limited partnerships. You misappropriated these funds to your own use and benefit.

6. In an attempt to prevent exposure of your activities, you transferred funds between various trusts without the consent of the clients.

You committed the above-described acts in wilful violation of your oath and duties as an attorney and in particular, California Business and Professions Code Sections 6068(a), 6103 and 6106; and former Rule 6-101(2) (pre-October 1983) and former Rules 5-101, 6-101(A)(2), 8-101(B)(3) and 8-101(B)(4) (pre-May 27, 1989).

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WITHIN TWENTY (20) DAYS after service of this Notice, you shall file a written answer as provided by Rule 552, Rules of Procedure of the State Bar of California.

NOTICE - DEFAULT PROCEDURE!

YOUR DEFAULT MAY BE ENTERED FOR FAILURE TO FILE A WRITTEN ANSWER TO THIS NOTICE WITHIN TWENTY (20) DAYS AFTER SERVICE AS PRESCRIBED BY RULE 552, RULES OF PROCEDURE OF THE STATE BAR. SHOULD YOU TIMELY FILE AN ANSWER YOUR DEFAULT MAY ALSO BE ENTERED FOR FAILURE TO APPEAR AT THE FORMAL HEARING. THE ENTRY OF YOUR DEFAULT MAY RESULT IN THE CHARGES SET FORTH IN THIS NOTICE TO SHOW CAUSE BEING ADMITTED AND DISCIPLINE RECOMMENDED OR IMPOSED BASED ON THOSE ADMITTED CHARGES. IF YOUR DEFAULT IS ENTERED, YOU WILL LOSE THE OPPORTUNITY TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS AND UNTIL YOUR DEFAULT IS SET ASIDE ON MOTION TIMELY MADE UNDER THE PRESCRIBED GROUNDS. SEE RULES 552.1 ET SEQ., RULES OF PROCEDURE OF THE STATE BAR.

NOTICE-INACTIVE ENROLLMENT

YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6007(c), THAT YOUR CONDUCT POSES A SUBSTANTIAL THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO THE PUBLIC, YOU MAY BE INVOLUNTARILY ENROLLED AS AN INACTIVE MEMBER OF THE STATE BAR. YOUR INACTIVE ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE RECOMMENDED BY THE COURT. SEE RULES 550 AND 560, RULES OF PROCEDURE OF THE STATE BAR.

NOTICE - COST ASSESSMENT!

IN THE EVENT THESE PROCEEDINGS RESULT IN PUBLIC DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS INCURRED BY THE STATE BAR IN THE INVESTIGATION, HEARING AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND PROFESSIONS CODE §6068.10. SEE RULES 460 ET SEQ., RULES OF PROCEDURE OF THE STATE BAR.

OFFICE OF TRIAL COUNSEL
THE STATE BAR OF CALIFORNIA

DATED: July 7, 1989

FRANCIS P. BASSIOS,
Deputy Chief Trial Counsel

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BRUCE E. NELSON

A Member of the State Bar

[No. 86-O-17038]

Filed September 25, 1990; as modified, October 25, 1990

SUMMARY

Based on stipulated facts showing that respondent had formed a partnership for the practice of law with a non-lawyer, divided legal fees with the non-lawyer, and used the non-lawyer as a "runner" and "capper," and on findings of other misconduct, a referee of the former, volunteer State Bar Court found respondent culpable of various statute and rule violations, and recommended two years stayed suspension, with one year of actual suspension. (Alexander Anolik, Hearing Referee.)

Both parties requested review. The State Bar examiner contended that additional violations of the Rules of Professional Conduct and State Bar Act should have been found and that the referee should have recommended at least two years of actual suspension. Respondent contended that he was not culpable of certain offenses and that in view of extensive mitigation, no actual suspension was warranted.

On review, the review department adopted most of the referee's culpability findings, and found respondent culpable of an additional charge of failing to pay client trust funds upon demand. It deleted the referee's findings that respondent had violated his oath and duties, except as to one charge where respondent had been found culpable of violating a criminal statute. Because respondent presented evidence of extremely strong mitigation, including remorse, restitution, rehabilitation, and extreme candor and cooperation in the State Bar investigation and proceedings, the review department recommended only a six-month actual suspension, with two years stayed suspension and two years probation.

COUNSEL FOR PARTIES

For Office of Trials: Erica Tabachnick

For Respondent: Philip B. Martin

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **221.00 State Bar Act—Section 6106**
1528 Conviction Matters—Moral Turpitude—Definition
Supreme Court has defined moral turpitude as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, or an act contrary to honesty and good morals.

[2] **221.00 State Bar Act—Section 6106**
Where respondent's involvement in capping was pervasive, and his law practice was built entirely on illegal payments to third parties for cases, respondent's conduct clearly involved corruption, and thus violated statute precluding acts of moral turpitude, dishonesty or corruption, even though no deceit was involved.

[3] **243.00 State Bar Act—Sections 6150-6154**
The reason behind the long-standing prohibition in the rules of professional conduct or state law, against capping and improper partnership and fee division activities between lawyers and non-lawyers, is the potential these activities have to adversely affect the independent professional judgment of the lawyer.

[4] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
Absent additional evidence, attorney could not be found culpable of committing act of moral turpitude by misappropriating client trust funds, where evidence showed that attorney had transferred funds to successor counsel, and State Bar had stipulated that successor counsel had actually misappropriated funds.

[5] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
A request by a client for payment of funds or property held by the attorney is an essential element of the charge of failing to pay client trust funds promptly upon request.

[6] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
119 Procedure—Other Pretrial Matters
139 Procedure—Miscellaneous
151 Evidence—Stipulations
280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]
Where respondent, represented by experienced counsel, stipulated to facts which respondent conceded supported uncharged violation of failing to notify clients of receipt of client funds, and respondent did not object to referee's amendment of notice to show cause to reflect such charge, review department held that any such objection was waived, and found culpability despite omission of charge from notice to show cause.

[7 a-c] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
To uphold a finding of culpability of withdrawal without taking steps to avoid foreseeable prejudice to the client, it is not necessary that the precise nature of the prejudice to the client be foreseeable. A finding that it was reasonably foreseeable that some prejudice would result to the client is sufficient to support culpability. Where respondent ended his association with running and capping in a hasty manner, and failed to give adequate notice of withdrawal and change of counsel, prejudice to clients was foreseeable even though evidence did not show that successor counsel's subsequent dishonesty was foreseeable.

[8] **213.10 State Bar Act—Section 6068(a)**
243.00 State Bar Act—Sections 6150-6154
Finding of culpability of violating attorney's duty to uphold the law was proper, where attorney was found to have violated criminal provision of Business and Professions Code as charged in notice to show cause.

[9] **243.00 State Bar Act—Sections 6150-6154**
1091 Substantive Issues re Discipline—Proportionality
Supreme Court attorney disciplinary opinions in which prohibited solicitation or capping activities were a significant or sole part of the lawyer's misconduct have imposed discipline ranging from six months actual suspension for isolated acts to disbarment in a few aggravated cases.

[10] **801.45 Standards—Deviation From—Not Justified**
802.30 Standards—Purposes of Sanctions
863.30 Standards—Standard 2.6—Suspension
1091 Substantive Issues re Discipline—Proportionality
Strong mitigating factors in matter involving capping and other misconduct dramatically lessened need for strict discipline imposed by Supreme Court in similar matters, but did not eliminate need for measurable discipline to maintain integrity of and public confidence in legal profession.

[11] **171 Discipline—Restitution**
Where evidence showed that another attorney, not respondent, was apparently responsible for certain thefts of trust funds, review department did not recommend requiring restitution as to those matters.

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a)
221.19 Section 6106—Other Factual Basis
243.01 Sections 6150-6154
252.21 Rule 1-310 [former 3-103]
252.31 Rule 1-320(A) [former 3-102(A)]
275.31 Rule 3-510 [former 5-105]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
221.50 Section 6106
252.05 Rule 1-300(A) [former 3-101(A)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.54 Misappropriation—Not Proven

Mitigation
Found
735.10 Candor—Bar
745.10 Remorse/Restitution
750.10 Rehabilitation

Standards

801.30 Effect as Guidelines
802.69 Appropriate Sanction
824.10 Commingling/Trust Account Violations
833.40 Moral Turpitude—Suspension
863.20 Standard 2.6—Suspension

Discipline

1013.08 Stayed Suspension—2 Years
1015.04 Actual Suspension—6 Months
1017.08 Probation—2 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School

OPINION

STOVITZ, J.:

Based on requests for review both by the State Bar examiner ("examiner") and Bruce E. Nelson ("respondent")[1], we review a recommendation of a volunteer referee of the former State Bar Court that respondent be suspended from the practice of law in this state for a period of two years, stayed on conditions including a one-year actual suspension.

The referee's findings are based on stipulated facts showing that respondent was culpable of misconduct in 1984 by forming a partnership for the practice of law with a non-lawyer ((former) Rules Prof. Conduct, rule 3-103[2]), dividing legal fees with this non-lawyer (rule 3-102(A)) and using this non-lawyer as a "runner" and "capper" (Bus. & Prof. Code, § 6152).[3] In addition, based on all the evidence presented, the referee found respondent culpable of a violation of Business and Professions Code section 6106 (act of moral turpitude, dishonesty or corruption) in one count, and of rule 5-105 (failing to convey to client a written settlement offer [one count]), rule 8-101(B)(1) (failing to notify client of receipt of trust funds [one count]) and rule 2-111(A)(2) (withdrawing from employment without avoiding foreseeable prejudice to client [four counts]).

On this review, the examiner contends that respondent is also culpable of additional violations of the State Bar Act and Rules of Professional Conduct. The examiner urges that we recommend at least a two-year actual suspension. In contrast, respondent urges that he is not culpable of certain offenses urged by the examiner and that in view of extensive mitigation, no actual suspension is warranted.

On our independent review of the record, we have concluded that in addition to his culpability of the offenses to which he stipulated, respondent is culpable of conduct involving a violation of Business and Professions Code section 6106 in count one, conduct showing a violation of rule 2-111(A)(2) in counts two, four, five, six, and eight, conduct showing a violation of rule 8-101(B)(4) in count six and conduct showing a violation of rule 5-105 in count ten. Because respondent has presented evidence of extremely strong mitigation, we shall recommend a six-month actual suspension as part of a two-year stayed suspension. But for respondent's strong mitigating evidence, we would have recommended considerably greater discipline for what is demonstrably very serious misconduct.

1. THE CHARGES.

On October 24, 1988, the State Bar's Office of Trial Counsel formally charged respondent with professional misconduct in an 11-count notice to show cause ("notice"). Count one charged him with having formed in 1984 a partnership for the practice of law with a non-lawyer (rule 3-103), dividing legal fees with this non-lawyer (rule 3-102(A)) and using this non-lawyer as a "runner" and "capper." Counts two, three, four, seven, eight and nine charged respondent, respectively, with similar misconduct as to different clients in 1984: after having undertaken the specific client's personal injury matter, relocating his office and turning the clients' matters over to another lawyer, Samuel Tolbert, without giving the clients due notice to allow them to seek other counsel. In these counts, respondent was charged with violation of his oath and duties as an attorney (Bus. & Prof. Code, §§ 6068 (a) and 6103) and improper withdrawal from employment (rule 2-111(A)(2)). Counts five and six charged respondent, respectively with similar misconduct as in counts two, three, four, seven, eight and nine but as to different clients. In addition, these counts charged respondent with having received trust funds for these clients, forging or causing to be forged the clients' endorsements on trust items to be deposited and failing to deliver to the

1. Respondent was admitted to practice law in California in 1982. He has no prior record of discipline.

2. Unless noted, all citations to "rules" are to the former Rules of Professional Conduct of the State Bar in effect from January 1, 1975, to May 26, 1989.

3. A "runner" or "capper" is "any person . . . acting . . . as an agent for an attorney at law . . . in the solicitation or procurement of business for such attorney . . . ." (Bus. & Prof. Code, § 6151 (a); *Goldman* v. *State Bar* (1977) 20 Cal.3d 130, 134.)

clients the funds they were entitled to receive. In these latter counts, and in addition to the laws and rules charged as to counts two, three, four, seven, eight and nine, respondent was charged with acts of moral turpitude (Bus. & Prof. Code, § 6106) and with failing to promptly pay to the client, upon request, the client's share of trust funds (rule 8-101(B)(4)).

Count 10 of the notice charged respondent with having failed to communicate to his client a written settlement offer made on his behalf, with having forged or caused to be forged the client's endorsement on trust items to be deposited and with having misappropriated trust funds. (Bus. & Prof. Code, §§ 6068 (a), 6103, 6106; rules 5-105 and 8-101(B)(4).) Finally, count 11 charged respondent with having settled a case for three joint clients, having disbursed to them their share of settlement funds, having withheld a portion of trust funds to pay a medical lien and having failed to promptly pay the clients' medical expenses. (Bus. & Prof. Code, §§ 6068(a), 6103; rule 8-101(B)(4).)

2. STIPULATED FACTS.

On July 11, 1989, and prior to the date of the State Bar Court trial on the charges, the parties reached a stipulation as to facts. In part, this agreement permitted either party to introduce further admissible evidence on any subject it covered and provided that the stipulated facts would control if additional facts were introduced conflicting with those stipulated facts. The parties also waived any variance between the stipulated facts and the notice. (Stipulation, filed July 11, 1989 ["Stip."], p. 2.)

As noted *ante*, the stipulation admitted as to count one that respondent was culpable of misconduct in 1984 by forming a partnership for the practice of law with one Thomas Carr, a non-lawyer (rule 3-103), dividing legal fees with this non-lawyer (rule 3-102(A)) and using this non-lawyer as a "runner" and "capper" (Bus. and Prof. Code, § 6152).[4] As to counts two, four and eight, the stipulation recited in essence that the respective clients named in each count retained respondent's law office to represent them in seeking damages for personal injuries. Thereafter, some of the clients received a letter from respondent (while others did not) stating that he was relocating to Northern California and that another lawyer, Samuel Tolbert, would be taking over the handling of their cases. The clients were never consulted about the transfer, but did not object to it, and the other lawyer settled their cases without authority and misappropriated a portion of their settlement proceeds. (Stip. pp. 3-4, 7-8.)

Counts five, six, ten and eleven involved still other personal injury clients for whom respondent's office had negotiated a settlement and had received trust funds. As to the receipt of the funds and their disbursement by respondent's office, the admitted facts differed in the four counts.

As to count five, the stipulation admitted in essence that respondent's non-lawyer partner negotiated a $6,000 settlement for the client, Ms. Terri Davis, without consulting with her about the settlement; that the funds were placed in respondent's trust account; and that respondent turned over responsibility for Davis' case and the trust account to Tolbert, who assumed the responsibility to disburse the funds. Davis did not receive a letter from respondent stating that he was leaving practice in Los Angeles and that Tolbert would be taking over the handling of her case and the trust funds. Although Davis was never consulted about the transfer, she did not object to it. Tolbert misappropriated her settlement proceeds. Davis hired another attorney who sued respondent. Respondent offered to settle the suit, but Davis rejected the offer and she has not yet received her funds. (Stip. pp. 5-6.)

As to count six, the parties stipulated in essence that Ms. Ollie Mae Warren Taylor received $2,570 from an insurance company under the medical pay coverage of the policy. The funds were placed in respondent's trust account, but respondent never told

4. The stipulation did not recite the statutes and rules cited above but respondent has never disputed his culpability of their violation based on the admitted facts.

Taylor of the receipt of her funds. She never endorsed the insurance company draft and never received any of its proceeds. These funds were transferred to Tolbert who assumed the responsibility to disburse them but did not do so. Taylor did not learn that respondent was leaving practice in Los Angeles and that Tolbert would be taking over the handling of her case and the trust funds. Although Taylor was never consulted about the transfer, she did not object to it and tried to communicate with Tolbert and Carr. Tolbert misappropriated a portion of Taylor's final settlement of her case. (Stip. pp. 6-7.)

As to count 10, the parties stipulated in essence that in August 1984, Carr negotiated a settlement of $5,900 for respondent's client Jose Montano. When Carr told Montano of the settlement, he rejected it and respondent instructed Carr to return to the insurer the $5,900 insurance company draft. Carr did not do so and the draft was still in the file when respondent transferred the case to Tolbert. Tolbert "and/or" Carr deposited the draft and misappropriated the funds. Montano received none of these monies and none of his medical providers were paid for their services. Beginning in January 1985, Montano tried repeatedly but unsuccessfully to reach Carr about his case. In May 1986, respondent first learned there was a problem with Montano's case from the State Bar. In March or April of 1987, after his many unsuccessful efforts to obtain the Montano file from Tolbert, respondent paid Montano the $5,900 full amount of the insurance draft. (Stip. pp. 8-9.)

As to count 11, the parties agreed that, in September 1984, respondent settled the personal injury case of his clients, the Vasquezes, paid them their share of the settlement funds, but withheld $4,725 for the liens of a treating chiropractor. These withheld funds were transferred to Tolbert. Tolbert assumed responsibility to disburse them to the doctor but instead misappropriated them. Respondent agreed to pay the doctor the full amount due ($4,725) but has paid only $1,700. (Stip. pp. 9-10.)

The parties admitted no facts concerning counts three, seven and nine and those counts were dismissed by the referee on motion by the examiner. Also, at the examiner's request, the charge in count one of violation of rule 3-101(A) was dismissed. (R.T. p. 7.)

3. ADDITIONAL EVIDENTIARY FACTS.

Respondent testified at length before the hearing referee. His testimony showed that, while in law school in 1979 or 1980, respondent became a clerk with a three-member Los Angeles law firm (Licker, Rothstein and Delchop) which did plaintiff's personal injury work. After admission to practice in December 1982, he became an associate attorney with that firm and worked there until he decided to start a sole practice in February 1984. (Stip. p.2; R.T. pp. 18-20.)

According to respondent, the Licker firm obtained its cases "almost exclusively" through tow truck drivers, insurance agents and others who worked as runners and cappers. (R.T. p. 21.) Respondent's own reaction was that this practice was improper and he knew as a result of law school that it was illegal (R.T. pp. 22, 72); but initially he thought that it was the law firm's own "business." He learned that most personal injury firms he became acquainted with obtained cases that way. (R.T. pp. 21-22.) Respondent learned from observation that "if you did not pay for cases, you didn't get them" and that $500 or (sometimes) more was a typical payment to a capper for a good case. (R.T. pp 22-24.) As respondent saw it, capping was not only tolerated, but necessary to acquire personal injury cases in Los Angeles at that time. (R.T. p. 73.) Also, at that time, respondent saw no visible enforcement of the capping laws. (R.T. p. 23.)

While with the Licker firm, respondent met Carr, a law clerk with that firm. Carr asked respondent if he were interested in setting up his own practice. Carr told respondent that he (Carr) knew a lot of insurance agents who could refer cases to respondent and Carr proposed that respondent split profits "50-50." (Stip. p. 2; R.T. p. 29.) Since respondent wanted his own practice, Carr's offer appealed to him and he accepted. (*Id.*)

The parties stipulated that Carr's role in respondent's new practice was to be that of "administrator." His role was to get clients, conduct client interviews, sign letters of representation, get and develop medical information and assist in negotiating settlements. (Stip. pp. 2-3.)

Respondent's own testimony showed that he operated his new practice in two stages. From about February or March to June 1984, respondent continued to work at the Licker firm and at his new practice. He supervised Carr by phone or in person about an hour a day. For purposes of "convenience," he also allowed Carr to be a signatory to respondent's trust account and to make deposits and write trust account checks. (R.T. pp. 30-32, 74-76.) Respondent's testimony on the extent to which he supervised Carr in handling the trust account is unclear at best.[5]

Respondent's testimony also showed that he was allowing Carr to do more than "assist" in various aspects of the practice. Rather, Carr was allowed, on his own, to sign up clients without prior review by respondent and to conclude the settlement with the insurers; but his instructions from respondent were always to advise insurance adjusters that the client had the final word on accepting the settlement. (R.T. pp. 36-37, 75-76.) But as respondent testified: "Well, during the time period that I was still working for Licker . . ., I would talk to [Carr] on a daily basis . . . . At lunch, in the evening, [Carr] would basically give me an update as to whether or not we had received any cases, whether or not *he had settled* any cases . . . ." (R.T. p. 32, emphasis added.) Elsewhere in his testimony, respondent stated that Carr's negotiation of settlements (subject to client's final approval) was acceptable.[6] (R.T. pp. 36-37.) It is undisputed that respondent did not keep adequate records of all the clients Carr "took in." (Stip. p. 3.)

In about June 1984, the Licker firm found out about respondent's new practice and it terminated him. (R.T. pp. 74-75.) Respondent moved over full time to his new practice, but respondent did not restrict any of the authority he had given Carr.

In the short term, respondent's sole practice flourished. (R.T. p. 38.) However, some of the cases came to respondent from another capper, Chamino, who had had a falling out with another law firm in which he (Chamino) was the "administrator." (R.T. pp. 39-40.) Chamino treated the cases he had referred as his own. In about July 1984, respondent decided that one of the cases Chamino had referred to him was a "bad liability" and "nominal" damages case. Respondent decided to instruct Carr to notify the clients that he would not handle the case. Respondent became "livid" when Carr told him that Chamino had to approve. (R.T. p. 41.) Since respondent believed that Chamino had a reputation for violence or doing unsavory things if someone opposed him, he decided to get and did get Chamino's approval to decline to handle the case. (R.T. p. 42.)

In early September 1984, respondent decided he could not continue to be personally responsible for paying for cases—he could not reconcile running his practice in the way he had been doing. Also, the Chamino incident showed him he did not have control over his own practice. Respondent decided to leave his Los Angeles practice and move to Sacramento where he had lived before going to law school. At that time, respondent had 50 or 60 cases in the

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5. "Q. [By the examiner] Did you . . . review with [Carr] on a monthly basis any transactions that went through your trust account?

"A. [Respondent] *No, not on a monthly basis.*

"Q. Did you review with him on any kind of normal basis the trust account transactions?

"A. I would look at them when they came in, *yes. I would.* If I had questions, I would ask him. I didn't have any problems. Never experienced any.

"Q. When they came in, meaning when your bank statement would come in?

"A. Yes." (R.T. p. 77, emphasis added.)

6. Had respondent wanted guidance in this respect, he could have consulted Formal Opinion No. 277, Committee on Legal Ethics, Los Angeles County Bar Association (June 17, 1963) which held in part that it is ethical to allow a non-lawyer to be delegated the tasks of learning from the insurance company what it will pay, discussing with adjusters the facts of the accident and extent of injuries, so long as the *attorney* reviews the work of the non-lawyer and the *attorney* decides whether the offer extended is in the best interests of the client and the *lawyer* approves or disapproves the settlement. The facts of the Nelson matter show that respondent allowed Carr to conclude those negotiations and to issue checks and releases without exercising his independent judgment as an attorney. Although respondent was not charged with such an offense, his engaging in this conduct shows his awareness of what Carr was doing as early as March 1984, before respondent started full-time work in this practice.

office. None were in litigation. (R.T. pp. 43-47, 49-50.) Respondent considered just severing his ties with Carr and his wife[7] but feared an emotional response from them. Instead, respondent told Carr that "he should find another attorney." (R.T. pp. 48-50.) At first, Carr was very upset and was astounded that respondent would decide so abruptly to cease practice; but Carr did seek out another attorney, choosing Samuel Tolbert, whose office was adjacent to respondent's. (R.T. pp. 50-52.)

Respondent did not know Tolbert to any significant degree and decided to meet with him for a few hours before agreeing to turn his practice over to him. It was understood that Carr would work for Tolbert and essentially do about the same for Tolbert that Carr did for respondent. (R.T. pp. 52-54.) Respondent met with Tolbert, determining that he appeared competent and had a busy practice. Tolbert agreed to sublease respondent's office and keep the same phone number. Carr was able to remain in the same office.

In early October 1984, respondent drafted a letter to all his clients advising them he had decided to relocate to Northern California and had made arrangements with Tolbert to "take over the handling of [the client's] file." Although Tolbert had only been admitted to practice for 16 months at the time, respondent described him in the letter as "highly experienced and competent" in the field of personal injury. Respondent also wrote his clients that Carr, who had been with respondent throughout and who was intimately familiar with the case, would stay on with Tolbert to serve in the same (undefined) capacity. Respondent assured his clients that the transfer would not affect the progress of their cases. The notice did not invite the clients to choose their own counsel but did invite them to call respondent if they had any questions. The letter stated that respondent would be in the office until the transition was complete. (Stip., attached exh. A.)

It is undisputed that about 75 percent of respondent's clients received the above notice. Respondent had asked Mrs. Carr to prepare the notices and send them out. Respondent gave two reasons why all clients were not notified: some cases were Chamino's, and in other cases, respondent surmised that a "demand" might have been made by Mr. Carr on the defendant's insurer and the Carrs were afraid that they might not be able to keep the case for themselves or Tolbert if the clients were notified of respondent's departure from practice. (R.T. pp. 55-58.)

In addition to respondent's failure to notify all his clients, the transition of respondent's cases to Tolbert was far from smooth in other regards. In late September 1984, the Carrs "cleaned out" all of respondent's files from the office, fearful that respondent would leave the Carrs "high and dry." A few days or a week later, the Carrs returned the files. (R.T. pp. 82-83, 93.) At about the same time, Mr. Carr unilaterally withdrew $40,000 to $50,000 from respondent's trust account. (R.T. pp. 83-84.) Carr refused to return the money and, since respondent had continued to let him be a signatory to the trust account, there was nothing he could do about it. He did draft a few one-page documents for Tolbert to sign, acknowledging the transfer of monies and files from respondent to Tolbert. (Stip., attached exh. D; R.T. pp. 84-89.) However, respondent did not itemize the files being transferred and he admitted he did not do so because he did not have a key to the suite at all times; Carr had taken the files for a period of time and respondent did not have complete records of his clients' cases in any event. (R.T. pp. 88-90.)

In 1985, respondent formed an association with a Sacramento attorney with whom he has engaged in a varied litigation practice ever since. He has apparently exercised complete independence of judgment, unfettered by non-lawyers. According to respondent, he has not paid non-lawyers anything for any legal business since leaving his Los Angeles practice. He compared his 1984 Los Angeles practice with his post-1984 Sacramento one as the difference between "night and day." (R.T. pp. 61-66.)

7. Throughout respondent's practice, Carr's wife, Mrs. Vicki Carr, also worked in the office as secretary and receptionist. (R.T. pp. 34-35.)

Respondent expressed remorse and accepted responsibility for what he had done in 1984 and he recognized even by Labor Day of 1984 that it was simply wrong to allow non-lawyers to exert control over his practice as they did. (R.T. p. 71.) It is undisputed that respondent cooperated fully with the State Bar in this proceeding—he did everything asked of him (R.T. pp. 67-69, 97-98)[8] and he made restitution totalling $7,600. That sum included the full $5,900 to Mr. Montana paid before formal charges were filed and $1,700 to Dr. Noriega. However, the record indicates Dr. Noriega is still owed $3,025, and two clients, Davis and Taylor, have not been repaid the funds misappropriated after they were transferred to Tolbert, although respondent's offer to Davis was rejected by Davis's new counsel. (R.T. pp. 91-92.)

4. THE APPROPRIATE FINDINGS AND CONCLUSIONS TO ADOPT.

In his decision, the hearing referee adopted findings almost entirely consistent with the stipulated and undisputed facts. Except as shown below, we adopt those findings and conclusions.

As to count one, the general matter in which respondent admitted that he formed a partnership with a non-lawyer (Carr) for the practice of law, used Carr as a runner and capper and shared legal fees with Carr, the referee concluded that respondent violated, respectively, rules 3-103, 3-102(A) and Business and Professions Code section 6152, but did not violate rule 3-101, prohibiting aiding the unauthorized practice of law. Neither party challenges those conclusions on review and we adopt the referee's findings and conclusions in that regard. The only dispute is over the referee's additional conclusion in count one that respondent violated Business and Professions Code section 6106 (prohibiting acts of moral turpitude, dishonesty and corruption). Respondent sharply disputes that conclusion, but the State Bar contends it is warranted. On our independent record review (Trans. Rules Proc. of State Bar, rule 453; *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916), we conclude that the activities admitted by respondent in count one did violate section 6106 by constituting an act of moral turpitude.

[1] The Supreme Court has often defined moral turpitude proscribed by section 6106. As the Court stated in *In re Mostman* (1989) 47 Cal.3d 725, 736-737: "One eloquent, oft-cited definition equates moral turpitude with an 'act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' [Citations.]" Another simpler definition was stated in a case in which the attorney was disbarred for solicitation of over 200 potential clients, *Kitsis* v. *State Bar* (1979) 23 Cal.3d 857, 865: "[A]n act 'contrary to honesty and good morals is conduct involving moral turpitude.' [Citations.]" Kitsis deceived one of the cappers that her actions were legal. **[2]** Respondent's acts here did not involve deceit. Nonetheless, the Court's conclusions that Kitsis' activities involved moral turpitude did not rest only on deceit, but were based independently on Kitsis' pervasive transgressions. Here, respondent's involvement in capping was similarly pervasive. While we lack any evidence that respondent or Carr solicited any victims in unfortunate situations (such as at the scene of accidents or in hospitals) as did Kitsis' cappers, respondent's entire practice for about six months in Los Angeles was founded on his payment of persons for referral of cases. Even if we should decide that no moral turpitude was involved, Business and Professions Code section 6106 also bars an act of "corruption." Respondent's Los Angeles law practice, built entirely on illegal payments to third parties for cases, clearly involved corruption.

[3] Respondent's capping and improper partnership and fee division activities in this case reveal the very reason behind their long-standing prohibi-

8. Respondent testified as to his cooperation with the State Bar. He travelled from Sacramento to Los Angeles on three or four occasions during the State Bar investigation. During one of those trips, he gave a lengthy taped interview to several State Bar attorneys and investigators. He also wrote detailed letters in response to the bar's investigation of each of the complaints. (R.T. p. 68.)

tion in the rules of professional conduct or state law. These activities adversely affected respondent's independent professional judgment as a lawyer. As noted, respondent was fearful of the actions of one capper who had referred him cases and respondent was wary of the emotional responses of Carr or of Carr's wife. In short, near the end of his Los Angeles practice, respondent realized that he was no longer in charge of it—others, lay persons, were influencing or dominating his decisions.

[4] The examiner contends that we should conclude that respondent misappropriated trust funds in counts five, six and eleven in violation of Business and Professions Code section 6106 and rule 8-101(B)(4). (Examiner's Review Department Brief, filed March 16, 1990, pp. 1-3, 4-7.) As to section 6106, it is undisputed, however, that the parties' stipulation recited that only Tolbert misappropriated any trust funds in those counts. The examiner did not introduce evidence in the form of bank records or other affirmative evidence to show that this respondent committed any act of misappropriation. Considering this lack of proof, the terms of the stipulation and the evidence showing that respondent transferred trust funds to Tolbert for the purpose of handling the matters, we are unable to conclude that the examiner presented enough clear and convincing evidence to find *respondent* culpable of misappropriation of funds.

We also decline to conclude that respondent is culpable of a violation of rule 8-101(B)(4) in those counts. Rule 8-101(B)(4) prohibits an attorney from failing to "promptly pay or deliver to the client as requested by a client" the funds or other property belonging to a client. **[5]** We hold that a request by a client for payment of funds or property held by the attorney is an essential element of the offense proscribed by rule 8-101(B)(4). The record yields no evidence that the clients requested respondent to pay over their funds in counts five, six and eleven (although clients did make such a request of Tolbert after respondent withdrew from employment). Nor have the parties cited any cases where, in discussing rule 8-101(B)(4), the Supreme Court dispensed with the requirement of client request and we are unaware of any such decisions.

Noting respondent's lack of objection, we adopt the referee's conclusion in count six that respondent wilfully violated rule 8-101(B)(1) (failure to promptly notify client of receipt of funds or property).[9] **[6 - see fn. 9]**

We also adopt the referee's conclusions in count 10 that respondent wilfully violated rule 5-105 by failing to promptly communicate to his client Montano, the written settlement offer negotiated by Carr on his behalf.

In the remaining five counts in which culpability was found by the referee regarding specific clients (counts two, four, five, six and eight), we adopt the referee's conclusions that respondent wilfully violated rule 2-111 (A)(2) by withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to his clients. Respondent objects to findings of the referee in each of these five counts. Respondent states that the referee rejected respondent's contention and concluded that it was foreseeable that Tolbert would act dishonestly, settle cases without authority and misappropriate trust funds when respondent knew Tolbert would have the same unethical fee-splitting and capping arrangements with Carr.[10] **[7a]** We agree with respondent's view that there is not sufficient evidence to support that portion of these findings that it was foreseeable

9. **[6]** Respondent was not charged in count six with a violation of rule 8-101(B)(1). The stipulation of facts filed July 11, 1989, in which respondent's experienced counsel participated recited facts which would support a rule 8-101(B)(1) violation. (Stip., p. 6, line 28.)

In his trial brief filed on September 18, 1989, the day of the formal hearing before the referee, respondent conceded that those facts show a rule 8-101(B)(1) violation, but noted that the violation "was not charged." Respondent has not objected to the referee's amendment of the notice to show cause to charge rule 8-101(B)(1) and in the circumstances, we hold that he waived any objection to the amendment. (Cf. *Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 108-109.)

10. See hearing referee's decision filed December 14, 1989, pp. 7 (count 2, finding 9), 9 (count 4, finding 8), 13 (count 5, finding 11), 16 (count 6, finding 10) and 19-20 (count 8, finding 10).

that Tolbert would act dishonestly. However, our rejection of a portion of these findings does not free respondent from other evidence which clearly shows that he did not act to avoid foreseeable prejudice to his clients.

By his own admission, respondent did not keep accurate records of clients obtained for his law practice by Carr. In the fall of 1984, when respondent decided to quit his Los Angeles practice, he delegated to Carr and his wife the task of notifying clients that respondent was ceasing practice and turning his cases over to Tolbert. When respondent delegated this task to the Carrs, he knew that the Carrs had already acted improperly toward respondent's files and funds and that respondent had not itemized all his client files because he did not have a key to his offices at all times. Throughout his partnership with Carr, respondent delegated to this non-lawyer a broad scope of activities with little evidence of close supervision. **[7b]** We conclude that the foregoing evidence, coupled with respondent's knowledge that Carr would continue to act in the same capacity for Tolbert as he had done for respondent, made it reasonably foreseeable that some prejudice would result to his clients.

[7c] It is not necessary under rule 2-111(A)(2) that the precise nature of the prejudice be foreseeable. While it was to respondent's credit that he ended his association with running and capping activities, he did so in such a hasty manner that he violated rule 2-111(A)(2) in the above five counts, when he failed to give adequate notice of his withdrawal from employment or opportunity to consult about the change of counsel.

Finally, we adopt the referee's conclusion in counts one, two, four, five, six, eight and ten that respondent did not violate Business and Professions Code section 6103 since that authority does not state an independent duty as a ground of discipline. (See *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815; *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931.) However, on the authority of *Sands* v. *State Bar*, *supra*, we strike from the referee's decision the conclusions in each of those same counts except count one (counts two, four, five, six, eight and ten) that respondent violated Business and Professions Code section 6068 (a). **[8]** As to count one, we adopt the referee's conclusion that respondent violated section 6068 (a). We do so on the basis that in count one, respondent was found to have violated a criminal provision under California law, section 6152 (a)(2), as charged in the notice to show cause.

5. DEGREE OF DISCIPLINE.

Consulting the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) ("standards") as guidelines (see, e.g., *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 774), we note that a range of discipline from suspension to disbarment is provided for either of respondent's offenses of moral turpitude (standard 2.3) or capping activities violating Business and Professions Code section 6152 (standard 2.6). (See also standard 1.6 for guidance in selecting the appropriate sanction.) Standard 2.3 guides the choice between disbarment and suspension as depending upon the "extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." Standard 2.6 guides the choice between disbarment and suspension as depending upon somewhat similar criteria: the gravity of offense or harm to the victim with "due regard to the purposes of imposing discipline" prescribed in standard 1.3 (protection of the public, courts and legal profession, maintenance of high professional standards and preservation of public confidence in the profession). Here, there was no demonstrable evidence of harm caused to clients by respondent's capping activities. However, the potential for such harm was great, for respondent acknowledged that these activities challenged his independent professional judgement as a lawyer. Further, respondent's capping activities, while limited to about a six-month period, were not isolated activities. Rather, it appears that his entire law practice during that period was derived from paying nonlawyers for referral of cases. Whether or not respondent saw capping of cases as acceptable by local professional culture standards, he knew prior to his State Bar membership that that activity was illegal. Instead of nsing his legal knowledge to prevent himself and his employee Carr from running afoul of possible legal problems, he exposed himself and Carr to potential arrest and prosecution for the crime of capping.

[9] When we examine Supreme Court attorney disciplinary opinions in the past 20 years in which prohibited solicitation or capping activities were a significant or sole part of the lawyer's misconduct, they have imposed discipline ranging from a minimum of six months actual suspension for isolated acts of solicitation via cappers, to disbarment imposed in a few aggravated cases. (*Kitsis* v. *State Bar*, *supra*, 23 Cal.3d at p. 866, and cases cited; see also *In re Gross* (1983) 33 Cal.3d 561 [three-year actual suspension, false medical reports involved]; *In re Arnoff* (1978) 22 Cal.3d 740 [two-year actual suspension; false medical reports also involved]; *Goldman* v. *State Bar*, *supra*, 20 Cal.3d 130 [one-year actual suspension].)

After weighing the foregoing factors, and before reaching mitigating or aggravating circumstances, we would conclude that the appropriate sanction is a suspension from practice with a significant period of actual suspension. In that regard, we note that respondent's violation of rule 8-101(B)(1), by itself, would call for a minimum of a three-month actual suspension. (Standard 2.2(b).)

The record contains evidence of substantial, impressive mitigation in the form of respondent's voluntary and decisive withdrawal from any further improper activities (standard 1.2(e)(vii)), his unquestioned and thorough cooperation with the State Bar (standard 1.2(e)(v)) and the passage of about five years between the end of respondent's misconduct and the evidentiary hearings with no dispute as to his rehabilitation. (Standard 1.2(e)(viii).) [10] We conclude that these strong mitigating factors lessen dramatically the need for the type of strict discipline imposed by our Supreme Court in similar matters, but do not eliminate the need for measurable discipline to assure maintenance of the integrity of the legal profession and the preservation of public confidence in that profession. Accordingly, we recommend that respondent be suspended from practice for two years, stayed, on condition of a six-month actual suspension. We also recommend that respondent be required to comply with rule 955, California Rules of Court and pass the Professional Responsibility Examination within one year of the effective date of the Supreme Court's order. [11] Because we have concluded that a member of the State Bar other than respondent appears to have been responsible for the theft of funds from clients Davis and Taylor and Dr. Noriega, we do not recommend respondent make restitution relative to these matters.[11] However, we do recommend compliance with other, standard probationary duties to insure that respondent's continued rehabilitation is formally supervised.

6. FORMAL RECOMMENDATION.

For the reasons stated above, we recommend that respondent, Bruce E. Nelson, be suspended from the practice of law in the State of California for a period of two (2) years; that execution of the order for such suspension be stayed; and that respondent be placed upon probation for said period of two (2) years upon the following conditions:

1. That during the first six (6) months of said period of probation, he shall be suspended from the practice of law in the State of California;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

11. We note, for the benefit of those clients, that the State Bar Client Security Fund may be able to consider any losses not yet reimbursed if caused by the dishonest conduct of any active member of the State Bar and if the losses meet applicable rules of the fund. (Bus. & Prof. Code, § 6140.5.)

(a) in his first report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

4. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

5. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1.

6. That, except to the extent prohibited by the attorney-client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, his or her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

7. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective; and

8. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of two (2) years shall be satisfied and the suspension shall be terminated.

We further recommend that within one year of the effective date of the Supreme Court's order in this case, respondent be required to take and pass the examination in professional responsibility prescribed by the State Bar and provide proof thereof to the Clerk of the State Bar Court.

Finally, we recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days respectively, after effective date of the Supreme Court's order in this case.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROMUALDO BENITO NAVARRO

A Member of the State Bar

[No. 87-O-14338]

Filed October 11, 1990

SUMMARY

Respondent failed to file a timely answer to the notice to show cause, but did attempt to file an answer five days before the expiration of the time to answer set forth in the examiner's notice of application to enter default. The clerk's office rejected the answer for filing, and sent respondent a form letter which indicated that the answer had been rejected for noncompliance with technical rules, and invited resubmission of a corrected version. The letter did not fix a time by which respondent's cured answer was to be returned to the clerk's office. Less than a week later, respondent resubmitted his corrected answer by mail to the clerk's office. However, the clerk's office had in the interim entered respondent's default. The resubmitted response was therefore rejected, and the matter was set for default hearing. The hearing referee found respondent culpable as charged, and recommended discipline including actual suspension for one year. (Linus J. Dewald, Jr., Hearing Referee.)

Respondent filed a motion to set aside the default well within the time allowed under the rules, but the motion was denied. (Steven H. Hough, Assistant Presiding Referee.)

On ex parte review, the review department held that it was an abuse of discretion to deny respondent's motion for relief from default. The review department vacated the hearing department decision, vacated the order denying relief from default, vacated the default, ordered the filing of respondent's corrected answer and remanded the matter for a de novo hearing on the merits.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: No appearance (default)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **107 Procedure—Default/Relief from Default**
130 Procedure—Procedure on Review
166 Independent Review of Record
In order to reach merits on review of decision recommending discipline following default hearing, review department first had to be satisfied with the propriety of the entry of the respondent's default and the order denying respondent's motion for relief from default.

[2 a, b] **106.50 Procedure—Pleadings—Answer**
107 Procedure—Default/Relief from Default
119 Procedure—Other Pretrial Matters
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
Time to file answer to notice to show cause is extended twenty days by service of notice of application to enter default, and is extended an additional five days when the application is served by mail.

[3 a, b] **106.50 Procedure—Pleadings—Answer**
107 Procedure—Default/Relief from Default
119 Procedure—Other Pretrial Matters
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
Where respondent who filed motion for relief from default had previously submitted proposed answer to notice to show cause to State Bar Court and served it on examiner, and declaration accompanying motion to set aside default verified essential allegations of proposed answer, this constituted substantial compliance with rule requiring motion to set aside default to be accompanied by verified proposed answer.

[4] **107 Procedure—Default/Relief from Default**
130 Procedure—Procedure on Review
165 Adequacy of Hearing Decision
166 Independent Review of Record
General rule is that where record is silent, all intendments and presumptions are indulged to support a lower court order; moreover, inadvertent misuse of terms in an order does not require reversal. Review department therefore presumed that referee considered and denied alternate ground for relief from default which was addressed in moving papers of both parties but not listed in referee's order denying motion.

[5 a, b] **107 Procedure—Default/Relief from Default**
139 Procedure—Miscellaneous
There is a strong public policy in favor of hearing cases on the merits and against depriving a party of the right of appeal because of technical noncompliance in matters of form. The policy against deprivation of a hearing due to noncompliance with filing requirements appears just as strong in the situation of noncompliance resulting in default prior to trial. In both cases parties are deprived of a significant legal remedy if the noncomplying pleading is ultimately disregarded despite its reasonably timely correction.

[6] **101 Procedure—Jurisdiction**
106.50 Procedure—Pleadings—Answer
107 Procedure—Default/Relief from Default
135 Procedure—Rules of Procedure
The time limit for filing an answer to the notice to show cause is not jurisdictional, and an answer will be accepted for filing at any time prior to the actual entry of default, no matter how belatedly it is submitted.

[7 a-d] **107 Procedure—Default/Relief from Default**
139 Procedure—Miscellaneous
167 Abuse of Discretion
Review department declined to decide whether clerk's entry of default prior to expiration of reasonable time to respond to clerk's notice, which rejected answer due to technical defects, was void, or erroneous and voidable. Instead, review department determined that the denial of respondent's motion to set aside default was an abuse of discretion. An attorney's neglect in untimely filing papers must be evaluated in light of the reasonableness of the attorney's conduct; respondent acted reasonably in timely submitting answer to notice to show cause, and promptly resubmitting corrected answer after receiving clerk's rejection notice.

[8] **107 Procedure—Default/Relief from Default**
135 Procedure—Rules of Procedure
194 Statutes Outside State Bar Act
In proceedings to set aside default under Rule of Procedure 555.1(a), the terms "mistake, inadvertence, surprise or excusable neglect" are interpreted and applied in the same manner as in motions in civil cases pursuant to section 473 of the Code of Civil Procedure.

[9] **107 Procedure—Default/Relief from Default**
135 Procedure—Rules of Procedure
Effective September 1, 1989, the former Rules of Procedure of the State Bar were replaced by the Transitional Rules of Procedure of the State Bar. A motion to set aside default filed and served prior to September 1, 1989, was governed by former Rules of Procedure. (Rule 109, Trans. Rules Proc. of State Bar.)

[10] **107 Procedure—Default/Relief from Default**
167 Abuse of Discretion
194 Statutes Outside State Bar Act
Appellate review under section 473 of the Code of Civil Procedure is for abuse of discretion, the test being whether the trial court exceeded the bounds of reason. The Supreme Court has applied a similar abuse of discretion standard in reviewing procedural motions in State Bar proceedings.

[11 a, b] **107 Procedure—Default/Relief from Default**
162.20 Proof—Respondent's Burden
169 Standard of Proof or Review—Miscellaneous
194 Statutes Outside State Bar Act
It is the policy of the law under section 473 of the Code of Civil Procedure to favor a hearing on the merits; any doubts in applying section 473 must be resolved in favor of the party seeking relief from default. A trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits. Nonetheless, it is the moving party's responsibility to recite facts that meet the burden of proving mistake, inadvertence, surprise or excusable neglect.

[12] **106.50 Procedure—Pleadings—Answer**
107 Procedure—Default/Relief from Default
139 Procedure—Miscellaneous
162.20 Proof—Respondent's Burden
166 Independent Review of Record
Where record showed that respondent cured defects in otherwise timely answer within six days of mailing of notice to do so by clerk's office, review department's duty of independent record review precluded it from ignoring those facts in determining just disposition of motion for relief from default, despite weakness of respondent's moving papers.

[13] **107 Procedure—Default/Relief from Default**
139 Procedure—Miscellaneous
194 Statutes Outside State Bar Act
An attorney is ordinarily justified in relying on communications from the clerk as a basis for relief under section 473 of the Code of Civil Procedure.

[14] **106.50 Procedure—Pleadings—Answer**
107 Procedure—Default/Relief from Default
135 Procedure—Rules of Procedure
Pursuant to Rule of Procedure 552(a), an answer submitted for filing prior to the entry of default is not required to be verified.

[15] **106.50 Procedure—Pleadings—Answer**
107 Procedure—Default/Relief from Default
135 Procedure—Rules of Procedure
167 Abuse of Discretion
It would be an abuse of discretion to deny relief from default solely on the basis of the lack of a verification of respondent's proposed answer, without giving respondent a chance to cure the defect.

[16] **107 Procedure—Default/Relief from Default**
139 Procedure—Miscellaneous
Examiner's argument against setting aside default on review, based on resulting delay, necessity for new trial, and resulting prejudice and inconvenience, was unpersuasive. Reversal of denial of motion to set aside default will always require new hearing. Moreover, record revealed that examiner had notice prior to hearing of respondent's intention to move to set aside default.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

Respondent was admitted to practice in 1975 and has no prior disciplinary record. The notice to show cause served on respondent charged two separate types of misconduct, both involving the same client, Clarence Walker.[1] The notice also contained separate counts of making a misrepresentation to the State Bar during its investigation of the Walker matter and of practicing law while suspended for nonpayment of dues. Respondent attempted to file a response to the charges which was rejected and his default was entered. His timely motion to set aside the default was denied and the hearing and ensuing recommendation of one year actual suspension occurred without his participation.

[1] In order to reach the merits we must first be satisfied with the propriety of the entry of respondent's default and the referee's order denying respondent's motion for relief from default. We have considered the matter after requesting briefing and oral argument by the examiner—the only party before us—and have determined that respondent's motion to set aside his default should have been granted and that the matter should be remanded for a new hearing before a judge of the State Bar Court.

PROCEDURAL HISTORY BELOW

The notice to show cause was served on respondent on April 7, 1989, and the return receipt (exh. 4) indicates that respondent received it on April 10, 1989. Respondent failed to file an answer within 20 days as directed in the notice to show cause. That notice also bore a prominent notice, in capital letters, of the State Bar's default procedure for failure to timely file a written answer. **[2a]** On May 10, 1989, a notice of application to enter default was served which gave respondent an additional 20 days to file an answer (exh. 5); respondent appears to have received it on May 12 (exh. 6). On May 31, five days before expiration of respondent's time to answer,[2] **[2b - see fn. 2]** the clerk's office received a response to the notice to show cause. As of that date, respondent still had the right to file an answer to avoid having his default entered. On June 1, 1989, the clerk's office rejected the filing, and sent respondent a form notice that it had done so on the grounds that (1) there was no proof of service on the examiner, and (2) respondent had not submitted the required number of copies. (Exh. 9.) The cover letter sent to respondent by the clerk's office stated that the document "has not been FILED with the court as it does not meet filing requirements. . . . [¶] This document will remain endorsed only RECEIVED unless you correct the matter(s) checked below." The boxes checked were "Proof of service on opposing party" and "Four duplicates required." The letter concluded "PLEASE RETURN THIS FORM WITH YOUR CORRECTED DOCUMENT TO ENSURE PROPER HANDLING." The letter did not fix a time by which respondent's cured answer was to be returned to the clerk's office.

On June 7, 1989, respondent served the corrected response by mail and mailed it to the clerk's office for filing. On June 12, 1989, the clerk's office received respondent's resubmitted response complete with proof of service and the requisite copies. (Exh. 10.) However, unbeknownst to respondent, on June 6, 1989 the clerk's office had already entered respondent's default. (Exh. 7.) For this reason, the resubmitted response was rejected. (Exh. 10.) Notice that the hearing in this marter would take place on August 1, 1989 was filed and served on the examiner by the clerk's office on June 9. Because respondent was then in default, he was not served with the notice.

On Friday, July 28, 1989, respondent served on the examiner a motion to set aside default, along with

1. One count charged misappropriation, allegedly occurring in 1985, and one count charged abandonment involving two separate matters which respondent allegedly stopped working on in mid-1986.

2. **[2b]** Respondent's time to answer was extended an additional five days because service on him of the notice of application to enter default was by United States mail.

a declaration in support thereof.[3] **[3 - see fn. 3]** Coincidentally, this motion reached the examiner the afternoon before the August 1 hearing, and reached the court on the same day as the hearing. The examiner filed an opposition to the motion on August 9. The respondent's motion was denied by the Assistant Presiding Referee on August 29, 1989, on the ground that: "The respondent failed to establish inadvertence, surprise or excusable neglect pursuant to rule 555.1(a) of the Rules of Procedure of the State Bar."[4] **[4 - see fn. 4]**

The referee assigned for trial proceeded to hear the matter without respondent's participation while the motion to set aside his default was taken under submission. Based on the State Bar's submission of declarations of witnesses and exhibits entered in evidence, the referee found respondent culpable on all four counts and also made findings in aggravation and mitigation, including respondent's lack of a prior record of discipline over many years of practice. The State Bar requested disbarment, but the referee recommended a three year probation, with actual suspension for one year and until proof of restitution. The examiner did not request review and the matter originally came before us on an ex parte basis. Pursuant to rule 452(b) of the Transitional Rules of Procedure of the State Bar (hereafter "Rules Proc. of State Bar"), we then set the matter for briefing and argument by the examiner.

DISCUSSION

When we set the matter for hearing we asked the examiner to address two questions. The first question was: "Was respondent's default properly entered when he had already submitted to the clerk's office a response to the notice to show cause which was rejected due to technical defects and a reasonable period for the timely correction of those defects had not yet elapsed?"

The question was followed by a citation to *United Farm Workers of America* v. *Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912. In the cited case (hereafter "*United Farm Workers*"), a party to an ALRB proceeding submitted a petition for review of the ALRB'S order on the last day for seeking review under Labor Code section 1160.8. The court clerk returned the petition due to lack of verification. The party verified the petition and filed it three days later. The California Supreme Court held that for purposes of compliance with Labor Code section 1160.8 the time of the filing was the original delivery of the document to the appropriate clerk's office during office hours. It is the filer's actions that are scrutinized to assess timely filing and the rejection of the petition by the clerk for a technical defect could not undo a "filing" that had already occurred. The Supreme Court further stated that "This is not to say, however, the reviewing court could not later order dismissal if a party has not undertaken timely correction of defects noted." (*United Farm Workers*, *supra*, 37 Cal.3d at p. 918.) **[5a]** The court cited with approval *Litzmann* v. *Workmen's Comp. App. Bd* (1968) 266 Cal.App.2d 203, 205 ("There is a strong public policy in favor of hearing cases on their merits and against depriving a party of his right of appeal because of technical noncompliance in matters of form.").

[5b] The Supreme Court in *United Farm Workers* was interpreting a Labor Code section governing perfection of an appeal and State Bar proceedings, in

3. **[3a]** In opposing respondent's motion to set aside his default, the examiner objected to it because it was not accompanied by the proposed response. Respondent had already submitted the proposed response to the court and served it on the examiner. This constituted substantial compliance with the rule requiring submission of a proposed answer, and its absence therefore would not be grounds for denying respondent's motion. (See *Job* v. *Farrington* (1989) 209 Cal.App.3d 338, 340-341 [proposed answer submitted after motion was filed, but before it was heard; substantial compliance].)

4. Rule 555.1(a), like Code of Civil Procedure section 473 on which it was modeled, lists four grounds for relief: "mistake, inadvertence, surprise or excusable neglect." Apparently, through inadvertence, the referee did not, in denying the motion, list "mistake" among the grounds he found respondent not to have established. **[4]** The general rule is that where the record is silent, "all intendments and presumptions are indulged to support a lower court order." (9 Witkin, Cal. Proc. (3d ed. 1985) Appeal § 267 pp. 276-277.) Moreover, inadvertent misuse of terms in an order does not require reversal. (*Id.* at § 334, p. 342.) Both the respondent, in his moving papers, and the examiner, in his opposition, addressed the ground of mistake. We therefore presume that the Assistant Presiding Referee did consider and deny this ground for relief along with the others.

contrast, are sui generis. (See, e.g., *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300-301.) Nonetheless, the policy against deprivation of a hearing due to noncompliance with filing requirements appears just as strong in the situation of noncompliance resulting in default prior to trial. In both cases, the parties are deprived of a significant legal remedy if the noncompliant pleading is ultimately disregarded despite its reasonably timely correction.[5] **[6 - see fn. 5]**

The examiner argues that respondent waived any contention that the initial entry of default was improper by failing to make that contention when he moved to set the default aside. However, it is generally held in civil cases that a premature entry of default is void. (6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 246, pp. 546-547 and cases cited therein.) If so, it would be reversible error per se and need not be raised by the respondent. (See, e.g., 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §365, p. 367 and cases cited therein.) The examiner argues that lack of proof of service was not just a technical defect which would automatically require retroactive filing of the answer and void the default. We do not need to reach this issue.

In marking the original timely, but defective, answer "RECEIVED" and issuing a form letter permitting corrections, the clerk's office was following court policy instituted pursuant to the directive of the then Presiding Referee of the State Bar Court. The form notice from the clerk's office implied that the clerk's office would wait for his response to its letter before entering his default in order to permit a resubmitted corrected answer to be filed. **[7a]** We need not decide whether the clerk's entry of default prior to the expiration of a reasonable time to respond was void *ab initio* or erroneous and voidable (cf. *Potts* v. *Whitson* (1942) 52 Cal.App.2d 199, 208) in light of the second question we posed to the examiner: "Was it an abuse of discretion for the Assistant Presiding Referee to deny respondent's motion to set aside his default?"

[8] The rule we must interpret here is rule 555.1(a) of the Rules of Procedure of the State Bar.[6] **[9 - see fn. 6]** It provides that in ruling on a motion for relief from default, this court interprets and applies the terms "mistake, inadvertence, surprise or excusable neglect" in the same manner as those terms are interpreted and applied in civil cases in motions brought pursuant to section 473 of the Code of Civil Procedure. **[10]** Appellate review under section 473 is for abuse of discretion, the test being "whether the trial court exceeded the bounds of reason." (*Shamblin* v. *Brattain* (1988) 44 Cal.3d 474, 478.)[7] The Supreme Court has applied a similar abuse of discretion standard in reviewing procedural motions in State Bar proceedings. (See, e.g., *Slaten* v. *State Bar* (1988) 46 Cal.3d 48, 54-55, 57; *Boehme* v. *State Bar* (1988) 47 Cal.3d 448, 453; *Frazer* v. *State Bar* (1987) 43 Cal.3d 564, 567-568.)

[11a] Under section 473, "[i]t is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. [Citation.]" (*Shamblin* v. *Brattain*, *supra*, 44 Cal.3d at p. 478.) The Supreme Court has repeatedly stated the importance of the policy favoring disposition on the merits. "[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of

5. **[6]** The time limit for filing an answer to the notice to show cause is not jurisdictional, and an answer will be accepted for filing at any time prior to the actual entry of default, no matter how belatedly it is submitted. (See rule 552.1, Rules Proc. of State Bar.) In this respect the situation here presents an easier issue than in *United Farm Workers*, discussed *ante*, because Labor Code section 1160.8 was jurisdictional and relation back was necessary to allow perfection of the appeal.

6. **[9]** Effective September 1, 1989, the former Rules of Procedure of the State Bar were replaced by the Transitional Rules of Procedure of the State Bar. Respondent's motion to set aside his default was governed by the former Rules of Procedure. (See rule 109, Trans. Rules Proc. of State Bar.) In any event, the text of rule 555.1(a) is identical in both versions of the rules.

7. In *Shamblin*, the trial court set aside the default of a party who had been dropped by mistake from the court's mailing list for notices in the action, whose attorney had withdrawn, and who apparently had not received actual notice of the new trial at which the party had failed to appear. The Supreme Court held that the court of appeal should not have reversed the trial court's order setting aside the default. (*Id.* at p. 479.)

the party seeking relief from default [citations]. . . . Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits. [Citations.]" (*Elston* v. *City of Turlock* (1985) 38 Cal.3d 227, 233.)

[11b] Nonetheless, it is the moving party's responsibility to recite facts that meet his burden of proving mistake, inadvertence, surprise or excusable neglect. (See, e.g., *Barragan* v. *Banco BCH* (1986) 188 Cal.App.3d 283, 300.) **[12]** Respondent's moving papers are weak and would not of themselves justify relief. However, the record itself supplies the missing necessary details, affirmatively disclosing that the respondent cured defects surrounding his otherwise timely answer within six days of mailing of notice to do so by the clerk's office. Particularly in view of our duty of independent record review, we cannot ignore these facts in determining the just disposition of the motion.

Even where appellate review is narrower, a court of appeal will take appropriate action on its own motion. *Kapitanski* v. *Von's Grocery Co.* (1983) 146 Cal.App.3d 29 is a case on point. There, summary judgment had been entered in favor of a defendant because the trial court had refused to consider the plaintiff's declaration in opposition to the motion, on the ground that the declaration was filed a day late under the trial court's local rules. The court in *Kapitanski* discussed at length the fact that requiring compliance with local procedural rules is a matter of discretion, which judges frequently exercise in favor of considering untimely-filed documents in order to promote the policy of disposing of cases on their merits. (*Id.* at p. 32.) It proceeded to treat the plaintiff's request for consideration of his late-filed declaration as a request for relief under section 473, and held that it was an abuse of discretion for the trial court to refuse to consider it. **[7b]** In so holding, the court stated that "[a]n attorney's neglect in untimely filing opposing papers must be evaluated in light of the reasonableness of the attorney's conduct. [Citation.]" (*Id.* at p. 33.) Under Code of Civil Procedure section 473, a short grace period has long been sanctioned. (See *Bank of Haywards* v. *Kenyon* (1917) 32 Cal.App. 635, 637 [answer filed one day late; abuse of discretion to strike answer and give default judgment].)

[7c] In the present case, we cannot characterize respondent's conduct as unreasonable. He submitted a timely response to the notice to show cause, which was marked received, but not filed, due to lack of proof of service and insufficient copies. Only five days after the rejection notice was mailed out—the same day respondent presumably received the rejection notice—the clerk's office entered respondent's default, even though he had just been invited to resubmit a corrected response which the clerk's office indicated would be filed. Less than a week after that—apparently by return mail—respondent resubmitted his response, with the defects corrected, only to have it rejected again due to his default having been entered in the interim. Admittedly, respondent then waited six weeks before filing his motion to set aside the default; however, it was filed well within the time allowed him under the rules. (Rule 555.1(b), Rules Proc. of State Bar.) **[13]** An attorney is ordinarily justified in relying on communications from the clerk as a basis for relief under Code of Civil Procedure section 473. (See 8 Witkin, *Cal. Procedure* (3d ed. 1985) Attack on Judgment in Trial Court, § 159, pp. 561-562 and cases cited therein.)

The examiner argues that the lack of a verification of the answer was a separate ground for denying the motion for relief from default. **[14]** First, an answer submitted for filing *prior* to the entry of default (as respondent's was) is not required to be verified. (Compare rule 552(a), Rules Proc. of State Bar with *id.*, rule 555.1(b).) **[15]** Second, it would have been an abuse of discretion to deny relief from default solely on the basis of the lack of a verification, without giving respondent a chance to cure the defect. (See *United Farm Workers*, *supra*, 37 Cal.3d at p. 915 [lack of verification is curable by amendment, even after statute of limitations has run]; *Brochtrup* v. *INTEP* (1987) 190 Cal.App.3d 323, 332-333 [denial of relief under Code Civ. Proc. § 473 was abuse of discretion, where defect in verification of proposed discovery responses submitted with motion for relief was due to honest mistake of law].) **[3b]** In any event, the declaration submitted with respondent's motion did verify the essential allegations made in the response that he had attempted to file, thus constituting substantial compliance with the verification rule. (*Job* v. *Farrington*, *supra*, 209 Cal.App.3d at pp. 340-341.)

[16] The examiner also argues that the review department should not set aside the default at this point because the resulting delay and necessity for a new trial would prejudice and inconvenience the State Bar and the witnesses whose declarations were used at the original default hearing. This is unpersuasive. It is always the case that reversal of a denial of a motion to set aside a default will require a new hearing. Moreover, the record reveals that the examiner had received notice of respondent's intention to file a response on June 6, 1989, a copy of the response sought to be filed on June 14 and a copy of the motion to set aside respondent's default the day before the hearing, although it had not yet been filed by the clerk's office. (R.T. p. 5.)[8] The examiner does not explain how it would have prejudiced the State Bar or the examiner if the clerk's office, having permitted respondent to supply the proof of service belatedly, had refrained from entering his default in the meantime.

DISPOSITION

[7d] In light of our conclusion that it was an abuse of discretion to deny respondent's motion for relief from default, we therefore vacate the decision below, vacate the order denying relief from default, vacate the default, order the filing of respondent's corrected response received by the clerk's office on June 12, 1989, and remand the matter for a de novo hearing on the merits before a judge of the State Bar Court.

We concur:

NORIAN, J.
STOVITZ, J.

8. The examiner admitted below in his declaration in opposition to respondent's motion to set aside default, filed on August 9, 1989, that (1) the examiner was notified informally on June 6, 1989—*before* the examiner learned that respondent's default had been entered—that respondent intended to file an answer (see declaration, ¶¶ 6 and 7), and (2) the examiner received a copy of respondent's answer on June 14, 1989 (see declaration, ¶ 9).

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

LAWRENCE BUCKLEY

A Member of the State Bar

[No. 88-C-12896]

Filed October 11, 1990

SUMMARY

Respondent, who had two prior impositions of discipline, was convicted on a plea of nolo contendere of violating Penal Code section 647, subdivision (a), a misdemeanor which was found not to have involved moral turpitude. The former, volunteer review department had found misconduct warranting discipline, reversed the hearing referee's recommended dismissal, and remanded for further hearing. On remand, the hearing referee had adopted the examiner's recommendation of a one-year stayed suspension, no actual suspension, one year of probation with standard conditions, and passage of the Professional Responsibility Examination ("PRE"). (Jay C. Miller, Hearing Referee.)

Respondent requested review, contending that the recommended discipline was excessive. The review department agreed, and recommended that respondent be publicly reproved, conditioned upon passage of the PRE. Misdemeanor sex offenses which are not serious and are unrelated to the practice of law generally result in private reproval absent aggravating circumstances. Respondent's prior private reprovals for dissimilar conduct were held to warrant a public reproval, and another aggravating factor warranted requiring respondent to pass the PRE, but suspension was held inappropriate even if stayed in its entirety.

COUNSEL FOR PARTIES

For Office of Trials: Carol A. Zettas

For Respondent: Byron K. McMillan, G. David Haigh

HEADNOTES

[1 a-c] **806.52 Standards—Disbarment After Two Priors**
1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness
1514.30 Conviction Matters—Nature of Conviction—Sex Offenses
Misdemeanor convictions of sex offenses which are not serious and are unrelated to the practice of law have generally resulted in only private reproval absent aggravating factors. Where

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respondent was convicted of such a misdemeanor, disbarment would have been manifestly disproportionate to his cumulative misconduct, notwithstanding his record of two prior private reprovals. Respondent's misconduct was less serious than wilful failure to file tax returns or driving under the influence, and did not warrant the same degree of discipline.

[2] **159 Evidence—Miscellaneous**
162.90 Quantum of Proof—Miscellaneous
1691 Conviction Cases—Record in Criminal Proceeding
In a conviction matter, the respondent's criminal conviction by itself constitutes conclusive proof that the respondent committed all acts necessary to constitute the offense charged.

[3] **745.10 Mitigation—Remorse/Restitution—Found**
Where restitution to client was made after disciplinary hearing despite respondent's bankruptcy, this fulfilled a rehabilitative purpose which was appropriate to consider in disciplinary proceedings.

[4] **801.30 Standards—Effect as Guidelines**
1551 Conviction Matters—Standards—Scope
Assessment of the appropriate degree of discipline starts with the Standards for Attorney Sanctions for Professional Misconduct, and in a criminal conviction matter, specifically with part C of those standards.

[5] **513.20 Aggravation—Prior Record—Found but Discounted**
805.10 Standards—Effect of Prior Discipline
903.10 Standards—Miscellaneous Violations—Reproval
1514.30 Conviction Matters—Nature of Conviction—Sex Offenses
1554.10 Conviction Matters—Standards—No Moral Turpitude
Where respondent was convicted of misdemeanor sex offense not involving moral turpitude and not related to practice of law, respondent's record of two prior private reprovals made it appropriate to impose public reproval rather than private reproval that would otherwise have been warranted, but due to lack of common thread among matters and their collective lack of severity, it would have been manifestly unjust to recommend suspension.

[6] **173 Discipline—Ethics Exam/Ethics School**
541 Aggravation—Bad Faith, Dishonesty—Found
1554.10 Conviction Matters—Standards—No Moral Turpitude
Where respondent in criminal conviction matter had initially misrepresented his occupation in the course of his arrest, it was appropriate to impose requirement to take and pass professional responsibility examination as condition of public reproval.

[7] **173 Discipline—Ethics Exam/Ethics School**
251.10 Rule 1-110 [former 9-101]
When a requirement to take and pass the professional responsibility examination is attached as a condition to a reproval, wilful failure to comply may be cause for a separate disciplinary proceeding.

ADDITIONAL ANALYSIS

Standards

802.30 Purposes of Sanctions

Discipline

1641 Public Reproval—With Conditions

Probation Conditions

1024 Ethics Exam/School

Other

1527 Conviction Matters—Moral Turpitude—Not Found

OPINION

PEARLMAN, P.J.:

Respondent was admitted to practice in 1966. In 1987 he was convicted on a plea of nolo contendere of violating Penal Code section 647, subdivision (a), a misdemeanor. The Supreme Court conviction referral order directed the State Bar Court to conduct a hearing as to whether respondent's conviction involved moral turpitude or other misconduct warranting discipline, and if so, a recommendation as to discipline. The referee originally recommended dismissal based on a finding that the conduct did not involve moral turpitude. The former review department, while finding that the conviction did not involve moral turpitude, did find other misconduct warranting discipline and reversed and remanded for further hearing. On remand, the referee adopted the examiner's recommendation of one year suspension stayed, no actual suspension, one year probation with standard conditions and passage of the Professional Responsibility Examination ("PREX").

Respondent requested review contending that the discipline was excessive. He argues that his conduct warrants only a public reproval and passage of the PREX. We agree. [1a] Misdemeanor convictions of sex offenses which are not serious and are unrelated to the practice of law have generally resulted in only private reproval absent additional factors in aggravation.[1] Upon review of the record before us we have determined that respondent's prior unrelated private reprovals and the circumstances of the conviction warrant a public rather than private reproval, with the condition of passage of the PREX, but do not justify a suspension, even if stayed in its entirety.

DISCUSSION

The findings of the former review department are not disputed by either party and we adopt them as established by clear and convincing evidence in the record. [2] Respondent's criminal conviction by itself constitutes conclusive proof that he committed all acts necessary to constitute the offense charged. (*In re Higbie* (1972) 6 Cal.3d 562, 570; see also Bus. & Prof. Code § 6101 (a); *In re Prantil* (1989) 48 Cal.3d 227, 231-233.) It is therefore established that respondent solicited a lewd act in a public place. In addition, the review department found in aggravation that he was not carrying his driver's license although he had been driving when arrested; he was initially uncooperative with the arresting officer; and most significantly, he initially lied about his occupation when he was booked.

Respondent also had a prior private reproval in 1976 for a single abandonment of a case, coupled with failure to return unearned fees of $300. Respondent was found to be candid and cooperative in that proceeding. The failure to repay was due to financial inability. [3] Restitution to the client was made after the disciplinary hearing despite the fact that respondent was in bankruptcy. He thus fulfilled a rehabilitative purpose which the Supreme Court has recognized as appropriate to consider in disciplinary proceedings despite discharge in bankruptcy. (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1093; compare *Kwasnik* v. *State Bar* (1990) 50 Cal.3d 1061, 1074 [applicant's failure to repay isolated discharged debt unrelated to practice of law held insufficient basis for denial of admission to practice].)

In 1980, respondent was again privately reproved for a matter in which he had been held in contempt of court. Respondent had been substituted out as counsel for a criminal client with the client's consent but without filing a formal notice of substitution with the court. The judge at the sentencing hearing at which new counsel for the client appeared held a separate hearing at which he cited respondent for contempt for failure to appear at the morning sentencing hearing since he was still counsel of record for the defendant. The State Bar hearing panel

1. For example, the May 1990 issue of *California Lawyer* anonymously summarized three matters in which private reprovals had resulted from convictions for various misdemeanor sex crimes. (*State Bar Discipline* (May 1990) 10 Cal.Law. vol. 5, pp. 75, 80.) Specifically, the convictions involved in those matters were for: soliciting an act of prostitution; disturbing the peace (after agreeing to an act of prostitution), and soliciting and engaging in a lewd act in public.

found that the respondent did not conduct himself with proper decorum for a public courtroom in the contempt hearing, but also found that his inappropriate conduct may have been provoked by the judge.

In the present matter, respondent testified in mitigation that he is employed at the Public Defender's Office representing indigents in major felony cases, that his crime occurred long after working hours and had nothing to do with his law practice and that the two priors occurred many years ago and were of decreasing degrees of seriousness.

[4] In assessing the appropriate degree of discipline to recommend we start with the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V), and specifically with the Standards Pertaining to Sanctions For Professional Misconduct Following Conviction of the Member of a Crime. (*Id.*, part C.) Standard 3.4 provides that final conviction of a crime not involving moral turpitude (but involving other misconduct warranting discipline) "shall result in a sanction as prescribed under Part B of these standards appropriate to the nature and extent of the misconduct found to have been committed by the member." Standard 2.10, in part B, provides that for violation of any unspecified provision of the Business and Professions Code or the Rules of Professional Conduct the discipline which shall result is "reproval or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3." The primary purposes of imposing discipline, as set forth in standard 1.3, are "protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys[;] . . . preservation of public confidence in the legal profession [and] [r]ehabilitation of a member . . . ." Also relevant is standard 1.7(a) which provides that the effect of one prior imposition of discipline is that "the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust."[2] **[1b - see fn. 2]**

[1c] To support the asserted reasonableness of the discipline recommended by the examiner and adopted by the referee in this case, the examiner cites cases involving other crimes (which, as here, did not involve moral turpitude) in which the Supreme Court imposed actual suspensions of two to six months. These cases, however, involved much more serious offenses than the crime involved here. (*In re Rohan* (1978) 21 Cal.3d 195, 200 [wilful failure to file income tax returns]; *In re Carr* (1988) 46 Cal.3d 1089, 1090 [driving under the influence].) As pointed out in Justice Tobriner's concurring opinion in *Rohan*, there is a nexus between an attorney's wilful failure to file tax returns and the attorney's fitness to practice, because the recordkeeping and timely action required to prepare a tax return are closely related to the skills involved in practicing law and handling client funds. (*In re Rohan*, *supra*, 21 Cal.3d at p. 206 (conc. opn. of Tobriner, J.).) Obviously, the criminal conduct involved in *Carr* poses a serious risk of injury and death which is not involved in the type of conduct committed by respondent in this case.

[5] We conclude, in accordance with standard 1.7(a), that greater discipline than the private reproval that would otherwise be warranted is appropriate in light of respondent's priors, but that the lack of a common thread in this and the prior matters coupled with their collective lack of severity would make it manifestly unjust under the circumstances to recommend suspension based thereon. (See *Arm* v. *State Bar*, *supra*, 50 Cal.3d at pp. 778-790.) We therefore recommend that respondent be publicly reproved. **[6]** Because of respondent's initial misrepresentation of his occupation in the course of his arrest, however, we deem it appropriate to recommend

2. [1b]Standard 1.7(b) provides that presumptively when there are two priors "the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate." The examiner, to her credit, conceded that standard 1.7(b) should not be applied by the referee in the circumstances of this case. We agree with her position. (See *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 778-780.) Disbarment in this matter would be manifestly disproportionate to respondent's cumulative misconduct.

attaching to the reproval the condition that he take and pass the PREX within one year of the effective date of the Supreme Court's order of final discipline. (See Cal. Rules of Court, rule 956; see also *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) [7] Pursuant to rule 956, respondent is advised that the wilful failure to comply with the PREX requirement, if ordered by the Supreme Court, may be cause for a separate disciplinary proceeding under rule 1-110 of the Rules of Professional Conduct.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD JUDE MORONE

A Member of the State Bar

[No. 85-O-14944]

Filed November 8, 1990

SUMMARY

Upon ex parte review of a recommendation of disbarment by the hearing department of the former, volunteer State Bar Court (Charles J. Greaves, Hearing Referee), the review department held that the denial of the respondent's motion to set aside his default (Stephen H. Hough, Assistant Presiding Referee) had been an abuse of discretion, and remanded the matter for further proceedings.

As an independent ground for remanding the matter, the review department held that the record revealed a series of procedural problems. Specifically: (1) it was error for the State Bar to propound discovery requests after the entry of the default; (2) it was error for the hearing department to deem facts admitted based on respondent's failure to respond to the post-default discovery requests; (3) the notice to show cause was amended substantively without notice to respondent, and (4) the hearing department's findings went beyond the original substantive charges.

COUNSEL FOR PARTIES

For Office of Trials: Geri Von Freymann

For Respondent: No appearance (default)

HEADNOTES

[1] **107 Procedure—Default/Relief from Default**
135 Procedure—Rules of Procedure
Legal effect of entry of default in disciplinary proceeding is to admit allegations in notice to show cause and to preclude respondent attorney's further participation in proceeding unless default is set aside.

[2] **575.10 Aggravation—Refusal/Inability to Account—Declined to Find**
595.10 Aggravation—Indifference—Declined to Find
745.31 Mitigation—Remorse/Restitution—Found but Discounted
Timing of restitution is a factor which may affect the degree of discipline.

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[3] **107 Procedure—Default/Relief from Default**
Granting motion to set aside default would not have prejudiced State Bar where State Bar relied only on documentary evidence and did not present live witnesses.

[4] **107 Procedure—Default/Relief from Default**
135 Procedure—Rules of Procedure
169 Standard of Proof or Review—Miscellaneous
194 Statutes Outside State Bar Act
In ruling on a motion to set aside default under Rule of Procedure 555.1(a), State Bar Court interprets and applies terms "mistake, inadvertence, surprise or excusable neglect" in same manner as in civil cases under section 473 of the Code of Civil Procedure.

[5 a, b] **107 Procedure—Default/Relief from Default**
167 Abuse of Discretion
In reviewing an order on a motion to set aside default, the standard of review is abuse of discretion. However, because law strongly favors resolution of matters on the merits, doubts are to be resolved in favor of the defaulted party, and orders denying relief are scrutinized more closely than orders permitting trial on the merits.

[6] **107 Procedure—Default/Relief from Default**
162.20 Proof—Respondent's Burden
Party requesting relief from default has burden of proving excusable neglect by a preponderance of the evidence.

[7] **107 Procedure—Default/Relief from Default**
135 Procedure—Rules of Procedure
Rule of Procedure 555 does not require that motion to set aside default be made within a reasonable time, but only that it be made within 75 days. Motion to set aside default filed 75 days after entry of default was timely, and also was filed within a reasonable time, where it was filed approximately one month after respondent learned true status after receiving conflicting notices, less than two weeks after seeking a continuance for that purpose, and less than one week after obtaining counsel.

[8 a, b] **107 Procedure—Default/Relief from Default**
167 Abuse of Discretion
194 Statutes Outside State Bar Act
Respondent's fear, panic, or aversion to formal charges alone would not show abuse of discretion in failure to grant relief from default, but specific showing regarding preoccupation with mother's serious illness raised doubts as to proper exercise of discretion, which review department resolved in respondent's favor.

[9] **107 Procedure—Default/Relief from Default**
113 Procedure—Discovery
State Bar had no right to propound and rely on discovery requests after entry of respondent's default; if discovery was required in order to prove charges, default should not have been taken until after discovery responses were due and State Bar should not have opposed motion to set aside default.

[10 a, b] **107 Procedure—Default/Relief from Default**
113 Procedure—Discovery
192 Due Process/Procedural Rights
Service of discovery requests after entry of default is inconsistent with fundamental fairness and due process, and does not serve purposes of modern discovery procedures such as exchanging information, informing parties of merits of case, and facilitate settlement or resolution of matter.

[11] **107 Procedure—Default/Relief from Default**
113 Procedure—Discovery
Failure by party in default to respond to requests for admissions propounded after default cannot serve as basis for propounding party to seek order deeming admission of truth of facts or genuineness of documents.

[12 a-e] **106.20 Procedure—Pleadings—Notice of Charges**
107 Procedure—Default/Relief from Default
165 Adequacy of Hearing Decision
192 Due Process/Procedural Rights
In default matter, hearing referee erred in basing findings of culpability partly on facts deemed admitted by failure to respond to improper post-default discovery, and in finding culpability on charges broader than those set forth in notice to show cause.

[13] **106.40 Procedure—Pleadings—Amendment**
107 Procedure—Default/Relief from Default
Motions to amend notice to show cause to correct typographical errors or modify facts which do not alter the charges in the original notice are permissible after entry of default.

[14] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
107 Procedure—Default/Relief from Default
135 Procedure—Rules of Procedure
192 Due Process/Procedural Rights
Rule of Procedure 557, permitting amendment of notice to show cause to conform to proof without requiring additional time to prepare answer and defense, assumes respondent attorney's presence at disciplinary proceeding. Where respondent is not present due to entry of default, respondent does not have an opportunity to defend against charges.

ADDITIONAL ANALYSIS

[None.]

OPINION

STOVITZ, J.:

A hearing referee of the former, volunteer State Bar Court has recommended that Richard Jude Morone ("respondent"), a member of the State Bar since 1979[1] and with no prior record of discipline, be disbarred. Respondent did not answer the formal charges, his default was entered but his timely motion to set it aside was denied. (Rules Proc. of State Bar, rules 552.1, et seq.)[2]

The State Bar examiner ("examiner") did not seek review and respondent was unable to do so because of his default. Nevertheless, the procedural rules governing review of State Bar Court decisions rendered under former Business and Professions Code section 6079.1 required that we review the hearing referee's decision ex parte. Upon that review, a number of issues surfaced including: the propriety of the examiner propounding requests for admission after the entry of respondent's default and the hearing referee's having deemed those requests admitted when respondent unsurprisingly failed to answer; the appropriate standard of review of the assistant presiding referee's decision declining to set aside respondent's default; and the appropriateness of this review department adopting any changed findings necessary because of the hearing referee's reliance on discovery after default entry. Accordingly, we exercised our power to set this matter for oral argument before us, inviting the examiner to address the foregoing issues.

Upon our independent review of the record, we conclude that the assistant presiding referee exceeded his discretion in denying the motion to set aside the default. We accordingly remand for a hearing de novo before a judge of the State Bar Court with respondent to be given an opportunity to answer the present or an amended notice to show cause.

Our review of the record has also revealed a series of procedural problems concerning the default hearing and the referee's findings. Specifically, we have concluded that it was error for the State Bar examiner to propound and the hearing referee to deem admitted requests for admissions and genuineness of documents after the entry of respondent's default, that the notice to show cause was amended substantively without notice to respondent and that the findings went beyond the original substantive charges. We conclude that these errors, taken together, would have likely warranted remand for a new hearing even if we were to have concluded that the assistant presiding referee had not exceeded his discretion in refusing to set aside respondent's default.

I. THE PROCEEDINGS BELOW

A. Notice to Show Cause.

On April 24, 1989, this formal disciplinary proceeding against respondent was started in the State Bar Court by the filing of a notice to show cause (rule 550). In its four counts, the notice to show cause charged respondent with serious multiple acts of misconduct over the period from approximately September of 1984 until January of 1988.

Count one charged that in July of 1986 respondent was hired to defend one Kenneth Mimura in a criminal misdemeanor matter. At that time, Mimura gave respondent $2,500 as advanced attorney fees. Respondent agreed that $1,000 of the sum advanced was for his fee at an upcoming arraignment. If the matter went to trial, he would earn the remaining $1,500 of the advance fee. The criminal charges against Mimura were disposed of without trial. Mimura made numerous requests for return of the $1,500 in attorney fees but respondent allegedly failed to refund those fees or to render an appropriate accounting to Mimura.

1. The hearing referee's decision recites respondent's admission date as December 19, 1974. However, State Bar records show that respondent was admitted to practice law in this state on July 19, 1979. (Exh. 1.)

2. The Rules of Procedure of the State Bar in effect prior to September 1, 1989, govern the proceedings held before the hearing referee because evidence had been offered into the record before that date. (Trans. Rules Proc. of State Bar, rule 109.) Unless otherwise noted, all references to rules are to the pre-September 1, 1989 Rules of Procedure of the State Bar.

Count two charged that in November of 1983, respondent was hired by James Ginelli to represent him in a negligence action. In December of 1983, respondent signed a lien agreement between himself and Ginelli in favor of a physical therapist. In August of 1984, the physical therapist who had treated Ginelli agreed to respondent's request to reduce his fee to $2,000. The next month, respondent settled the case and a few days later deposited the settlement funds into his trust account. Respondent allegedly did not promptly pay the physical therapist until January of 1986 and he misappropriated those funds to his own use.

Count three charged that in September of 1985, respondent was hired by Youssef Sadek to represent him in seeking judicial review of a State Personnel Board decision. Sadek paid respondent $7,500 as advanced fees. Thereafter, respondent failed: to advise Sadek of the status of his case despite his many attempts to contact respondent; to perform the legal services for which Sadek hired him; and to return the unearned fees. In about September of 1987, respondent allegedly misrepresented to Sadek that he had filed Sadek's petition when he knew that he had not done so.

Finally, count four charged that in May of 1985, respondent was hired to represent Howard Lusk in a personal injury matter. Two years later, respondent received $25,000 to settle Lusk's claim. He deposited the settlement funds into his client trust account but allegedly failed to promptly pay Lusk's share, and misappropriated the funds to his own use.

As to all four counts, the notice charged respondent with having wilfully violated his oath and duties as an attorney (Bus. & Prof. Code, §§ 6068 (a) and 6103). In counts two, three and four, the notice charged respondent with having violated Business and Professions Code section 6106 (proscribing an act of moral turpitude, dishonesty or corruption). In count three the notice charged respondent with having wilfully violated Business and Professions Code section 6068 (m) (failing to respond promptly to reasonable client status inquiries and failing to keep clients reasonably informed). Finally, each of the four counts charged respondent with having wilfully violated individual provisions of the Rules of Professional Conduct of the State Bar, in effect prior to May 27, 1989: counts one and three charged wilful violations of rule 2-111(A)(3) (failing to promptly pay unearned fees upon withdrawal from employment); count one additionally charged that respondent wilfully violated 2-111(A)(2) of those rules (failing to avoid foreseeable prejudice upon withdrawal from employment); and counts two and four charged respondent with having wilfully violated rule 8-101(B)(4) of those rules (failure to promptly pay to the client as requested funds or property which the client is entitled to receive).

B. After Respondent's Default Was Entered for Failing to Answer the Notice to Show Cause, Discovery Was Propounded on Him by the State Bar Examiner.

On April 6, 1989, prior to the issuance of the notice to show cause, the respondent and the examiner met and discussed the allegations in the notice (see rule 509(b)) but were unable to reach a settlement. As noted *ante*, the notice to show cause was filed on April 24, 1989, and it was served on respondent by certified mail on April 26, 1989. The notice warned respondent that if he failed to file an answer within 20 days of service, that his default would be entered. Respondent filed no answer within the 20-day period and on June 2, 1989, the examiner served on respondent an application for entry of default. (Rule 552.1.) It too warned respondent that his default would be entered if no answer were filed within an additional 20 days. Respondent filed no answer and on June 28, 1989, the clerk of the State Bar Court entered respondent's default. (Rule 552.1(c).)

[1] The legal effect of the entry of respondent's default was to admit the allegations set forth in the notice to show cause. (Bus. & Prof. Code, § 6088; rules 552.1(c), 552.1(d)(iii).) Moreover, respondent was not entitled to participate further unless his default was set aside. (Rule 552(c).) Nevertheless, starting on the day his default was entered and continuing for about three weeks later, the examiner propounded several forms of discovery on respondent. On June 28, 1989, the examiner filed with the State Bar Court her first set of written interrogatories to respondent. This document posed a total of 27 questions to respondent concerning all four of the charged matters. On July 10, 1989, the examiner served on respondent a demand to produce and

permit inspection and copying of documents specified in twelve different categories. The record does not reveal that the examiner pursued either her interrogatories or inspection demand, but on July 21, 1989, she did file and serve on respondent a request for 39 admissions, and a request as to genuineness of 43 documents. (Exh. 16.) This document requested that respondent admit the truth of the matters requested within 30 days after service. Since the examiner's request for admissions and genuineness of documents was served on respondent by United States mail, State Bar Court procedure permitted him a total of 35 days after service to respond to the request. Thus, his response to the requests for admissions would have been due on August 25, 1989, if not for the fact, as noted, *ante*, that since respondent's default was entered, he had no right to file a response.

C. After His Default Was Entered, Respondent Tried Unsuccessfully to Appear at Trial of These Proceedings.

Prior to the entry of respondent's default, the State Bar Court had set a mandatory settlement conference for August 7, 1989. On August 7, 1989, respondent telephoned the examiner to discuss the time and place of that settlement conference. (Motion for order to set aside default, declaration of Richard J. Morone, p. 9, ¶ 15; examiner's opposition to motion, declaration of Geri Von Freymann, p. 4.) The next day, the examiner wrote to the respondent stating that he was in default and that a hearing was set for August 23, 1989. The examiner told respondent he must move expeditiously to file a motion to set aside the default and told him about the State Bar's policy to oppose any such motion. She advised respondent to retain counsel or seek advice from someone qualified to assist him in this matter. Respondent appeared at the August 23, 1989 trial hearing, and requested a continuance to prepare and file his petition to set aside the default. His request was denied.

Under the rules of procedure governing this matter before the volunteer State Bar Court, motions for relief from default were determined not by the hearing referee, but by the presiding referee or designee. (Rule 555.1(d).) Under practice followed by the volunteer State Bar Court and to achieve consistency in rulings in motions to set aside defaults, the presiding referee usually designated the assistant presiding referee in charge of the hearing department to rule on such motions. That was done in this case. At the August 23, 1989 hearing, the State Bar presented no live witness testimony, but did present several declarations under penalty of perjury and other documents concerning the charges. At that hearing, the State Bar offered for admission into evidence the requests for admissions and genuineness of documents. The referee accepted them into evidence and deemed the respondent's failure to deny the requests for admissions "within the time allowed" to cause the matters to be admitted. (R.T. pp. 7-8.)[3]

D. After Taking the Matter Under Submission, the Hearing Referee Filed His Decision, Which Significantly Exceeded the Notice to Show Cause in Several Substantive Areas.

At the August 23 trial hearing, the State Bar examiner presented evidence that in the Ginelli matter charged in count two, respondent failed to pay funds due a Dr. Grant under a second lien. No charging allegations supported the introduction of such evidence. At the request of the examiner the referee ordered the notice as to that count amended to "conform to proof" pursuant to rule 557. (R.T. pp. 11-12.)

On September 20, 1989, the referee filed his decision in which he deemed admitted the requests for admissions and genuineness of documents. (Decision, p. 2.) Throughout his decision he incorporated by reference the specific facts set forth in the requests

3. As noted *ante*, respondent purportedly had until August 25, 1989, two days after the trial hearing, to file answers to the requests for admissions and genuineness of documents.

for admissions as they pertained to each of the four counts. (See findings of fact 11, 17, 21, 25 and 32.) Moreover, in two respects, findings of fact were made based on admitted requests which appeared to expand the scope of the charges.

In the Mimura matter, the referee adopted as part of finding of fact 11, requested admission 13, that respondent did not earn the fee paid to him on July 2, 1986, by Mimura. At best, the effect of this admission was to create a conflict with other admitted facts or charges which showed that respondent did represent Mimura at the arraignment for which his fee was $1,000. Moreover, the admission was ambiguous as to what amount of the $2,500 advanced fee respondent did earn. In the Ginelli matter, the hearing referee's findings 15 and 17 were based in part on requested admission 22, which stated that respondent did not pay the physical therapist the amount of his lien until after being contacted by the State Bar. [2] While this added fact would not by itself affect culpability, it is well settled that timing of restitution is a factor which may affect the degree of discipline. (See, e.g., *Hitchcock* v. *State Bar* (1989) 48 Cal.3d 690, 708-709; *Schneider* v. *State Bar* (1987) 43 Cal.3d 784, 798-800.)

In addition to circumstances in which requests for admissions broader than the charges of the notice to show cause became part of the substantive findings of the referee, those findings contain additional defects. Finding 10 in the Mimura matter, findings 19 through 21 in the Ginelli matter and findings 28 and 30 in the Lusk matter all find facts beyond the scope of the notice to show cause. Moreover, conclusions 18, 33, 40 and 42 pertaining respectively to the Ginelli and Lusk matters purport to find respondent culpable of a wilful violation of rule 8-101(A), Rules of Professional Conduct, although respondent was never charged with such a violation. Respondent was charged with misappropriation of funds in each of those two matters, but ironically, the referee failed to make specific findings or conclusions that respondent had misappropriated trust funds. Finally, in finding 35 (concerning aggravation), the referee found that respondent's conduct in the Lusk matter involved bad faith, dishonesty and concealment, although no such acts were charged in the notice to show cause to which respondent defaulted.

E. Promptly After the August 23, 1989 Trial, Respondent Retained Counsel and Filed a Timely Motion to Set Aside Default.

Respondent was required to present to the State Bar Court within 75 days of entry of default any motion seeking relief. (Rule 555.1(b).) On the 75th day, September 11, 1989, respondent presented his motion together with points and authorities, his declaration and a proposed verified answer. This motion and its attachments stated that after he was unsuccessful in seeking a continuance of the August 23, 1989 hearing, and on September 8, 1989, respondent retained counsel. In his supporting declaration, respondent stated that he received the notice to show cause when it was served but "was so alarmed" that he read it only briefly and did not notice the warning that his default might be taken. When he learned that his default had been entered, he recalled thinking that, as with civil defaults, the presumption would be in favor of setting aside the default and determining the matter on the merits.

At about the same time that he learned that the State Bar would pursue the matters that became the subjects of the notice to show cause, respondent stated in his declaration that his life had been greatly upset by the fact that his mother had suffered a serious heart condition and had undergone three operations for cancer. Her condition seemed to be gravely worsening, and respondent had been travelling about three times a week to San Diego, where she lived. Respondent alleged that because of his mother's situation and his regular visits with her he had been very preoccupied and upset and that significantly contributed to his failure to properly handle defense of the State Bar matter. At the same time, he stated that the State Bar examiner never misled him to believe that merely attempting to appear at the August 23 hearing would be successful. Respondent fully acknowledged his sole responsibility for determining the proper procedures to follow.

Respondent knew of no prejudice that would be caused to the State Bar were his default to be set aside;[4] [3 - see fn. 4] and if he were relieved from default, he proposed to answer the notice as follows: In the Mimura matter, that Mimura was satisfied enough with the favorable outcome in the criminal proceeding and he authorized respondent to keep the remaining $1,500 in advanced fees. In the Ginelli matter, he would show that he promptly prepared to disburse monies to pay the physical therapist for his services, but the disbursement was misplaced in his office. Because he believed that the amounts were actually sent to the therapist, he mistakenly transferred to himself the remaining amount in his trust account. He did not discover this mistake until the end of December, 1985, and promptly sent the amount due to the therapist. As to the Sadek matter, he acknowledged receiving a $7,500 fee and claimed he timely prepared a petition for judicial review but that due to a mix-up with the amount of the filing fee and the handling of the filing by respondent's attorney service, the filing was not completed on the last day allowed for the filing. Respondent admitted that he did not fully inform the client of the exact status of his matter but he never told Sadek that his petition had been properly filed. Respondent did not reeall whether Sadek ever requested a refund of fees but respondent did state that no fees have ever been returned to Sadek. As to the Lusk matter, respondent admitted that he used the trust funds owed the Lusks for his own purposes but repaid those funds with interest five months later.

On September 15, 1989, the State Bar examiner filed opposition to respondent's motion to set aside the entry of his default. In her supporting declaration she set forth the number of contacts that she had with respondent before the notice to show cause issued in arguing that under case law interpreting Code of Civil Procedure section 473 respondent had not sustained his burden of showing that his default was excused. On September 28, 1989, the assistant presiding referee in charge of the hearing department denied respondent's request for a hearing on the motion for relief from default and denied respondent's motion for relief from default by simple order reciting that "no good cause exist[ed]."

II. DISCUSSION

A. The Assistant Presiding Referee Exceeded His Discretion in Denying Respondent's Motion to Set Aside His Default.

[4, 5a] We begin by repeating the discussion in our recent opinion in *In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, 198: "The rule we must interpret here is rule 555.1(a) .... It provides that in ruling on a motion for relief from default, this court interprets and applies the terms 'mistake, inadvertence, surprise or excusable neglect' in the same manner as those terms are interpreted and applied in civil cases in motions brought pursuant to section 473 of the Code of Civil Procedure. Appellate review under section 473 is for abuse of discretion, the test being 'whether the trial court exceeded the bounds of reason.' (*Shamblin* v. *Brattain* (1988) 44 Cal.3d 474, 478.) The Supreme Court has applied a similar abuse of discretion standard in reviewing procedural motions in State Bar proceedings. (See, e.g., *Slaten* v. *State Bar* (1988) 46 Cal.3d 48, 54-55, 57; *Boehme* v. *State Bar* (1988) 47 Cal.3d 448, 453; *Frazer* v. *State Bar* (1987) 43 Cal.3d 564, 567-568.)" (Fns. omitted.)

In applying section 473, we believe the key issue is, whether respondent's neglect in not timely filing an answer to the notice to show cause was "excusable"; for inexcusable neglect prevents relief. (*Carroll* v. *Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 895.) **[6]** The party asking for relief (here, respondent) has the burden of proving excusable neglect by a preponderance of the evidence. (*Iott* v. *Franklin* (1988) 206 Cal.App.3d 521, 528, and cases cited.)

[5b] Despite the burden placed on the party seeking relief from default, it is clear from the numerous cases construing section 473 that the law

4. [3] The granting of respondent's motion would not have significantly prejudiced the State Bar, as the examiner presented no live witnesses at the August 23 hearing, relying solely on documentary evidence. (Contrast *Frazer* v. *State Bar*, *supra*, 43 Cal.3d 564, 567.)

strongly favors resolution of matters on the merits and the resolution of doubts in applying section 473 in favor of the defaulted party. In 1985, our Supreme Court discussed these principles in *Elston* v. *City of Turlock* (1985) 38 Cal.3d 227. There, the SupremeCourt noted that "[w]here . . . the trial court denies the motion for relief from default, the strong policy in favor of trial on the merits conflicts with the general rule of deference to the trial court's exercise of discretion." (*Id.* at p. 235.) "[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. . . . [A] trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits." (*Id.* at p. 233, citing *Brill* v. *Fox* (1931) 211 Cal. 739, 743-744 and *Flores* v. *Board of Supervisors* (1970) 13 Cal.App.3d 480, 483.) The court went on to state that "[r]eversal of an order denying relief is appropriate where the effect of the order is to 'defeat, rather than to advance the ends of justice.'" (*Elston, supra*, 38 Cal.3d at p. 236, quoting *Mitchell* v. *California etc. S.S. Co.* (1909) 156 Cal. 576, 580.)

The lone dissent by Chief Justice Lucas in *Elston* opined that the affidavit was lacking in sufficient factual detail to establish excusable neglect. (*Elston, supra*, 38 Cal.3d at pp. 240, 241 (dis. opn. of Lucas, C.J.).) The showing in *Elston* essentially turned on understaffing of the attorney's office. Here, whether we apply the analysis of the majority or the dissent in *Elston*, we have determined that respondent's burden was met. [7] Respondent filed a timely motion approximately one month after learning his true status after receiving conflicting notices from the examiner, the first precluding him from further participation, and others purportedly requiring him to participate *further* in discovery preparatory for trial. His motion was made only two weeks after seeking a continuance for that purpose and less than one week after obtaining counsel. Rule 555 does not contain the requirement found in section 473 that a motion to seek relief must be "made within a reasonable time", but instead requires only that the motion be made within 75 days. We conclude that respondent acted timely within rule 555 and also acted within a reasonable time.

[8a] If the only ground respondent cited for setting aside his default was his fear, panic or aversion to the formal charges, we could not conclude that the assistant presiding referee exceeded his discretion in declining to set aside respondent's default. Under decisional law, the party who wishes to participate in a judicial matter must take adequate and timely steps to defend the action and must act with the same "reasonable diligence as a man of ordinary prudence usually bestows upon important business." (*Elms* v. *Elms* (1946) 72 Cal.App.2d 508, 513.) Respondent's unwillingness or inability to deal with the charges because of panic or emotional discomfort brought on by those charges would not meet court tests for relief due to "excusable neglect."

[8b] However, we conclude that the specifics set forth by respondent concerning the extent to which he was preoccupied with his mother's illness have at least raised doubts as to the referee's exercise of discretion. Again, applying *Elston* v. *City of Turlock*, *supra*, we must exercise those doubts in respondent's favor.

We have located two cases construing section 473 involving inexcusable neglect claims due to attention paid to sick relatives. We believe that both cases, which upheld decisions of trial judges declining to grant default relief, can be distinguished as involving weaker showings than offered by respondent. In *Davis* v. *Thayer* (1980) 113 Cal.App.3d 892, also cited by the examiner, one of the litigants asserted that she was unable to file a timely answer to a civil complaint because she was in poor health and caring for her elderly mother and dying husband. The court found her conduct to be inexcusable neglect in that she failed to elucidate the details of her illness, including the amount of time she devoted to her relations' care, or the extent to which their condition rendered her "too distraught to think of plaintiff's claim." (*Id.* at p. 909.) In the more recent decision of *Bellm* v. *Bellia* (1984) 150 Cal.App.3d 1036, the defaulting party claimed that he had forgotten about the summons served upon him in November 1981 because of the business pressures from Christmas sales orders, and that the death of his mother 16 months prior and the serious illness of his father during that winter were "very trying" experiences

which affected his ability to answer the summons. (*Id.* at p. 1038.) The two-to-one majority rejected these factors as constituting excusable neglect, again finding insufficient evidence in the record that these events occupied all Bellia's time and thoughts to warrant relief from the default.

We believe that respondent's declaration, while not a model of specificity, was sufficiently more specific than was presented to the court either in the *Davis* or *Bellm* cases to invoke the policy in favor of trial on the merits.

[9] Apart from the denial of respondent's motion for relief from default, we note several other troublesome factors in this record. While respondent did not assign any confusion on his part to the examiner's propounding of discovery requests after entry of his default, it certainly sent mixed signals to him. Under the circumstances, the examiner in fact had no right to serve and rely on "discovery." If she needed discovery to prove her case, she should not have taken respondent's default before the discovery was due and should not have opposed his attempt to set aside his default.

Thus, if, on remand, respondent chooses to participate below, the examiner could propound again the same or similar discovery. Further, the examiner might be able to rely upon some of the same bank records and other documents in support of the notice to show cause. While live testimony may be necessary in lieu of declarations, it is merely a consequence of the right to cross-examine which lies at the heart of the policy favoring trial on the merits as opposed to trial by default. Possibly the need for live testimony can be reduced if some of the alleged facts are the subject of a pretrial stipulation.

Finally, we observe that the burden placed on a respondent seeking to set aside the default was somewhat more difficult under procedures followed by the former, volunteer State Bar Court than today. Under the volunteer State Bar Court, as we noted earlier, only the presiding referee or designee, in this case the assistant presiding referee of the hearing department, could act on the motion to seek relief from default. Thus, this respondent could not expect to obtain relief from default merely by pressing his case to the hearing referee on the day of trial. However, under the full-time judge State Bar Court, the assigned hearing judge decides motions such as those seeking relief from default (see State Bar Court Standing Order no. GEN 89-7, filed September 13, 1989), and that hearing judge can weigh in the balance any concerns by the State Bar of prejudice that would result if a continuance to be heard on the merits is granted. Such an efficient alternative, customary in all trial courts of record, was simply not available to the hearing referee under the governing rules of procedure of the State Bar.

Respondent's proffered defense, to the extent established, could affect the findings of culpability as well as the degree of discipline. We draw no conclusions as to either. As we set forth in our formal disposition, *post*, we shall now afford respondent an opportunity to participate in the formal disciplinary proceedings, should he wish to do so.

B. Even If We Were to Have Upheld the Assistant Presiding Referee's Order Declining to Set Aside Respondent's Default, We Would Have Grave Doubts About Whether the Decision of the Hearing Referee Could Stand.

Having independently concluded that the assistant presiding referee exceeded his discretion in declining to set aside respondent's default, we could simply remand the matter without further discussion. However, because of other very significant procedural errors we are compelled to conclude that even if we had not determined that the assistant presiding referee exceeded his discretion, we would have almost surely required a new hearing in any event.

On review, the examiner defended the use of discovery by the State Bar and the hearing referee after respondent's default was entered. However, at oral argument she conceded that certain of the findings by the hearing referee, not related to discovery, were in error. Accordingly, we deem it valuable to provide guidance for the retrial of this matter and the trial of other matters raising similar issues.

We first turn to the examiner's use of discovery propounded to respondent after default was entered. Presumably because discovery is universally recog-

nized as appropriate only when litigants are not in default, we have been unable to find any California case discussing the propriety of propounding requests for admissions after default. **[10a]** Service of discovery requests after the entry of default is clearly inconsistent with principles of fundamental fairness and due process which must be afforded attorneys in disciplinary proceedings. (*In re Ruffalo* (1968) 390 U.S. 544, 550-551; *Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 229.) The defaulted respondent has no right to respond or recourse to the State Bar Court for protection from the discovery request unless and until the default is set aside.

[10b] Modern discovery procedures are designed to assist in the search for truth and to remove the "sporting" aspects of litigation. (*Greyhound Corp.* v. *Superior Court* (1961) 56 Cal.2d 355, 376; 2 Witkin, Cal. Evidence (3d ed. 1986) Discovery, § 1422, pp. 1401-1402.) Discovery is premised on, among other purposes, the exchange of relevant information by participating advocates to sharpen and simplify the issues in conflict, shorten and facilitate any trial and avoid surprise. (*Burke* v. *Superior Court* (1969) 71 Cal.2d 276, 280-281; *Greyhound Corp.* v. *Superior Court, supra*, 56 Cal.2d at p. 376.) Requests for admissions of key facts or issues are a specific form of pretrial discovery designed to inform all parties of the merits of the case and lead to settlement or other speedy resolution of the matter. (*Billings* v. *Edwards* (1981) 120 Cal.App.3d 238, 244.) These purposes cannot be served when discovery is propounded on one whose default is entered and who cannot participate under the rules. **[11]** The ensuing failure to answer simply cannot serve as a basis for the requesting party to seek an order deeming admitted the genuineness of any documents or the truth of any matters specified in the requests. (See Code Civ. Proc., §§ 2024, subd. (a), 2033, subd. (k).)

[12a] Contrary to the examiner's position on review, in both the Mimura and Ginelli matters, we believe that the referee's findings took on a substantively broader ambit than set forth in the notice to show cause. Accordingly, we cannot conclude, as the examiner suggests, that use of the requests for admissions was harmless and merely amounted to an expedient way of dealing with proof consistent with the notice to show cause.

[12b] Several other instances in which the referee's findings significantly exceed the scope of the charges also cause us great concern. As we noted, *ante*, at the hearing the examiner moved to amend the Ginelli charges to include respondent's wilful failure to pay a second medical provider's lien. We do not find this matter to be a proper amendment on due process grounds.

The California Supreme Court has determined that a "slight variance in the evidence that relates to the *noticed* charge does not, in itself, deprive [the attorney] of adequate notice." (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929, emphasis added.) In *Van Sloten*, the Court found that a four-month variance between the date specified in the notice and the date proved at the hearing did not unfairly deprive the attorney of adequate notice of the charges, nor did it prejudice his defense. **[13]** Thus, motions to correct typographical errors or modify facts in pleadings which do not alter the charges in the original notice would appear to be permissible after entry of a default.

[14] Rule 557 assumes the respondent attorney's presence at the disciplinary proceeding by dispensing with the requirement of additional time to prepare an answer and defense when the amendment is one to conform to proof. In *Rose* v. *State Bar* (1989) 49 Cal.3d 646, the Court found that the State Bar could have amended its notice to conform to proof concerning an additional charge of wilful failure to communicate, "provided the attorney is given a reasonable opportunity to defend against the charge." (*Id.* at p. 654, citing *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 420.) Where the respondent is not present at the hearing by operation of the default and thus is unaware of the additional evidence and charges offered at the proceeding, he does not have a reasonable opportunity to defend at the hearing, nor can any response be filed with the clerk's office with the default in place.

[12c] In this case, the proposed amendment is more than a modification of the charges alleged in the notice in the Ginelli matter. A completely separate act of misappropriation and moral turpitude is charged in the amendment apart from that alleged in the original charge.

[12d] We also note the referee's conclusions in two of the counts that respondent wilfully violated rule 8-101(A) of the Rules of Professional Conduct, although he was not charged with such violation.

[12e] Finally, we note that in the most serious matter, the Lusk matter, the referee's findings include that respondent denied receiving an award and that he issued one insufficient funds check when he ultimately paid Lusk his share of the settlement. Neither of those matters were charged in the original notice.

Despite our power of independent review, the Supreme Court, the litigants and the public should be able to expect that decisions of the hearing department are free of the flaws found in this case. We are simply unable to enter the mind of the hearing referee and decide whether or to what extent any evidence or charges beyond the original charges led to the disbarment recommendation.

III. DISPOSITION

Based on our conclusion that the assistant presiding referee exceeded his discretion in declining to set aside respondent's default, we set aside the hearing referee's findings of fact, conclusions and recommendation and remand this matter to the hearing department for a hearing de novo before a judge of the State Bar Court.

Within thirty (30) days of the effective date of this opinion, the Office of Trial Counsel shall serve upon respondent a notice to show cause as provided by rule 243 of the Transitional Rules of Procedure of the State Bar. The notice may be the original notice filed in this matter or an amended notice to show cause provided the Office of Trial Counsel has reasonable cause to believe such amendments warrant formal proceedings. Thereafter, all further proceedings shall be governed by the Rules of Procedure of the State Bar in effect at the time.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GORDON C. WRIGHT

Petitioner for Reinstatement

[No. 89-R-10910]

Filed November 19, 1990

SUMMARY

An attorney who had been disbarred for misappropriation of trust funds was denied reinstatement. On review, the attorney contended that the record of the State Bar proceedings which had led to the attorney's disbarment was improperly admitted in evidence; that a second character affidavit from an employer should have been admitted in evidence; and that the hearing judge was biased against him. (Hon. Alan K. Goldhammer, Hearing Judge.)

The review department rejected these contentions, but modified the findings to state that the attorney had made restitution to the victims of his misconduct. Nonetheless, because the attorney had clearly failed to meet the high burden of proving rehabilitation, present fitness to practice, and present learning in the general law, the review department affirmed the denial of the petition for reinstatement.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Petitioner: Gordon C. Wright, in pro. per.

HEADNOTES

[1] **159 Evidence—Miscellaneous**
191 Effect/Relationship of Other Proceedings
2504 Reinstatement—Burden of Proof
2590 Reinstatement—Miscellaneous
In a reinstatement proceeding, records of prior discipline, including the proceeding in which the petitioner was disbarred, are admissible, because the evidence of the petitioner's present character must be considered in light of the moral shortcomings which resulted in the prior discipline.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2 a, b] **2504 Reinstatement—Burden of Proof**
The petitioner in a reinstatement proceeding bears the heavy burden of showing by clear and convincing evidence that he or she meets readmission requirements. A person seeking reinstatement after disbarment should be required to present stronger proof of present honesty and integrity than one seeking admission whose integrity has never been called into question; the proof presented must overcome the former adverse judgment of the person's character. Reinstatement may be sought on a showing that the petitioner has reattained the required standard of fitness to practice law, by sustained exemplary conduct over an extended period of time.

[3] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
2590 Reinstatement—Miscellaneous
The review department gives great weight to the findings of the hearing judge, who saw and heard the witnesses and resolved matters of testimonial credibility. Nevertheless, under rule 453(a), Trans. Rules Proc. of State Bar, the hearing judge's decision serves as a recommendation to the review department, which undertakes an independent review and may make findings of fact or draw conclusions of law at variance with those of the judge.

[4] **135 Procedure—Rules of Procedure**
2509 Reinstatement—Procedural Issues
By obtaining a 30-day extension of the 90-day period to investigate a petition for reinstatement before referral for hearing, State Bar examiner did not violate State Bar procedural rules, which allow investigation even after the 90-day period or any extension of it. (Rule 664, Trans. Rules Proc. of State Bar.)

[5] **139 Procedure—Miscellaneous**
2509 Reinstatement—Procedural Issues
To justify relief based on claimed procedural irregularity, specific prejudice must be shown; relief was denied to reinstatement petitioner who made conclusory claim of prejudice from prolongation of pre-hearing investigation, but did not demonstrate actual prejudice.

[6 a, b] **142 Evidence—Hearsay**
159 Evidence—Miscellaneous
167 Abuse of Discretion
2590 Reinstatement—Miscellaneous
In a reinstatement proceeding, the hearing judge acted within his discretion in excluding a second affidavit from a character witness. Like a character reference letter in a disciplinary proceeding, the character reference, even though in affidavit rather than letter form, was excludable as hearsay absent a stipulation to the contrary. Further, the second affidavit was cumulative, and the hearing judge carefully considered the more detailed first affidavit, which he admitted into evidence as part of the reinstatement application.

[7 a, b] **135 Procedure—Rules of Procedure**
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act
2590 Reinstatement—Miscellaneous
As a formal proceeding of the State Bar Court, a reinstatement hearing is governed by the formal rules of evidence applicable in civil proceedings. (Rule 556, Trans. Rules Proc. of State Bar.) More liberal evidentiary standards applicable in certain other types of statutory proceedings do not apply in State Bar proceedings.

[8] **159 Evidence—Miscellaneous**
167 Abuse of Discretion
Trial judge has discretion to refuse to admit evidence which is cumulative; hearing judge who carefully considered detailed affidavit from witness did not err in excluding second, less detailed affidavit from same witness.

[9] **103 Procedure—Disqualification/Bias of Judge**
159 Evidence—Miscellaneous
As sole trier of fact, hearing judge had responsibility to declare in decision how he weighed evidence at hearing, including credibility of party as witness, where party's attitude toward reformation and restitution was fundamental issue in proceeding. Judge's occasional use of blunt language did not show bias.

[10] **2551 Reinstatement Not Granted—Rehabilitation**
Although petitioner for reinstatement made restitution to the victims of the misconduct which had resulted in disbarment, petitioner's lack of concern to keep his creditors at least informed of his whereabouts and his indifferent attitude toward his creditors were negative factors despite his very modest financial resources.

[11] **2554 Reinstatement Not Granted—Rule 955**
Because subdivision (e) of rule 955 provides that a disbarred lawyer's failure to comply with rule 955 may constitute a ground for denial of reinstatement, the clear failure of a petitioner for reinstatement to comply with rule 955 was a serious negative factor regardless of whether the petitioner had any clients at the time when he was required to comply with rule 955.

[12 a, b] **2504 Reinstatement—Burden of Proof**
2552 Reinstatement Not Granted—Fitness to Practice
Character evidence, albeit laudatory, was not alone determinative in a proceeding for reinstatement. Presentation of affidavit of one witness regarding conduct in six years since disbarment was inadequate as showing of good character, and was depreciated by petitioner's concealment of disbarment from employer and omission of recent civil suit from disbarment application.

[13] **135 Procedure—Rules of Procedure**
148 Evidence—Witnesses
2509 Reinstatement—Procedural Issues
Petitioner for reinstatement could have presented additional character testimony from out-of-state witnesses without undue expense by taking their depositions. (Rules 318, 666, Trans. Rules Proc. of State Bar.)

[14] **2553 Reinstatement Not Granted—Learning in Law**
2590 Reinstatement—Miscellaneous
Where petitioner for reinstatement did not adequately demonstrate present learning in the law, reinstatement could have been recommended conditioned on passage of California Bar Examination, if petitioner had been found rehabilitated and morally fit.

ADDITIONAL ANALYSIS

[None.]

OPINION

STOVITZ, J.:

Petitioner, Gordon C. Wright, was disbarred by the Supreme Court in 1983 for misappropriation of trust funds. (Bar Misc. No. 4609.) A hearing judge of the State Bar Court (Hon. Alan K. Goldhammer) has denied his petition for reinstatement and petitioner seeks our review. Before us, he levies a broad attack upon the proceedings and findings below including contentions that the trial judge erred in refusing to admit in evidence a character reference affidavit; that the judge erred in admitting in evidence the record of State Bar proceedings leading to his disbarment; and that the judge was biased against him.

We have very carefully conducted an independent review of the record below and have concluded that petitioner was afforded a fair hearing. While we have decided to modify one of the findings of the hearing judge, to show that petitioner did make restitution for the losses in the matters which led to his disbarment, the judge's remaining findings are supported by the record and we shall adopt them. Those findings show that petitioner has clearly failed to sustain the high burden he has in this reinstatement proceeding to demonstrate that he is rehabilitated, presently fit and learned in the general law. Accordingly, we shall also adopt the hearing judge's decision denying the petition for reinstatement.

I. BACKGROUND OF PETITIONER'S DISBARMENT.

[1] Throughout these proceedings, petitioner has objected to State Bar Court consideration of the records of his disbarment. (See, e.g., R.T. p. 18; Petitioner's Brief in Support of Request for Review, p. 11.) In support of his point, petitioner has cited *Maggart* v. *State Bar* (1946) 29 Cal.2d 439. Yet, as the examiner has pointed out (see State Bar Brief in Opposition to Petitioner's Request for Review, pp. 28-30), in a later decision distinguishing *Maggart*, our Supreme Court expressly rejected the claim that in a reinstatement proceeding, records of prior discipline are inadmissible. (*Roth* v. *State Bar* (1953) 40 Cal.2d 307, 313.) The Supreme Court has followed *Roth* consistently, observing that evidence of present character in a reinstatement case must be considered in light of the "moral shortcomings" which resulted in prior discipline. (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1092.) Accordingly, we must reject petitioner's contention.

We summarize briefly the facts surrounding petitioner's disbarment. He was admitted to practice law in California in 1955. Effective May 27, 1983, he was ordered disbarred by the Supreme Court. (Bar Misc. No. 4609.) The disbarment rested on findings of fact showing his misappropriation of trust funds in two matters. In one of the matters, petitioner misappropriated $23,876.10 from an estate for which he acted as fiduciary, concealed the improper disbursements of estate funds to himself and another and disobeyed a court order to distribute the estate assets until found in contempt. (Exh. 3.) In the other matter which led to his disbarment, petitioner was found to have misappropriated client funds held to satisfy a $2,300 physical therapist's lien, failed to keep proper records of the clients' funds in the matter, failed to pay the therapist's lien on demand and abandoned his clients after they were sued by the therapist. (Exh. 3.)

II. LEGAL PRINCIPLES SURROUNDING REINSTATEMENT MATTERS.

[2a] In one of the first opinions we filed, *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 30,[1] we summarized, as follows, the principles often cited by our Supreme Court which guide us in a reinstatement case: "Our Supreme Court has consistently held that the petitioner seeking reinstatement has the burden to show by clear and convincing evidence that he meets readmission requirements and that burden is a heavy one. (E.g., *Hippard* v. *State Bar* (1989) 49 Cal.3d 1089, 1091-1092; *Tardiff* v. *State Bar* (1981) 27 Cal.3d 395, 403;

1. Since we were aware that petitioner has resided in New Mexico for the past several years, prior to oral argument in this matter, we furnished petitioner with our opinion in *In the Matter of Giddens*, *supra*.

Feinstein v. *State Bar* (1952) 39 Cal.2d 541, 546.) The Court reviewed the standard in *Tardiff, supra*, explaining: 'As we have repeatedly said: "'The person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character.' [Citations.] In determining whether that burden has been met, the evidence of present character must be considered in the light of the moral shortcomings which resulted in the imposition of discipline." [Citation.]' (*Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 403.)"

[2b] On occasion, in opinions ordering disbarment, the Supreme Court has held that reinstatement may be sought on a showing that the petitioner has reattained the required standard of fitness to practice law, by "'sustained exemplary conduct over an extended period of time.'"(*In re Giddens* (1981) 30 Cal.3d 110, 116, quoting *In re Petty* (1981) 29 Cal.3d 356, 362.)

[3] In our review, we give great weight to the findings of the hearing judge who saw and heard the witnesses and who resolved matters of testimonial credibility. (*Feinstein* v. *State Bar* (1952) 39 Cal.3d 541, 547; Trans. Rules Proc. of State Bar, rule 453(a).) Nevertheless, under rule 453, our review is independent and the hearing judge's decision serves as a recommendation to us. We may make findings or draw conclusions at variance with those of the judge. (Trans. Rules Proc. of State Bar, rule 453(a); *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.)

III. THE PRESENT RECORD.

A. The Evidence.

(i) Restitution.

After his disbarment, petitioner assigned a $30,000 judgment in his favor in another matter to the bonding company which had earlier reimbursed the estate beneficiaries the amount of funds petitioner misappropriated. (R.T. p. 55.) In the physical therapist lien matter which also led to petitioner's disbarment, State Bar Court records showed that the therapist obtained a default judgment against petitioner to recover the monies petitioner withheld. Before the review department in petitioner's earlier disciplinary proceeding, petitioner proffered a stipulation of settlement of the therapist's suit. (Exh. 3.)

(ii) Petitioner's Lack of Compliance With Rule 955.

The Supreme Court's order disbarring petitioner directed that he comply with rule 955, California Rules of Court (duty of disbarred, suspended or resigned attorneys to notify clients, courts and opposing counsel of inability to serve as attorney). Petitioner testified both that he did not comply with the rule, and that he did not know whether he complied or not since he did not know what the rule was. (R.T. p. 57.)[2]

(iii) Petitioner's Activities After Disbarment.

In 1983, the year he was disbarred, petitioner moved to Santa Fe, New Mexico. During the first year he was there, he did volunteer work for a retirement home and also worked for Project Light Hawk, a conservation group. (R.T. p. 25.) He then

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2. Petitioner was asked and he testified:

"Q. [By the examiner] . . . Did you comply with the [rule 955] order of the Supreme Court?

"A. [By petitioner] I don't know what that rule is.

"THE COURT: Answer it yes or no, Mr. Wright. If you didn't comply, just tell him you didn't.

"THE WITNESS: I didn't comply. But I don't know what the rule is, so I don't know whether I complied or not." (R.T. p. 57.)

started working for 20 hours per week for a blind New Mexico attorney, Albert v. Gonzales, Sr., as a reader, note taker, legal researcher, case preparer and brief-writer at a salary of $8 per hour. At the time of the hearing, petitioner was still employed by Gonzales at 20 hours per week but now earns $10 per hour. This monthly income of approximately $800 is petitioner's sole income. (R.T. pp. 25-26, 40.) Petitioner hoped to be reinstated so that he could qualify for admission to practice law in New Mexico. (Petitioner's declaration filed June 5, 1989.)

When petitioner obtained employment from Gonzales, he told him that he was retired from the practice of law in California, but did not tell Gonzales that he had been disbarred. (R.T. pp. 43-44; petition for reinstatement, attached letter from Gonzales.) Gonzales learned this from another New Mexico attorney about two years after he had hired petitioner. (R.T. p. 44.)

(iv) Petitioner's Character Evidence.

Petitioner presented no witnesses on his behalf nor did he seek to introduce any other character evidence except for an affidavit by Gonzales attached to the petition for reinstatement and another affidavit by Gonzales. Although the examiner objected to both affidavits on the ground of hearsay, the judge admitted the first affidavit since it was part of the petition for reinstatement and "invited" by it; but excluded the second proffered affidavit. The judge based the exclusion of the second affidavit on the ground of hearsay but also that it was redundant and sketchier than the first. (Hearing judge's decision, pp. 6-7.)[3]

Gonzales's first affidavit praised petitioner's work on Gonzales's behalf, stated that although they have had "personality differences" he is a hard worker. "As to moral qualifications, he [petitioner] has always been honest and seems to be more concerned with ethics than I am." Gonzales stated also that he believed that petitioner had been fully rehabilitated and his reinstatement would be an asset to the bar. As will be discussed *post*, Gonzales's affidavit was also favorable to petitioner's learning in the law.

(v) Other Evidence Concerning Rehabilitation and Fitness.

Question 5c of the State Bar Court's application for reinstatement, required petitioner to disclose every civil case, including small claims actions, to which he was a party. Petitioner listed seven civil actions in response. One of these suits was filed as early as 1960, another as late as 1982 but petitioner placed a question mark next to the "Date Filed" question as to four of the suits.

Petitioner did not disclose a recent suit he had filed in the Magistrate's Court of New Mexico against Gonzales for withheld wages after Gonzales terminated petitioner because Gonzales wrongfully suspected petitioner of taking Gonzales's tape recorder. According to petitioner, Gonzales found his tape recorder, the two settled their differences and petitioner dismissed the suit. (R.T. pp. 41-43.) Petitioner testified that he did not think his suit against Gonzales was "that important" to list on his petition. "It was in the Magistrate's Court, for God's sake." (R.T. p. 41.)[4]

Petitioner disclosed on his reinstatement application three specific financial obligations totalling about $33,400. $30,000 of that amount was owed the Internal Revenue Service for tax obligations incurred as early as 1970. He testified that he could not pay these obligations due to his financial condition and the IRS was being kind in forbearing. As to the remaining two obligations, $1,937 owed the City and County of San Francisco for past due local taxes and

3. The hearing judge also considered admitting petitioner's second proffered affidavit of Gonzales for other than the truth of the matter asserted but, after being told by petitioner that in content it was the same but a little more affirmative than the first, concluded that it was very brief, did not add any factual detail to Gonzales's (first) affidavit attached to the petition for reinstatement, was conclusory and "essentially redundant." (R.T. pp. 30-31, 33.)

4. Petitioner characterized the New Mexico Magistrate's Court as the state's lowest court and its monetary jurisdiction as "halfway in between" California's small claims court and municipal court. (R.T. p. 41.)

about $1,500 owed an owner of property for back rent, petitioner testified that he did not notify the City and County and did not recall notifying the property owner of his current New Mexico address although he thought the creditors were aware of it. (R.T. pp. 34-37, 51.) Petitioner also listed his former wife on his reinstatement application as a creditor. Petitioner listed no specific amount owed her. Immediately below this he wrote: "Third persons have told me she claims I owe child support.—I dispute this."

At the end of his reinstatement application, petitioner appended his own statement in which he stated that since disbarment, he had engaged in no law violation more serious than a speeding offense, that he was a moral person who followed the "golden rule" in his conduct, that he sincerely regretted his earlier misconduct and stated it would never happen again, "as the circumstances which caused it cannot be repeated."

(vi) Evidence Concerning Petitioner's Learning and Ability in Law.

Gonzales's affidavit attached to the petition for reinstatement stated that petitioner's knowledge of law was as complete as any attorney he knew and that petitioner brought to Gonzales's attention all new relevant New Mexico decisions. Gonzales detailed two continuing legal education programs he and petitioner attended together and stated that petitioner also listened to a series of five tapes on legal ethics.

Most of petitioner's showing on his legal learning and ability rested on his own testimony. That testimony was that he did all of Gonzales's research in a number of areas of law, prepared three appellate briefs, and had over 50 hours of continuing legal education credit. (R.T. pp. 27-28.)[5] When asked if he subscribed to any California legal publications, he testified he had recently subscribed to the *Daily Banner*[6] and that he read its "appellate news" section. (R.T. pp. 46-47.) Petitioner presented no examples of briefs or other written work he had done for Gonzales. However in three of the papers he filed in this reinstatement proceeding, petitioner, a party to the proceeding, signed his own proof of service of those papers on the examiner. (See Opposition to Motion to Extend Investigation Period, filed June 27, 1989; Supplemental Declaration filed June 15, 1989; and Declaration filed June 5, 1989; see also Code Civ. Proc., § 1013, subd. (a); rule 242, Trans. Rules Proc. of State Bar.)

B. The Hearing Judge's Findings.

In his decision, the judge first summarized the evidence presented to him, then adopted specific findings. After making findings as to the background of petitioner's original admission to practice and disbarment, the judge adopted these findings: Petitioner did not comply with rule 955 as he was required to do. (Finding 4.) Petitioner failed to make restitution or satisfy long-standing major debts when his resources would have allowed "more than token" payments and petitioner was hostile, argumentative and evasive regarding inquiries as to his debts. Petitioner has not informed certain creditors of his whereabouts. (Finding 5.) Petitioner failed to complete his reinstatement application fully and correctly, omitted a recent lawsuit he brought against Gonzales and was evasive as to why he had not disclosed the suit. (Finding 6.) While petitioner had attended a number of legal education courses, recently began subscribing to a San Francisco legal newspaper and had been working for Gonzales as a legal research assistant since 1984, the form and content of petitioner's pleadings and his actions, arguments and demeanor at hearing show lack of present ability and learning in the law. (Findings 7, 8 and 9.) Petitioner offered no character testimony other than his own. (Finding 10.) Petitioner was not candid in his reinstatement application and his testimony showed an inappropriate attitude to a role as an attorney. (Finding 11.) Petitioner had not shown rehabilitation, moral qualifications for admission or present ability

5. Petitioner testified that he attended seven continuing education courses with Gonzales in 1987 and 1988. However, Gonzales's affidavit states that he attended only two such courses with petitioner. (Compare R.T. pp. 27-28 with Gonzales's affidavit attached to petition for reinstatement.)

6. We construe petitioner's testimony to refer to the San Francisco *Banner Daily Journal*.

in the general law, nor sufficient current good moral character to overcome his earlier disbarment. (Findings 12, 13, 14 and 15.)

IV. DISCUSSION.

A. Petitioner's Procedural Contentions.

Before reaching the merits, we shall deal with the several procedural contentions petitioner has advanced on review.

[4] Petitioner contends that the examiner obtained from the former assistant presiding referee an extension of the time to investigate the petition for reinstatement by a "supplemental motion" not authorized by the rules and that the examiner continued to investigate beyond the extension ordered. Petitioner's claim is without merit. The Rules of Procedure of the State Bar set a specific 90-day period for investigation of a petition for reinstatement before referral for hearing. An extension of the investigation period is also authorized. (Rule 664.) A 30-day time extension was properly obtained. Recognizing that a reinstatement petition may be filed at any time after five years from disbarment, the rules are designed to afford the State Bar Office of Trial Counsel an opportunity to investigate a petition before the time for trial setting commences. The rules do not prohibit investigative acts taken after the 90-day period or any extension of it. Here, the rules were complied with. [5] Moreover, to consider granting relief on a claim of procedural irregularity of the type made here, specific prejudice must be shown. (See, e.g., *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 310-311; *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 844-845; *Chefsky* v. *State Bar* (1984) 36 Cal.3d 111, 120-121.) While petitioner makes a conclusory claim of prejudice he demonstrates no actual prejudice whatever.

[6a] Petitioner also contends that the hearing judge improperly excluded Gonzales's second affidavit. We reject petitioner's contention. As we discussed *ante*, the judge excluded this affidavit partly on the ground that it was hearsay, but chiefly on the ground that it was cumulative. [7a] The reinstatement hearing, like a disciplinary proceeding, is a formal proceeding of the State Bar Court. As such, the formal rules of evidence applicable in civil cases apply. (Rule 556, Trans. Rules Proc. of State Bar.) [6b] In a disciplinary case, the Supreme Court has held that character reference letters are "excludable as hearsay in the absence of a stipulation to the contrary (rules 401, 556, Rules Proc. of State Bar; see Evid. Code, § 1200) . . . ." (*In re Ford* (1988) 44 Cal.3d 810, 818.) That the evidence was proffered as an affidavit instead of a letter does not change its hearsay nature. (*Windigo Mills* v. *Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597.) [7b] Any liberality expressed in *Windigo* to accepting affidavits in an Unemployment Insurance Appeals Board hearing is distinguishable here because, as the hearing judge correctly noted in his decision (at p. 6), the Unemployment Insurance Code authorizes a more liberal standard than applies in this State Bar proceeding. (*Windigo*, *supra*, 92 Cal.App.3d at pp. 597-598; see rule 556, Trans. Rules Proc. of State Bar.)

[8] A trial judge also has the discretion to refuse to admit evidence which is cumulative. (See, e.g., *Canavin* v. *Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 537, fn. 13.) We hold that the hearing judge acted within his discretion to exclude the second Gonzales affidavit on that basis as well. The hearing judge's decision shows that he carefully considered the more detailed Gonzales affidavit he deemed admissible. (Decision, pp. 6-7.)

We also reject petitioner's claim that the hearing judge was biased toward petitioner. To support his claim, petitioner cites critical language used by the hearing judge in his decision to characterize petitioner's response during the hearing to questions or colloquy.[7] Petitioner also argues that the judge

7. As examples, petitioner refers to the judge's use of words such as the word "snapped" in the phrase, ". . . [Petitioner] snapped when asked by the Trial Examiner about the date of the judgment . . ."; the words "sarcastic" and "argumentative" in the phrase "Petitioner was also sarcastic and argumentative when asked about restitution"; and the word "galling" in the phrase, ". . . and it is particularly galling for petitioner to complain he expected a fair and impartial investigation of the petition when it was [p]etitioner who objected to the request made by [the examiner] for more time to investigate the matter."

improperly recited in his decision evidence of petitioner's disbarment, the judge exercised his subjective opinion in commenting on petitioner's attitude toward restitution and made other errors in findings.

[9] As the sole trier of fact, it was the hearing judge's responsibility to declare to the litigants, the public and any reviewing body in his decision how he weighed the evidence including the credibility of petitioner as a party and witness in a proceeding in which the petitioner's attitude toward reformation and restitution is a fundamental issue. (See, e.g., *In re Andreani* (1939) 14 Cal.2d 736, 750.) That the hearing judge occasionally chose blunt language does not show bias. The judge would have been entitled to express his reasonable opinions of the evidence and credibility of witnesses even during the hearing, particularly when sitting without a jury. (See Cal. Const., art. VI, § 10; *Keating* v. *Superior Court* (1955) 45 Cal.2d 440, 444; *Davis* v. *Kahn* (1970) 7 Cal.App.3d 868, 880.)

As noted, *ante*, our review of the record is independent. Upon completion of that review, we are satisfied that the hearing judge gave careful attention to petitioner's evidence and arguments and conducted the hearing in a fair and patient manner despite petitioner's assertion of legal arguments without foundation such as that evidence of his disbarment was inadmissible or that the judge could not draw conclusions as to his attitude toward restitution. (Cf. *Meadows* v. *Lee* (1985) 175 Cal.App.3d 475, 484.)

B. The Merits.

Earlier in our opinion, we summarized the law requiring a petitioner for reinstatement after disbarment to make a very strong showing and meet a high burden. We are convinced by petitioner's positions taken throughout the proceedings, that he did not adequately understand these legal principles. We must conclude, as did the hearing judge, that petitioner failed to show adequate proof of his rehabilitation, present moral fitness or learning and ability in the law.

In his favor, petitioner did make adequate restitution to the victims of the matters for which he was disbarred. Although petitioner is a man of very limited means, he could have made some effort to meet his responsibilities to his remaining creditors. Instead, petitioner did not provide them with his current address in New Mexico. Petitioner also demonstrated by his demeanor at trial an indifference to creditors he listed on his petition for reinstatement. We adopt the last four sentences as a finding of fact which we substitute for finding 5 of the hearing judge.

[10] Although petitioner did make restitution to the victims of his misconduct, his lack of concern to keep his creditors at least informed of his whereabouts and his indifferent attitude toward them is a negative factor despite his very modest financial resources. (See *In re Andreani*, *supra*, 14 Cal.2d at pp. 750-751.)

[11] Petitioner's failure to comply with the provisions of rule 955, California Rules of Court, is clear and the judge's finding thereon is fully supported. As the examiner points out, rule 955, subdivision (e) provides that a disbarred lawyer's failure to comply may constitute a ground for denial of reinstatement. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1096.) Thus, petitioner's failure to comply with the rule was a serious, negative factor whether or not petitioner had clients at the time he was required to comply. (See *Lydon* v. *State Bar* (1988) 45 Cal.3d 1181, 1186-1187, and cases cited therein.)

[12a] Gonzales's affidavit attached to the petition for reinstatement is favorable to petitioner; but character evidence, albeit laudatory, is not alone determinative. (*Feinstein* v. *State Bar*, *supra*, 39 Cal.2d at p. 547.) Moreover, Gonzales was the only character reference offered by petitioner to permit the State Bar Court to evaluate his conduct in the six years since his disbarment. [13] Had petitioner wished to present additional character evidence of New Mexico witnesses without undue expense, he could have taken their depositions in New Mexico as the hearing judge pointed out. (R.T. p. 13; see rules 318 and 666, Trans. Rules Proc. of State Bar.) [12b] We hold that petitioner's showing of good character was both insufficient in the circumstances and depreciated by his having concealed from Gonzales his disbarment and having omitted from his application

for reinstatement a relatively recent lawsuit against Gonzales. (See *In the Matter of Giddens, supra*, 1 Cal. State Bar Ct. Rptr. 25.) The evidence at the hearing fell far short of petitioner's required showing of sustained exemplary conduct over an extended period of time. Moreover, that evidence did not serve to overcome the former adverse judgment of petitioner's fitness to practice law embodied in his prior disbarment.

[14] We read the hearing judge's findings as grounding petitioner's lack of learning in the law on the form and content of petitioner's pleadings, and actions, argument and demeanor. (Findings 7, 8 and 9.) While we agree with those findings, we also have doubts about the sufficiency of the other evidence proffered by petitioner regarding his learning in the law. Petitioner's testimony of having kept current in the law rested mostly on his own testimony. He had only recently undertaken some activities such as having read the *Daily Journal*, and he submitted no examples of any of the written work he had done for Gonzales. Had we concluded that petitioner was rehabilitated and morally fit, we would likely have conditioned recommendation of reinstatement of petitioner upon his passing the California Bar Examination, thus assuring that he is learned in the law. (Rule 952(d), Cal. Rules of Court.)[8]

CONCLUSION AND DISPOSITION

For the foregoing reasons, we adopt the hearing judge's findings with the minor modification set forth above. Petitioner's application for reinstatement is denied.

We concur:

PEARLMAN, P.J.
NORIAN, J.

8. Also a requirement for reinstatement is passage of the Professional Responsibility Examination. (Rule 952(d), Cal. Rules of Court.) The record is silent as to whether petitioner took or passed that examination, but we need not determine that fact in view of our decision.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DOUGLAS WAYNE TROUSIL

A Member of the State Bar

[No. 85-O-13574]

Filed November 20, 1990

SUMMARY

Respondent was found culpable on a single charge of practicing law while he was suspended from practice, first for nonpayment of State Bar dues, and later as a result of disciplinary action. Respondent had been disciplined on three prior occasions. All of respondent's disciplinary proceedings involved misconduct which occurred before respondent was, for the first time, accurately diagnosed and adequately treated for a long-standing mental disorder, causing dramatic improvement in his condition. Respondent had committed no misconduct since that date. His third prior disciplinary proceeding, which was resolved after his diagnosis and treatment, had resulted in a stipulation, approved by the Supreme Court, in which the State Bar agreed to discipline that did not include any actual suspension, despite misconduct seemingly more serious than that involved in this matter. In this matter, the hearing department recommended a three-year stayed suspension, three years probation with continued treatment, and three months actual suspension. (C. Thorne Corse, Hearing Referee.)

The State Bar sought review, contending that the recommended discipline was inadequate, and that disbarment should be recommended pursuant to standard 1.7(b). Because compelling mitigating circumstances clearly predominated, the review department held that under standard 1.7(b), disbarment would be inappropriate. Concluding that due to his recovery respondent did not pose a continuing threat of harm to the public, the review department reduced the recommended discipline to two years stayed suspension, two years probation with continued treatment, and one month actual suspension.

With respect to the specific charges of which respondent was found culpable based on his practicing law while suspended, the review department held that: (1) respondent was properly charged with and found culpable of violating sections 6068(a), 6125 and 6126 of the Business and Professions Code; (2) as a matter of law, respondent's unauthorized practice did not violate section 6127; (3) the charge of violating section 6103 was redundant, and (4) under all of the circumstances, respondent's unauthorized practice did not involve moral turpitude, in that it occurred with his client's knowledge and at the client's request. The review department also rejected the State Bar's contention that respondent violated sections 6068(a), 6103, and 6106 and former Rule of Professional Conduct 8-101(B)(4) by retaining, with his client's consent, fees earned for services rendered while respondent was suspended from practice. Respondent could not be found culpable of violating rule 2-107 because this violation had not been charged.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

COUNSEL FOR PARTIES

For Office of Trials: Loren McQueen

For Respondent: David A. Clare

HEADNOTES

[1] **166 Independent Review of Record**
Review department conducts de novo review of hearing department decisions, similar to that conducted by Supreme Court, based on the record established in the hearing department.

[2] **130 Procedure—Procedure on Review**
169 Standard of Proof or Review—Miscellaneous
Party seeking review is expected to set forth challenged finding, conclusion, or ruling below and point out wherein error lies.

[3] **130 Procedure—Procedure on Review**
166 Independent Review of Record
169 Standard of Proof or Review—Miscellaneous
Issues must be addressed on de novo review despite lack of appropriate briefing.

[4] **213.10 State Bar Act—Section 6068(a)**
230.00 State Bar Act—Section 6125
231.00 State Bar Act—Section 6126
Sections 6125 and 6126 together, when coupled with a section 6068(a) charge, create a basis for discipline for unlawful practice of law by a member of the State Bar.

[5] **231.50 State Bar Act—Section 6127**
Section 6127 does not authorize discipline for unauthorized practice of law that constitutes contempt of federal court.

[6 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
220.00 State Bar Act—Section 6013, clause 1
Where sole court order violated by attorney was order suspending attorney from practice, and attorney was found culpable of unauthorized practice under other statutes, charge of violating section 6103 was superfluous.

[7 a, b] **213.10 State Bar Act—Section 6068(a)**
220.10 State Bar Act—Section 6103, clause 2
Accepting fees for services rendered while suspended from practice does not violate sections 6068(a) or 6103.

[8] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
290.00 Rule 4-200 [former 2-107]
Client who has consented to attorney's retention of illegal fees may properly demand return of such fees.

[9 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
290.00 Rule 4-200 [former 2-107]
Discipline cannot be imposed for violations not charged; where attorney was charged only with retaining client funds as fees without client consent, and referee found client had consented, attorney could not be disciplined on ground that fee was illegal.

[10 a, b] **221.00 State Bar Act—Section 6106**
Unauthorized practice of law may or may not constitute moral turpitude. It did not constitute moral turpitude for attorney to continue to render, and accept fees for, legal services which, at client's insistence and with client's knowledge and consent, were rendered during attorney's suspension from practice.

[11] **582.39 Aggravation—Harm to Client—Found but Discounted**
586.31 Aggravation—Harm to Administration of Justice—Found but Discounted
588.32 Aggravation—Harm—Generally—Found but Discounted
720.30 Mitigation—Lack of Harm—Found but Discounted
Harm to public and to administration of justice, and risk of harm to client, is inherent in unauthorized practice of law.

[12] **102.10 Procedure—Improper Prosecutorial Conduct—Reopening**
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
755.52 Mitigation—Prejudicial Delay—Declined to Find
Evidence provided by State Bar demonstrated that closure and reopening of investigation of disciplinary matter was in compliance with applicable rules and did not bar disciplinary proceedings; respondent had not been prejudiced by delay.

[13] **801.30 Standards—Effect as Guidelines**
Standards operate as a guideline and do not require any outcome.

[14 a, b] **513.90 Aggravation—Prior Record—Found but Discounted**
806.51 Standards—Disbarment After Two Priors
Disbarment based on presence of multiple prior disciplinary matters is appropriate upon demonstration of common thread among disciplinary matters, pattern of misconduct, or increasing severity, but was not appropriate in matter where those factors were not present and compelling mitigating circumstances clearly predominated.

[15] **750.10 Mitigation—Rehabilitation—Found**
802.30 Standards—Purposes of Sanctions
806.51 Standards—Disbarment After Two Priors
863.10 Standards—Standard 2.6—Suspeusion
863.20 Standards—Standard 2.6—Suspension
863.30 Standards—Standard 2.6—Suspension
Where attorney found culpable of practicing while suspended no longer posed threat of harm to public, 30-day actual suspension was nonetheless appropriate to protect integrity of profession and courts.

[16] **172.40 Discipline—Prescribed Medication**
172.50 Discipline—Psychological Treatment
725.12 Mitigation—Disability/Illness—Found
Blood testing and continuing psychological treatment were appropriate probation conditions where mitigating evidence included showing that mental condition responsible for attorney's misconduct had been successfully alleviated by ongoing medication and treatment.

[17] **174 Discipline—Office Management/Trust Account Auditing**
Probation condition requiring detailed reporting on current client matters was excessively burdensome and not required for public protection in matter where respondent had not been found culpable of client neglect.

[18] **175 Discipline—Rule 955**
Requirement to comply with rule 955 of the California Rules of Court became inappropriate where length of recommended actual suspension was reduced to thirty (30) days.

[19] **173 Discipline—Ethics Exam/Ethics School**
Requirement to take and pass professional responsibility examination was not appropriate where attorney had successfully completed examination in connection with previous discipline.

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a)
230.01 Section 6125
231.01 Section 6126
Not Found
213.15 Section 6068(a)
213.95 Section 6068(i)
220.05 Section 6103, clause 1
220.15 Section 6103, clause 2
221.50 Section 6106
231.55 Section 6127
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
290.05 Rule 4-200 [former 2-107]
Aggravation
Declined to Find
625.20 Lack of Remorse
Mitigation
Found
735.10 Candor—Bar
Standards
822.51 Misappropriation—Declined to Apply
835.10 Moral Turpitude—Declined to Apply
Discipline
1013.08 Stayed Suspension—2 Years
1015.01 Actual Suspension—1 Month
1017.08 Probation—2 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1023.30 Testing/Treatment—Prescription Drugs
1023.40 Testing/Treatment—Psychological

OPINION

PEARLMAN, P.J.:

The essential facts involved in this matter are simple and not in dispute. Respondent was admitted to practice in June of 1977. He was found culpable on a single charge that while suspended for nonpayment of dues during 1983, respondent took on a consumer bankruptcy case, and continued to work on it after a subsequent disciplinary suspension went into effect, thus practicing law while suspended. Respondent admitted representing the bankruptcy client while suspended, although he had sought to remove himself from all pending cases and to substitute other counsel which this particular client refused to permit. No actual harm was found to have occurred to respondent's client.

Respondent was also charged, in connection with the same matter, with retaining fees without the client's permission out of money the client had given him to pay creditors, thus misappropriating client funds.[1] The referee dismissed this charge, finding in favor of respondent that the client had agreed to the retention of the funds for fees.

The central issue before us is the effect of respondent's prior discipline ("priors"). Respondent has three priors. All of the misconduct involved in the priors, as well as the initial misconduct in this matter, occurred before February 1984, when in the course of treatment following a second suicide attempt, respondent was diagnosed for the first time as having had bipolar mood disorder (manic depressive syndrome) for most of his life. Since February of 1984, respondent has been receiving ongoing treatment, including medication. His condition has improved dramatically and the record before us indicates that he has committed no new misconduct.

Based on the conclusion that compelling mitigating circumstances clearly predominated, the referee recommended a three-year stayed suspension, three years probation including a condition that respondent continue to undergo psychological treatment, and three months actual suspension. The examiner requested review on the ground that the hearing panel's recommendation of discipline is insufficient in light of the record. She argues, among other things, that, in view of the priors, standard 1.7(b) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V; hereafter "standard(s)") requires disbarment. No mention was made in her brief of the order of the Supreme Court in connection with respondent's third prior which imposed *no* actual suspension pursuant to *the stipulation of the Office of Trial Counsel*, approved by a referee and recommended to the Supreme Court by our predecessor review department, on seemingly more serious conduct than the present record, based on the diagnosis of respondent's psychological disorder placing a new perspective on all of his prior misconduct. (Exh. 42, stipulation as to facts and discipline pursuant to rules 405-408 of the Rules of Procedure, p. 10, ¶ 5.) Moreover, standard 1.7(b) expressly indicates that disbarment is clearly *not* warranted where, as here, there is a finding of the most compelling mitigating evidence. Comparable Supreme Court precedent and respondent's lengthy period of subsequent freedom from misconduct lead us to recommend two years stayed suspension, two years probation including continued psychological treatment, and one month actual suspension as the appropriate level of discipline.

COUNT ONE

Respondent was admitted to the practice of law in California on June 28, 1977. In count one, respondent was charged with accepting representation of Dominic Castanon in August of 1983 in a bankruptcy matter while suspended and making appearances in the United States Bankruptcy Court through August 1984 without being an active member of the State Bar. The referee found that from June 28, 1982, through February 23, 1984, respondent was suspended from the practice of law for non-payment of State Bar dues. In August of 1983, during this suspension, respondent was retained by Dominic

1. A third count, for failure to cooperate in the investigation of the first two counts, was dropped by the examiner at the hearing when she learned that an answer to the investigator's letter had in fact been sent. (R.T. pp. 70-71.)

Castanon to handle a bankruptcy matter. (Exhs. 1, 2, 3; R.T. pp. 10-12, 71.) Respondent represented Castanon in the bankruptcy during that suspension (exhs. 2-11; R.T. pp. 13-18) as well as after respondent paid his dues and was reinstated in February of 1984. (Exhs. 12-17; R.T. pp. 19-23.)

From April 13, 1984, through October 15, 1984, respondent was again suspended from the practice of law, this time by reason of a disciplinary proceeding. Respondent arranged with another attorney, Harriet Goldfarb, to take over his cases for him during this suspension.[2] However, Castanon refused to accept Goldfarb as his counsel, and insisted that respondent continue to represent him. (Finding of fact 8; R.T. pp. 60-63, 66-67, 74, 106.) Accordingly, respondent continued to handle the bankruptcy matter for Castanon during his disciplinary suspension, until the termination of their relationship in August 1984. (Exhs. 18-33; R.T. pp. 23-34.) Disbelieving Castanon's testimony that he was unaware of either of respondent's suspensions, the referee found, based on the testimony of respondent and Goldfarb, that Castanon was well aware of both of them. Citing "his demeanor on the witness stand, internal inconsistencies in his testimony and his obvious bias against [r]espondent," the referee found Castanon unworthy of belief. (Finding of fact 7, fu. 3.) On review, the examiner does not challenge the referee's credibility determination. We adopt the referee's findings as modified in his ruling on request for reconsideration dated October 23, 1989.

COUNT TWO

Count two charged respondent with retaining $500 of client funds for his attorney fees without his client's consent. The referee found the facts to be otherwise. On July 2, 1984, Castanon delivered to Goldfarb a check for $1,000 and $880 in cash. The referee found that these funds were intended for delivery to respondent to be applied by him to amounts owing to Castanon's creditors. (Finding of fact 10; R.T. pp. 26-28, 58.) Goldfarb delivered the funds to respondent. (Finding of fact 10.) The check proved to be uncollectible. (Finding of fact 10; R.T. p. 78.) As a result, on or about August 1, 1984, Castanon gave respondent $1,900, in a money order and cash, for the same purpose, but the creditor refused to accept this payment because of Castanon's earlier delinquencies. (Finding of fact 10; exhs. 23, 24, 26, 27.) On August 1, 1984, respondent returned the $1,900 and the $1,000 bad check to Castanon; on August 6, 1984, respondent returned $380 of the $880 received in cash to Castanon. Respondent retained the remaining $500 as fees for his services in dealing with the consequences of Castanon's having written the uncollectible check, and in defending the most recent adversary proceeding brought against Castanon by one of his creditors. (Finding of fact 11; exhs. 28, 29.)

Respondent testified that between August 1 and August 6, 1984, Castanon gave respondent his approval of the retention of $500 out of the $880 for fees. (R.T. p. 79.) The referee credited this testimony over that of Castanon, and determined that the $500 was retained with Castanon's consent. (Finding of fact 13.) This credibility determination is also not challenged by the examiner on review.

DISCUSSION

[1] It is our duty on review of a disciplinary recommendation of a former referee of the State Bar Court to conduct a similar de novo review to that which the Supreme Court conducts—to examine the record, reweigh the evidence and pass on its sufficiency. (See, e.g., *Farnham* v. *State Bar* (1988) 47 Cal.3d 429, 433.) While the review department undertakes de novo review, it does so based on the record established in the hearing department. The review department may adopt findings, conclusions and a decision at variance with the hearing department (rule 453, Trans. Rules Proc. of State Bar), but **[2]** the party seeking review is expected to set forth the challenged finding or conclusion of law or other ruling below and point out wherein the error lies.

2. As the referee noted, "[t]here is no claim by the State Bar, nor is there any evidence tending to show, that [r]espondent represented anyone other than Castanon or otherwise engaged in the practice of law during either period of suspension." (Finding of fact 9.)

Having conducted de novo review in the instant case, we find that the charge of practicing law while suspended is clearly established by the evidence. Indeed, respondent admits it. On this charge, the referee found respondent culpable of violating not only Business and Professions Code section 6125, which prohibits the unlicensed practice of law, but also Business and Professions Code sections 6068 (a) and 6103.[3]

The referee rejected culpability under sections 6126 (misdemeanor) and 6127 (civil contempt) as beyond his jurisdiction and, in any event, found that the substantive offenses set out in both sections are made culpable by section 6125. [3] It is unclear whether the examiner intended to challenge this ruling. It was not listed as a ground for review in her request for review. (See rule 450(a)(iii), Trans. Rules Proc. of State Bar.) It *is* mentioned in the introductory paragraph of her brief but is not supported by any argument in the body of the brief nor is it mentioned in the conclusion of the brief as a requested culpability determination. As a consequence, the issues are not addressed in respondent's brief either. Nevertheless, upon our *de novo* review of the record we must address this question despite the lack of appropriate briefing.

In *Chasteen* v. *State Bar* (1985) 40 Cal.3d 586, 591, the hearing referee found the respondent to have violated sections 6126 and 6127 by the unauthorized practice of law without active membership in the State Bar. There, the respondent did not challenge culpability under sections 6126 and 6127 and the Supreme Court did not indicate whether it found culpability under either provision or whether the referee exceeded his jurisdiction in so finding. Subsequently, in *Ainsworth* v. *State Bar* (1988) 46 Cal.3d 1218 the respondent was found culpable of violating section 6125 without any finding of culpability under either section 6126 or section 6127. The *Ainsworth* opinion does not indicate whether a violation of either of these provisions was charged. On the other hand, most recently in *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 604, the Court concluded that the petitioner had violated both sections 6125 and 6126 by his unauthorized practice of law while suspended.

In none of these cases had the petitioner been convicted of a criminal misdemeanor pursuant to section 6126. Neither *Chasteen* nor *Morgan* holds that the petitioner therein was guilty of a misdemeanor for which he had never been criminally charged; nor would it be appropriate to do so, as the burden of proof in a disciplinary proceeding is not the same as would be required in a criminal proceeding. [4] Rather, we read *Morgan* as construing sections 6125 and 6126 together to make the unlawful practice of law a crime and to create a standard which can form the basis of professional discipline when coupled with a section 6068 (a) charge. (See discussion *post*.) We therefore conclude that respondent was properly charged with violation of sections 6125 and 6126 and was culpable of violating both.

[5] Section 6127 appears to present a different issue. It expressly states that "proceedings to adjudge a person in contempt of court under this section are to be taken in accordance with the provisions of title V of Part III of the Code of Civil Procedure [Contempts]." Not only does the Legislature appear not to have anticipated an original State Bar proceeding charging contempt of court under section 6127, but the alleged contempt here involved contempt of a federal bankruptcy court. Section 6127 does not address possible contempt of a federal court. We therefore agree with the referee's refusal to find respondent culpable of a section 6127 violation.

We now address the issue of respondent's culpability under sections 6068 (a) and 6103. In *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931, the Court rejected culpability under section 6068 (a) on three counts involving violation of section 6106 and numerous rule violations, but upheld culpability under section 6068 (a) on a fourth count where the underlying charge was bribery of a hearing officer who had already pleaded guilty to that felony offense. Similarly here, the violation of section 6068 (a) is predicated on respondent's violation of criminal

3. All statutory references hereafter are to the Business and Professions Code unless expressly indicated otherwise.

provisions of the Business and Professions Code. (Bus. & Prof. Code, §§ 6125 and 6126.) There is no express provision for professional discipline to be imposed directly as a consequence of a section 6125 or 6126 violation. Indeed, section 6125 may be violated by persons who are not lawyers and who are thus not subject to discipline. Charging a respondent with violation of section 6068 (a) by reason of alleged violation of sections 6125 and 6126 provides the basis for imposition of professional discipline for the crime of practicing law while suspended.[4]

Section 6103 poses a different question. The Supreme Court has repeatedly held that section 6103 "defines no duties." (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815; *Sands*, *supra*, 49 Cal.3d at p. 931; *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561.) Nonetheless, in all of the recent cases in which this issue was addressed the high court was focusing on the general language in section 6103 which states that "any violation of the oath taken by him, or of his duties as such attorney, constitute[s] cause[] for disbarment or suspension." The Court has not specifically addressed the question whether any duty is defined by that part of section 6103 which refers to disobedience of court orders.

Section 6103 states, "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession which he ought in good faith to do or forebear, . . . constitute[s] cause[] for disbarment or suspension." Like an attorney's oath and duties, obedience of court orders is covered elsewhere in the Business and Professions Code. Section 6068 (b) specifies that it is the duty of an attorney "To maintain the respect due to the courts of justice and judicial officers." The respect due to the courts includes compliance with applicable court orders absent a good faith belief in a legal right not to comply. (*Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 954.)[5] Thus, any wilful violation of a court order clearly could be charged as a violation of section 6068 (b) just as was done in *Maltaman*. It therefore appears unnecessary to seek to rely on section 6103 as "creating a duty" or otherwise stating an independent basis for culpability by articulating the consequences of disobedience of a court order. **[6a]** Nevertheless, we do not need to determine in this case whether section 6103 defines a duty not to disobey court orders. Any separate charge for wilful violation of a court order is redundant under the circumstances presented here. That is because the only court orders involved are the two orders of the Supreme Court effectuating respondent's two suspensions.

A licensed member of the State Bar can only be suspended by order of the Supreme Court.[6] **[6b]** Respondent's violation of Business and Professions Code section 6125 for practicing while suspended necessarily encompassed violation of the two successive Supreme Court orders which removed him from practice for failure to pay dues and for discipline. Having found respondent culpable of violating section 6125, we treat the issue of culpability under section 6103 as superfluous.

We turn now to the issue of respondent's culpability on count two. As noted above, the referee found respondent's testimony that the client had authorized the retention of fees to be more credible than the client's testimony that it was not authorized.

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4. Similarly, violation of section 6152 of the Business and Professions Code (prohibition of solicitation) constitutes a misdemeanor under section 6153, but no statute expressly makes violation of section 6152 a disciplinable offense. Section 6068 (a) likewise provides a basis for imposing discipline for violation of section 6152. (*In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 189.)

5. In *Maltaman*, the Supreme Court noted "the evidence warrants the conclusion that petitioner's postjudgment disobedience . . . involved . . . a disrespect for law and the judicial system, as proscribed by Business and Professions Code section 6068." (43 Cal.3d at p. 954.) The petitioner had been charged with violating subsections (a), (b) and (d) of section 6068. The Court specifically linked petitioner's disrespect for the legal system to violation of subsection (b). (43 Cal.3d at p. 958.)

6. Effective December 1, 1990, the State Bar Court will have the power to impose certain temporary suspensions. (Rule 951, Cal. Rules of Court, as amended Sept. 25, 1990, effective December 1, 1990.) The sole authority to impose final disciplinary suspensions will remain with the Supreme Court, however, and all suspensions will continue to be imposed by court order, either of the Supreme Court or the State Bar Court.

(Decision at pp. 4-5; see also *id.* at p. 3, fn. 3.) Based on the record, this finding cannot be characterized as clearly erroneous, and the examiner does not argue that it was. **[7a]** Nonetheless, the examiner argues that respondent should be found culpable of violating sections 6068 (a), 6103 and 6106 and former rule 8-101(B)(4) of the Rules of Professional Conduct[7] contending, for the first time on review, that the payment of fees, even if authorized by the client, was illegal[8] because the services for which the fees were charged were rendered while respondent was suspended from practice.[9]

[7b] We reject culpability under sections 6068 (a) and 6103 pursuant to *Baker*, *Sands* and *Middleton*. We likewise find no culpability as charged under rule 8-101(B)(4). As the referee pointed out at the hearing, respondent was not charged with having accepted an illegal fee (a violation of former rule 2-107(A)), and therefore could not be found culpable on such a charge even though the evidence established a violation. (R.T. p. 92.)

[8] While a client who has consented to retention of illegal fees may properly demand to receive back such illegal fees, the notice to show cause did not allege that respondent accepted illegal fees in violation of rule 2-107 and retained them after client demand in violation of rule 8-101(B)(4). **[9a]** The referee properly found that the issue of illegality was not before him. (R.T. p. 92.) The examiner neither notified the respondent in the original charges that illegality of the fees was being charged as a basis for culpability under rule 8-101(B)(4), nor did she seek to amend the pleadings to so charge after the issue was brought to the referee's attention in closing arguments and he concluded that it was not charged. To the contrary, in the court below, the examiner put at issue solely the lack of client consent, and argued that respondent unilaterally decided to pay himself from client funds, which the referee found to be untrue. When the referee concluded that illegality was outside the charges, the examiner rested without seeking to amend the notice to conform to proof.

Thereafter, the examiner neither raised the illegality issue as a ground for review nor mentioned in her brief that the referee had rejected the issue of illegality as outside the charges before him. The procedural history of this issue should have been set forth in her brief. **[9b]** The State Bar Court cannot impose discipline for any violation not charged. (*Gendron* v. *State Bar* (1985) 35 Cal.3d 409, 420.) If evidence produced before the hearing panel shows the attorney committed uncharged ethical violations, the State Bar must seek to amend the notice to show cause to conform to the evidence in order to seek discipline based on those violations. (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929 for a discussion of the limitations of appropriate amendments to the charges at trial.)

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7. New Rules of Professional Conduct became effective on May 27, 1989. References to Rules of Professional Conduct herein are to the former rules which were in effect at the time of the events at issue in this matter.

8. The examiner relies on *Alpers* v. *Hunt* (1890) 86 Cal. 78, a case involving illegal contracts to share attorneys fees with lay persons, as her sole cited authority for the proposition that suspended attorneys may not legally contract for attorneys fees for services rendered while suspended. There is more apt authority. Section 6125 is a regulatory statute prohibiting the practice of law by anyone other than an active member of the State Bar. Statutes of this type operate as "a police measure, for the protection of the public and . . . a contract of an unlicensed person for the furnishing of [legal] services will not be upheld." (*Payne* v. *De Vaughn* (1926) 77 Cal.App. 399, 403; *Fewel & Dawes, Inc.* v. *Pratt* (1941) 17 Cal.2d 85, 90; see generally 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 491, p. 436.)

The general rule with respect to contracts made in violation of regulatory statutes is that "when the object of the statute or ordinance in requiring a license for the privilege of carrying on a certain business is to prevent improper persons from engaging in that particular business, or is for the purpose of regulating it for the protection of the public . . . the imposition of the penalty amounts to a prohibition against doing the business without a license and a contract made by an unlicensed person in violation of the statute or ordinance is void." (*Wood* v. *Krepps* (1914) 168 Cal. 382, 386; see also *Otlinoff* v. *Campbell* (1949) 91 Cal.App.2d 382; *California Chicks, Inc.* v. *Viebrock* (1967) 254 Cal.App.2d 638, 641; 1 Witkin, Summary of Cal. Law, Contracts, § 492, p. 437, and cases cited therein.)

9. The August 6, 1984 letter from respondent to the client that discusses the retention of fees specifies the services for which the fees were charged. (Exh. 29.) It appears from the record that these services were rendered after April 13, 1984, while respondent was under disciplinary suspension.

We turn now to the question of whether respondent violated section 6106. The referee found that respondent's conduct in this matter did not amount to moral turpitude. (Conclusions of law 3, 4.) We agree. Neither *Chasteen* nor *Morgan* addressed the issue of whether it is or may be moral turpitude to continue to practice law while under suspension. Violation of section 6106 does not appear to have been charged in either *Chasteen* or *Morgan*.

The fact that payment for services of unlicensed persons is prohibited by statute does not, in and of itself, make it morally reprehensible. The distinction has long been drawn between contracts malum in se (against good morals) and those which are malum prohibitum (prohibited by statute). (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 441, p. 396.) While either type of proscribed contract is generally void (*Smith* v. *Bach* (1920) 183 Cal. 259, 262), a contract which is malum prohibitum does not necessarily evince "serious moral turpitude." (*Robertson* v. *Hyde* (1943) 58 Cal.App.2d 667, 672; see also *Homestead Supplies, Inc.* v. *Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 990; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 451, p. 402.) "There are many varieties and degrees of illegality. These varieties and degrees must be taken into account in determining the juristic effect of a transaction that involves some form of illegality." (6A Corbin on Contracts (1962) § 1534, p. 816.) For this reason, the Supreme Court routinely asks the State Bar Court to hold a hearing on whether various misdemeanor convictions involve moral turpitude or other misconduct warranting discipline. **[10a]** Violation of sections 6125 and 6126 appears to fall into the category of conduct which may or may not involve moral turpitude as defined by Supreme Court precedent in attorney disciplinary proceedings.

[10b] We therefore examine the record as a whole. At the time the services in question were rendered, respondent represented the client only because the client insisted that respondent remain in the case even though the client knew that respondent had been suspended and wished to withdraw. (Finding of fact 8; R.T. pp. 67, 74.) The referee did find that respondent misrepresented to the bankruptcy court his continued authorization to practice (presumably a misrepresentation accomplished by silence when there was a duty to speak), but the referee further found that such misrepresentation was incidental to the unauthorized practice itself. (Finding 17, citing standard 1.2(b)(iii).) We agree with the referee's construction of section 6106 as not intending to embrace within its ambit the bare essentials of a section 6125 violation. Nor do we find evidence that respondent violated section 6106 on the basis of the facts before us. While it was wrong of respondent knowingly to continue to practice while suspended, we conclude the pressure of his client's request negates a conclusion that moral turpitude was involved.

FACTORS IN AGGRAVATION

Respondent has three prior disciplinary proceedings on his record which were admitted as factors in aggravation in this proceeding. First, in 1984, he was suspended for two years, the suspension was stayed, and he was given two years probation with an actual suspension for six months. This is the suspension which was in effect while respondent represented Castanon between April and August 1984. The offense for which respondent was suspended this first time was that, in 1980, he had made use of a forged power of attorney, purportedly issued by a man whom he knew to be dead, to obtain a loan for the latter's widow, and misappropriated a portion of the proceeds thereof. (Exh. 39.)

In March 1985, effective in April 1985, respondent was again suspended for a period of two years. Once again, the suspension was stayed, and he was given two years probation with an actual suspension for six months. In this second proceeding, the basis for discipline was that in four matters during 1978, 1979 and 1981, respondent failed to keep his clients adequately informed, failed to represent clients diligently and failed promptly to deliver funds and property to his clients. (Exh. 41; see *Trousil* v. *State Bar* (1985) 38 Cal.3d 337.)

In November 1985, respondent was again charged with misconduct. In this third matter, respondent and the State Bar stipulated to both facts and discipline. Once again, notwithstanding respondent's two prior suspensions, respondent was suspended for a period of two years (consecutive to the suspension ordered earlier in 1985 proceedings

as described above), the suspension was stayed, and respondent was placed on probation for two years. However, significantly, this time no actual suspension was imposed, by stipulation of the State Bar. The charges to which respondent stipulated in the third proceeding were similar to the charges in the second proceeding, that in three matters during 1980, 1981 and 1982, he failed to represent clients diligently and failed to communicate with clients. (Exh. 42).[10]

Besides the three prior instances of discipline, no other factors in aggravation were found by the referee. (See findings of fact 16-20.)[11] On review, although the examiner urges disbarment, she does not argue that any additional aggravating factors should have been found to exist.

MITIGATING FACTORS

The referee's findings as to mitigation are set forth in findings of fact 21 through 25. There was no harm caused to the client or any other individuals by respondent's misconduct herein; he has been diagnosed as a manic depressive which has been brought under control since the time he undertook the representation of Castanon; respondent exhibited candor and cooperation with the State Bar; and the record discloses no suggestion of misconduct in the five years (now six) since the events in question. The examiner does not argue that any of these findings are unsupported by the evidence, except the second finding. We construe the referee's finding of no harm caused to be limited to the issue of harm to individuals involved in the bankruptcy proceeding, presumably because no one became aware of respondent's incapacity to act prior to completion of the proceeding. [11] Inherent in the section 6125 violation, of which respondent was found culpable, was harm to the public and administration of justice by holding himself out as a licensed practitioner before the United States Bankruptcy Court in the Central District of California when he had no authority to so act. He thereby also created a risk of substantial harm to his client which did not in fact materialize.

As to the second finding, the examiner argues that respondent did not introduce adequate evidence that his psychiatric disorder was under control. However, in addition to respondent's testimony on this point, and the medical evidence attached to the stipulation in the most recent prior procedure (which was introduced into evidence in the present matter as exhibit 42), the following facts support the referee's finding.

First, in the third prior proceeding, the State Bar stipulated to no actual suspension of respondent for conduct which did cause harm to his clients on the basis that "[t]he new information regarding [r]espondent's medical condition provides a perspective on [r]espondent's prior disciplinary matters which was not available during the pendency of those matters." (Exh. 42, stipulation at p. 10.) That stipulation to no actual suspension was approved by the review department and adopted by the California Supreme Court. Significantly, the misconduct in this matter also began *prior* to the time respondent's condition was first diagnosed and initially treated in February 1984, was continued thereafter only at the insistence of his client, and terminated no more than six months later.

Second, the record discloses substantial additional evidence that respondent's medical condition no longer makes him a threat to the public. Respondent was on State Bar probation continuously from the end of his first six-month suspension (October

10. The record does not reflect that the charges brought in the instant proceeding were able to be consolidated into the third proceeding in which the stipulation was entered. One matter which was pending in investigation at that time was consolidated into the stipulation, but the stipulation does not state whether any additional investigation matters were pending when it was signed. We assume that this matter was not the subject of pending charges when the stipulation was reached.

11. The referee found that respondent's testimony indicated that respondent had previously had "a lack of appreciation of the seriousness of his offense" with respect to practicing while suspended for nonpayment of dues. (Finding of fact 19; see also finding of fact 8.) However, the referee concluded that respondent's attitude had subsequently improved, and apparently did not rely on this finding as an aggravating factor. (Finding of fact 19.) We decline to adopt the finding, because it is not supported by the record. (See R.T. pp. 71-73 [testimony stricken].)

15, 1984) through the end of his probation period in the third matter on April 16, 1989 (with an interruption for his six-month actual suspension during 1985). One of the conditions of respondent's probation in the stipulated matter was that he submit to monthly blood tests to verify that he was taking his medication. (Exh. 42, stipulation at pp. 12-13.) No probation revocation proceedings were brought during the entire time respondent was on probation, and respondent testified that he had successfully completed probation, and introduced a letter to that effect from the probation department. (R.T. pp. 101-102; exh. A.) Respondent has been actively practicing law since the end of his second actual suspension in October 1985, and the record discloses that no new complaints were made against him during the nearly four years between that date and the hearing in the present matter. (R.T. pp. 104-105.)

In short, partly as a result of the bar's delay in prosecuting the instant matter,[12] **[12 - see fn. 12]** respondent had, by the time of the hearing in late August of 1989, a substantial record of successful practice following the detection and treatment of his psychiatric problem. As respondent argues, this record must be given substantial consideration in determining whether respondent continues to pose a danger to the public. (See standard 1.2(e)(viii); *Hawes* v. *State Bar* (1990) 51 Cal.3d 587, 595-596; *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 316-317; *Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 450.)

RECOMMENDED DISCIPLINE

The examiner argues that standards 1.7, 2.2 and 2.3 require disbarment of respondent. **[13]** First of all, the standards operate as a guideline and do not require any outcome. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11; *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 774.) Secondly, neither standard 2.2 nor 2.3 is involved here because the referee properly rejected culpability under former rule 8-101(B)(4) and section 6106. This brings us to the applicability of standard 1.7(b).

[14a] As the Court stated in *Arm* v. *State Bar*, *supra*, rejecting a recommendation of disbarment pursuant to standard 1.7(b), "a common thread" among the various disciplinary proceedings should be articulated from which the State Bar can urge that increased discipline be imposed for a "habitual course of conduct" or "a repetition of offenses for which an accused has previously been disciplined." (50 Cal.3d at p. 780.) Similarly, in *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 606-607, the Court applied standard 1.7(b) only upon concluding that "petitioner's behavior demonstrates a pattern of professional misconduct and an indifference to this court's disciplinary orders; this is the *second* time that petitioner has been found culpable of practicing law while under suspension." (*Id.* at p. 607, emphasis in original.)

[14b] Here, we are not dealing with a common thread, a repeated finding of culpability of the same offense, or continuing misconduct of increasing severity. Indeed, the referee found that the respondent's case is one of those exceptional ones recognized in standard 1.7(b) in which the most "compelling mitigating circumstances clearly predominate." On review, the examiner has failed to demonstrate that the referee erred in making such a finding and we adopt it as supported by the record.

Upon a finding of compelling mitigating circumstances, the guideline provided by standard 1.7(b) affirmatively indicates that disbarment is *not* appropriate. Standard 1.7(b) provides no guidance as to the appropriate lesser sanction. For violations of sec-

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12. **[12]** The referee found that the State Bar had inexcusably delayed in bringing these proceedings, but that respondent was not prejudiced thereby. (Finding 25.) The examiner represented at oral argument that the investigation had been pushed along as quickly as possible. The record was augmented on review to take judicial notice of certain records of the Office of Investigations of the State Bar disclosing that this matter was closed in December of 1985 "without prejudice" to being reopened and was reopened following request of the complaining witness in March of 1988. The documentation provided by the State Bar pursuant to court order satisfactorily demonstrated that the closure and reopening was in compliance with former rule 512 and the matter was not barred under former rule 511. (Rules Proc. of State Bar, rules 511, 512.) (See *In the Matter of Trousil* (State Bar Ct. Review Dept., No. 85-O-13574) order re taking of judicial notice filed August 1, 1990; *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 125.)

tions 6068 (a), 6125 and 6126, standard 2.6 indicates that the appropriate sanction is "disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim . . . ." The referee concluded that the most apposite case is *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116. There, while Chefsky had no record of prior discipline, he was found culpable in five separate matters involving misappropriation and moral turpitude (neither of which were found here). Chefsky's evidence in mitigation was that he was ill at the time of the offenses, that his misconduct had taken place five years before, and that his conduct in the meantime had been exemplary. The Supreme Court reduced the review department's recommendation to three years stayed suspension conditioned on thirty days actual suspension. The referee, in the present matter, concluded "The parallels to this case are obvious." We agree.

We also see some parallels to *Chasteen* v. *State Bar*, *supra*, 40 Cal.3d 586. There, the petitioner was found to have engaged in misconduct for a period of six years involving failure to act competently and to perform his duties as an attorney, commingling and misappropriating funds, and the unauthorized practice of law while under suspension. He had a prior record of discipline. In mitigation, the hearing panel considered petitioner's previous addiction to alcohol and severe depression during the time period in which the misconduct occurred. The Supreme Court ordered a two-month period of actual suspension conditioned on lengthy probation and restitution to one client.

Here, the current misconduct was much less serious than in *Chefsky* and *Chasteen*, but was preceded by multiple priors. However, all of the prior misconduct occurred during a period of serious psychological impairment which has since been diagnosed and brought under control. Nonetheless, absent the lengthy subsequent period of time during which respondent has complied with terms of probation and remained free of disciplinary problems, we would weigh the priors more heavily.

[15] While we deem a lengthy period of probation appropriate, we do not see the need for an additional actual suspension in order to protect the public. The integrity of the bar and the courts (standard 1.3) does require, however, that respondent be suspended for initially signing up the client while suspended for nonpayment of dues and continued representation of the client before the United States Bankruptcy Court while under disciplinary suspension. Thirty days actual suspension appears appropriate for that purpose. **[16]** We also recommend that the conditions of probation include a blood testing condition in addition to the continued psychological treatment condition recommended by the referee. Otherwise, we adopt the referee's recommendation as to discipline, with minor modifications to conform to the standard language presently in use and with other minor changes in the conditions of probation, as set forth below.[13] **[17, 18 - see fn. 13]**

FORMAL RECOMMENDATION

It is therefore RECOMMENDED to the Supreme Court that:

1. Respondent DOUGLAS WAYNE TROUSIL be suspended from the practice of law for two (2) years;

2. Execution of respondent's suspension be stayed, and he be placed on probation for two (2) years subject to the following conditions:

(a) That during the first thirty (30) days of said period of probation, he shall be actually suspended from the practice of law in the State of California;

(b) That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

(c) That during the period of probation, he shall report not later than January 10, April 10, July

13. **[17]** We have eliminated condition 2(f), recommended by the referee, requiring detailed reporting on current client matters, as excessively burdensome and not required for the protection of the public, since respondent has not been charged with or found culpable in this matter of neglecting any client. **[18]** We have also deleted the referee's recommendation that respondent be required to comply with rule 955 of the California Rules of Court, which has become inappropriate in light of the reduced length of the actual suspension which we recommend.

10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(i) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(ii) in each subsequent report, that he has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(iii) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (ii) thereof;

(d) That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

(e) That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

(f) That respondent shall promptly report, and in no event in more than ten (10) days, to the membership records office of the State Bar and to the Probation Department, all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

(g) That respondent shall continue to undergo treatment, including medication, for his bipolar mood disorder, as prescribed by his physician, at his own expense and shall furnish evidence to the Office of the Clerk, State Bar Court, Los Angeles, that he is so complying with each report that he is required to render under these conditions of probation; provided, however, that should it be determined by respondent's physician that respondent no longer requires such treatment and/or medication, he may furnish to the State Bar a written statement from said physician so certifying by affidavit or under penalty of perjury, in which event, and subject to the approval of the court, no reports or further reports under this paragraph shall be required and he shall not be required to obtain further treatment, to continue to take medication, or to undergo testing as provided in the following paragraph (h);

(h) That, unless and until relieved from the obligations under this paragraph as provided in paragraph (g) above, respondent shall provide the Probation Department at respondent's expense on or before the 10th day of each month respondent is on probation with a laboratory screening report containing a laboratory analysis obtained not more than 10 days previously of respondent's blood and/or urine as may be required to show respondent has taken his medication for bipolar mood disorder as prescribed by his physician. The blood and/or urine sample or samples shall be furnished by respondent to the laboratory in such manner as may be specified by the laboratory to ensure specimen integrity. The screening report shall be issued by a licensed medical laboratory selected by respondent and previously determined to be satisfactory to the Probation Department. Respondent shall also provide the Probation Department with any additional screening

reports the Department may in its discretion require. Urine and/or blood fluid samples for such additional reports shall be delivered to the laboratory facility making the report no later than six hours after notification of respondent by the Department that an additional screening report is required;

(i) That respondent shall provide the Probation Department with medical waivers on its request and with access to all of respondent's medical records; revocation of any medical waiver is a violation of this condition. Any medical records obtained by the Probation Department shall be confidential and no information concerning them or their contents shall be given to anyone except members of the State Bar's Probation Department, Office of Investigation, Office of Trial Counsel, and State Bar Court who are directly involved with maintaining or enforcing this order of probation;

(j) That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective; and

(k) That at the expiration of the period of this probation, if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of two (2) years shall be satisfied and the suspension shall be terminated;

3. [19] Respondent should not be required to take the Professional Responsibility Examination since he successfully completed the examination in connection with previous discipline; and

4. Respondent should not be required to comply with rule 955 of the California Rules of Court inasmuch as the actual suspension recommended herein is of only thirty (30) days duration.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JAMES T. MORIARTY

A Member of the State Bar

[No. 88-C-14191]

Filed November 26, 1990

SUMMARY

Respondent, a member of the Universal Life Church, filed three annual federal tax returns claiming fraudulent deductions for charitable contributions. In 1988, he was convicted in federal court of making and subscribing a false income tax return. The conviction was reported to the California Supreme Court, which found that the offense involved moral turpitude, placed respondent on interim suspension, and referred the matter to the State Bar for a hearing, report and recommendation as to the discipline to be imposed. The Supreme Court vacated the interim suspension order seven months after its effective date.

The State Bar Court hearing referee recommended that respondent be suspended for seven months, with credit for the seven months he had been on interim suspension, and that he be placed on probation for four years, on condition that he abide by the probation conditions of his criminal sentence. (Daniel J. Modena, Hearing Referee.)

The examiner sought review, asserting that the recommended discipline and the findings of fact contained in the referee's decision were insufficient. The review department modified the referee's decision to expand the factual findings describing the circumstances of the offense, but found the recommended discipline appropriate, except that it added probation conditions consistent with those usually imposed in disciplinary cases. Although noting the application of standard 3.2, which recommends disbarment for crimes involving moral turpitude, the review department declined to recommend disbarment, citing respondent's strong showing of mitigating circumstances, the disposition of similar matters by the Supreme Court, and the fact that respondent's criminal co-defendant, also an attorney, whose culpability was more aggravated, was actually suspended for only ninety days.

COUNSEL FOR PARTIES

For Office of Trials: Mara J. Mamet

For Respondent: Judd C. Iversen, Mark R. Vermeulen

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
The review department must independently review all matters coming before it, and may adopt findings of fact, conclusions of law and recommendations at variance to those of hearing department. (Rule 453, Trans. Rules Proc. of State Bar.)

[2 a, b] **146 Evidence—Judicial Notice**
191 Effect/Relationship of Other Proceedings
1091 Substantive Issues re Discipline—Proportionality
1691 Conviction Cases—Record in Criminal Proceeding
At respondent's request, in a conviction proceeding, the review department took judicial notice of the record in a disciplinary case involving another attorney who was respondent's co-defendant in the underlying criminal matter. The discipline imposed on the co-defendant was considered in determining the appropriate discipline for respondent.

[3 a, b] **521 Aggravation—Multiple Acts—Found**
Where respondent filed three annual federal tax returns containing false information as to charitable contributions, respondent's misconduct involved multiple acts of misconduct separated by time sufficient to allow the member to consider his actions, and therefore constituted a factor in aggravation.

[4 a, b] **691 Aggravation—Other—Found**
Respondent's extensive law enforcement background, first as FBI agent and then as deputy district attorney, was factor in aggravation in conviction referral matter as it gave respondent special awareness of law's requirements.

[5 a, b] **801.30 Standards—Effect as Guidelines**
802.69 Standards—Appropriate Sanction—Generally
In determining the appropriate sanction, the review department starts with the Standards for Attorney Sanctions for Professional Misconduct, which serve as guidelines and which do not mandate the discipline to be imposed. Each case must be resolved on its own particular facts and not by application of rigid standards.

[6] **1091 Substantive Issues re Discipline—Proportionality**
In assessing appropriate discipline, the review department considers whether the recommended discipline conforms to or is disproportionate to prior decisions of the Supreme Court based on similar facts.

[7] **801.47 Standards—Deviation From—Necessity to Explain**
When the review department's decision departs from the discipline recommended by the standards, the reasons for the departure should be made clear, for the benefit of the Supreme Court and the parties.

[8 a-e] **801.41 Standards—Deviation From—Justified**
1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness
1516 Conviction Matters—Nature of Conviction—Tax Laws
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Disbarment would be excessive in case arising out of criminal conviction for filing false federal income tax return, even though offense involved moral turpitude, based on comparable Supreme Court cases and given respondent's compelling showing of mitigation, including absence of any prior or subsequent misconduct; extreme emotional difficulties arising from an amputation; respondent's acknowledgment of his misconduct and his candor and cooperation with the State Bar; a persuasive showing of respondent's good character and high esteem in the community; family problems existing at the time of the misconduct; and the fact that the misconduct did not involve the practice of law.

[9] **801.41 Standards—Deviation From—Justified**
802.30 Standards—Purposes of Sanctions
1549 Conviction Matters—Interim Suspension—Miscellaneous
1552.59 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
In conviction referral matter in which interim suspension had been imposed and later vacated after seven months, review department declined to recommend total of one year actual suspension, even though possibly appropriate, because resulting additional four-month suspension would have been disruptive and punitive rather than achieving the purposes of disciplinary proceedings (protection of the public, courts and legal profession as well as rehabilitation in proper cases).

ADDITIONAL ANALYSIS

Mitigation
Found
710.10 No Prior Record
725.11 Disability/Illness
735.10 Candor—Bar
740.10 Good Character
745.10 Remorse/Restitution
750.10 Rehabilitation
760.11 Personal/Financial Problems
791 Other

Discipline
1613.08 Stayed Suspension—2 Years
1615.04 Actual Suspension—6 Months
1616.50 Relationship of Actual to Interim Suspension—Full Credit
1617.06 Probation—1 Year

Probation Conditions
1022.50 Probation Monitor Not Appointed
1024 Ethics Exam/School

Other
1521 Conviction Matters—Moral Turpitude—Per Se
1541.20 Conviction Matters—Interim Suspension—Ordered
1543 Conviction Matters—Interim Suspension—Vacated

OPINION

NORIAN, J.:

An examiner for the Office of Trial Counsel, State Bar of California, has asked that this department review the discipline recommendation of a State Bar Court hearing department referee's decision that respondent James T. Moriarty, a member of the State Bar of California since June of 1974 with no prior record of discipline, be suspended from the practice of law for seven months and be placed on probation for four years. The referee determined that respondent had fulfilled this requirement because of his seven-month interim suspension by the Supreme Court. The examiner contends that the referee's decision contains insufficient findings of fact and that the discipline recommendation is also insufficient.

This matter is a conviction referral originated by the Supreme Court (Bus. & Prof. Code, §§ 6101-6102; Cal. Rules of Court, rule 951) as a result of respondent's conviction in federal court of a one count violation of 26 U.S.C. section 7206(1), making and subscribing a false income tax return. The Supreme Court determined the conviction to be a crime involving moral turpitude and referred the matter to the State Bar Court for a hearing, report and recommendation as to the discipline to be imposed.

[1] Rule 453, Transitional Rules of Procedure of the State Bar of California, prescribes that this department independently review the record on all matters that come before it. The rule also states that the review department may adopt findings, conclusions and recommendations that are at variance with those of the hearing department.

We have concluded, based on our independent review of the record, that the hearing panel's decision should be modified to: expand the findings of fact; include specific findings with respect to the issues of mitigation and aggravation; and set forth probation conditions customary to State Bar proceedings. With these modifications we find the discipline recommended by the referee to be appropriate.

BACKGROUND

The parties filed a stipulation as to facts with the hearing panel on May 16, 1989,which we adopt as findings of fact. The stipulated facts demonstrate that:

On April 8, 1987, respondent was indicted in federal district court on three counts of having violated 26 U.S.C. section 7206(1), making and subscribing false income tax returns. On January 6, 1988, respondent pleaded guilty in the United States District Court, Northern District of California, to a violation of 26 U.S.C. section 7206(1). Judgment was entered on March 1, 1988, and respondent was sentenced to two years imprisonment, execution of which was stayed on the condition that he serve four years probation. No appeal was filed.

Effective March 25, 1988, the Supreme Court of California issued an order holding that respondent's criminal conviction involved moral turpitude. (Bus. & Prof. Code, § 6102 (a).) The order suspended respondent from the practice of law pending final disposition of the federal court proceeding. On October 12, 1988, the Supreme Court filed an order which denied respondent's request for a hearing before the State Bar Court on the issue of whether his conduct involved moral turpitude. The Supreme Court then referred the matter to the State Bar Court for a hearing, report and recommendation as to the discipline to be imposed. The Supreme Court also, upon request of respondent, stayed the interim suspension order upon good cause shown.

The record shows that the State Bar Court hearing was held on May 16, 1989, before a one-member hearing panel. The referee's decision was filed on August 1, 1989. The referee recommended that respondent be suspended from the practice of law for a seven-month period, "of which said suspension is hereby acknowledged and completed" which presumably made reference to the period of interim suspension previously imposed by the Supreme Court. The referee also imposed four years probation on condition that respondent complete all the terms and conditions of the probation ordered by the federal court.

The examiner requested our review on the grounds that the referee's findings of fact were not sufficient and that the discipline recommendation was insufficient. [2a] At oral argument before this department on March 28, 1990, respondent's counsel asked that we take judicial notice of the discipline decisions of the hearing department and the review department concerning *In the Matter of Terrence W. Andrews* (July 5, 1989, No. 88-C-13412 [Bar Misc. 5659]) State Bar Ct. Hrg. Dept.; same cause (November 29, 1989) State Bar Ct. Review Dept. [nonpub.; former Review Dept.]. Terrence W. Andrews (Andrews) had been a co-defendant in the same federal indictment as respondent, with somewhat similar charges. Andrews had pleaded guilty in federal court to the same charge as respondent, but had received a lesser discipline on recommendation by the State Bar Court.

Shortly following oral argument respondent submitted the State Bar Court decisions in *In the Matter of Andrews, supra.* This department, by letter of April 10, 1990, asked counsel for the parties jointly to submit additional documents relating to the Supreme Court and State Bar Court actions on the matters concerning respondent and Andrews. Upon receipt of these documents the matter stood submitted.

FINDINGS OF FACT

The only finding of fact contained in the referee's decision is the statement that "after reviewing oral and written evidence and the stipulation by the parties heretofore filed that there is sufficient enough [sic] evidence in mitigation that the sentence hereinafter imposed by this Hearing Officer is mitigated by the acts and actions of the Respondent's pro bono work throughout his legal career and his rehabilitation since the misconduct occurred." As this statement does not set out findings of fact in this matter, we shall do so.

A. The Facts of the Underlying Federal Court Case

Respondent pleaded guilty to one count of the indictment and declared that he "knowingly overstated the amount of deductible contributions to which he was allegedly entitled" in the amount of $14,177 for the 1982 tax year. The record showed that respondent had become a member of the Universal Life Church (ULC) of Modesto, California, for a payment of approximately $25 and then purchased by mail a ULC chapter for a nominal amount. He claimed on tax returns for the years 1980, 1981 and 1982 that he had made charitable contributions to his chapter of the ULC equaling fifty percent of his adjusted gross income. Fifty percent of adjusted gross income is the percentage limit for charitable contributions allowed to an individual by federal law. (26 U.S.C. § 170.) His claimed contributions were in the amounts of $28,915, $28,900 and $14,177 for the respective years.

These contributions consisted of personal living expenses that respondent considered church related. Among other things, he claimed his home swimming pool to be a baptismal font, and payments for the education of his children at church related colleges and the trips taking him there, as religious educational expenses. Vacation trips were considered missionary outreach or religious retreats.

While holding down a full-time position as deputy district attorney, respondent did conduct weekly religious services at a rest home for the aged, who were of meager means, for quite a number of years. He also conducted ceremonies, including weddings and baptisms. However, there is no evidence in the record, within his chapter of the ULC, of the existence of the elements of what normally would be considered a distinct church organization and parish.

B. Facts Involving Mitigation and Aggravation

Respondent is a 1955 graduate of the University of Louisville Law School. From 1955 to 1961 he worked as a special agent of the Federal Bureau of Investigation (FBI). Between 1961 and 1968 he was employed as an investigator and special agent for private organizations. From 1969 to 1974 he was an investigator for the District Attorney's Office of Contra Costa County. Upon passing the California bar exam in 1974 he joined the office as a deputy district attorney and was employed there until he retired in October of 1986.

In 1979 after being diagnosed as having a malignant tumor on an ankle, respondent's leg was amputated below the knee. In January of 1980 an Internal Revenue Service (IRS) agent conducted an audit of respondent's 1977 federal income tax return. The agent disallowed as a business expense certain mileage deductions that respondent had taken when he conducted pro bono teaching activities at a federal correctional institution, and reclassified them as a charitable expense. This reclassification provided a lesser tax deduction. During the course of the meeting the subject of respondent's amputation was discussed. The agent then asked to see his leg stump and prosthesis. Respondent detached the artificial limb for the agent's closer inspection. After doing so, the respondent needed the agent's help in seating the stump within the prosthesis.

The IRS agent's conduct greatly upset respondent. Respondent said nothing to the agent at the time. Respondent related, however, that he stewed about the agent's conduct for a long period. At about this same time, respondent having learned from a friend about the ULC, did some investigation and became a member. His intention was that by accumulating more taxable deductions he would pay back the IRS and get even for the humiliation and embarrassment the agent had put him through. Thereafter, for three years starting in 1980, he used his ULC charter as a tax shelter which effectively lowered his federal income tax payment.

Respondent has no prior disciplinary record. Since this offense he has practiced law for more than six years, from 1983 to 1986 as a deputy district attorney of Contra Costa County, and as a sole practitioner from 1986 to 1990 (other than the period of interim suspension).

During the period of the misconduct, respondent's mother was suffering from diabetes, cancer and severe depression. His mother died in January of 1981. Following his mother's death, his father, who was an alcoholic, moved into his house. In addition, respondent was under both a severe amount of pain and stress in his professional and social activities as a result of his new life as an amputee. All these facts were cited in a psychologist's evaluation of respondent in March of 1989 just prior to the hearing. In a statement also submitted to the referee at the hearing, respondent related that he had regularly attended weekly counseling meetings, that he had come to realize that his real anger was caused by the loss of his leg and not entirely by the conduct of the IRS auditor and that he had come to better understand the causes of his stress. He has continued to participate voluntarily in recognized counseling programs.

Respondent has fully cooperated in the State Bar's investigation and disposition of this matter. He has been candid and forthright in recognizing his misconduct and, without equivocation, has expressed regret for his actions. The referee, in his decision, listed these factors as the most impressive finding of the hearing. Letters testifying to respondent's good character were submitted from members of the community among whom were judges and lawyers. They were aware of his misconduct as it had been reported thoroughly in the local media. He has also continued to participate actively in community service.

[3a] While the decision of the referee did not indicate any factors in aggravation, the record shows that respondent's misconduct was not a one-time occurrence. It was an act that he repeated on three occasions, each a year apart, when he filed false income tax returns using deductions that were not genuine. **[4a]** We also note that respondent was a former FBI agent trained in investigation of violations of federal law as well as an assistant district attorney prosecuting state law violators. This made his misconduct additionally serious since it came from one with extensive background in law enforcement who therefore had special awareness of the requirements of the law.

DISCUSSION

The Supreme Court referred this matter to the State Bar for a report and recommendation as to the appropriate degree of discipline to be imposed for respondent's misconduct. **[5a]** In determining the appropriate sanction, we start with the Standards for

Attorney Sanctions for Professional Misconduct (Rules Proc. of State Bar, div. V)[1] which serve as our guideline. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) [6] We also will consider if the recommended discipline conforms to or is disproportionate to prior decisions of the Supreme Court based on similar facts. (See, e.g., *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Standard 3.2 calls for disbarment for a conviction of a crime involving moral turpitude. It states that only if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. It also states that in those latter cases, the discipline shall not be less than a two-year actual suspension, prospective to any interim suspension imposed, irrespective of mitigating circumstances.

[5b] The Supreme Court has recognized that the standards provide a guideline and do not mandate the discipline to be imposed. (*Boehme* v. *State Bar* (1988) 47 Cal.3d 448, 454; *Greenbaum* v. *State Bar* (1987) 43 Cal.3d 543, 550.) The Court has also held that each case must be resolved on its own particular facts and not by application of rigid standards. (*In re Nadrich* (1988) 44 Cal.3d 271, 278.)

[7] Should this department in its decision depart from the standards, it is helpful to the Court and the participants in the matter that we make the reasons clear. (*Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

[8a] When weighing the misconduct in this case against the factors in aggravation and mitigation we find that imposition of disbarment pursuant to standard 3.2 is excessive. Also, as will be discussed later, previous decisions of the Court that involved the filing of a false income tax return had findings of fact which were more egregious and in which the discipline was, as a result, more severe than what is appropriate for this matter.

[3b] This department does have serious concern that this misconduct occurred over a substantial period of time. Respondent filed three income tax returns one year apart and took charitable deductions that were without basis. While it is indicated that the decision to falsify the tax return was arrived at in the spring of 1980, the two subsequent false filings, a year apart, do not support any claim of impulsive aberrational behavior. The year separations between the filings illustrate that these were multiple acts. Respondent had ample time to reflect, to reconsider and to study the consequences of his actions. [4b] He had a special awareness of law enforcement concerns as a former FBI agent and prosecutor. He chose to continue. He stopped taking the deductions subsequent to June of 1982 when agents from the IRS came to his office to investigate his returns.

[8b] While acknowledging the seriousness of the misconduct, it is also evident that respondent has made a most compelling case in mitigation. Admitted to the bar in 1974, respondent had practiced law for seven years without any misconduct prior to filing his first false tax return. Since his final false filing, he has practiced law for six years, again without incident.

[8c] At the time his misconduct occurred he suffered extreme emotional difficulties when his leg was amputated below the knee. The evaluation by the psychologist indicates that, in addition to this amputation, other family pressures and personality factors affected respondent and all came together at this particular point in time causing this exercise of bad judgement. The psychologist's report stated that respondent has learned to deal with negative situations such as he experienced at the time of his misconduct. Respondent has participated in formal counseling sessions and now participates in voluntary programs.

[8d] Respondent was cooperative and displayed spontaneous candor in the investigation and the proceedings of this matter. While there was widespread publicity in the media regarding respondent's tax conviction and while knowing the circumstances of the misconduct, a diverse cross section of the

1. Hereafter all references to the standards shall mean the Standards for Attorney Sanctions for Professional Misconduct, Rules of Procedure of the State Bar, division V unless otherwise indicated.

community, which included individuals from the courts and the bar, submitted letters to the federal court which were made a part of this record, attesting to his good character and to the high esteem in which respondent was held. He has continued a commitment of service to his community.

[8e] Respondent has fully acknowledged his misconduct. His misconduct was not related to the practice of law.

We are aware of two cases decided by the Supreme Court that involve the filing of false income tax returns but neither involves knowingly overstating the amount of deductible contributions. *In re Hallinan* (1957) 48 Cal.2d 52 involved an attorney who in violation of 26 U.S.C. section 145 consistently failed, over a four-year period, to account fully to the IRS for income received in the practice of law, and who had a planned pattern of taking fees in cash with an intent not to report receipt of these fees. The attorney had a prior record of misconduct for acts of deceit practiced upon a fellow attorney. The attorney received a three-year actual suspension.

In re Distefano (1975) 13 Cal.3d 476, the second case, concerned an attorney who in violation of 18 U.S.C. section 287, over a two-year period, filed numerous income tax refund claims for living persons without their knowledge or consent. In his filing of these refund claims he used the individuals' names and social security numbers and by so doing he exposed these individuals to the possibility of investigation by the IRS. He also had not been in practice long enough to establish a showing of good character necessary for membership in the State Bar. The attorney was disbarred.

These cases involve misconduct that is more serious than that of respondent. In *Hallinan*, the failure to report had to do with the practice of law, contained overt acts of deceit and the attorney had committed prior misconduct where deceit was also involved. In *Distefano*, the false refund filings were in greater number, the filings were falsely subscribed to unknowing persons exposing them to possible future investigation, and the attorney's misconduct occurred within four years after being admitted to the practice of law.

In other federal income tax matters found to have involved moral turpitude, an attorney, who was convicted of conspiracy to impede the lawful function of the IRS in violation of 18 U.S.C. section 371, participated in a tax shelter plan and signed a backdated conditional sales contract for his automobile. There was strong mitigation. The Supreme Court finding the tax violation involved moral turpitude ordered discipline of one year suspension, the execution of which was stayed, with probation for three years. No actual suspension was ordered. (*In re Chira* (1986) 42 Cal.3d 904 [the Court noted that the attorney, so devastated by the conviction, was unable to practice law for a period of three years and did not stand to gain any tax benefits].)

Another case also involved conviction of conspiracy to impede the lawful function of the IRS in violation of 18 U.S.C. section 371. (*In re Chernik* (1989) 49 Cal.3d 467.) There the attorney was found to have made use of backdated documents to support unlawful tax deductions for a client in a real estate tax shelter scheme allocating partnership losses to a partner prior to its entry into the partnership. The Court, while finding many similarities to *In re Chira, supra*, 42 Cal.3d 904, distinguished the attorney's situation in *Chernik* from that in *Chira* because Chernik's misconduct was directly related to the practice of law. The Court suspended Chernik for a period of three years, the execution of which was stayed, and placed him on probation for three years including actual suspension for one year.

[2b] Andrews, who was named in the same indictment as respondent, was convicted in federal court under the same code section as respondent of a one count violation of making and subscribing a false income tax return. In the indictment, which was made part of the State Bar Court record, Andrews had additionally been charged with aiding, counseling and advising in the preparation of respondent's false deductible contribution claims on his income tax return. It is noted that Andrews' federal probation conditions included participation in a residential community treatment center and a home electronic detention program for eight months except while he was at work during the day.

On August 20, 1990, the Supreme Court adopted the State Bar Court recommendation of discipline for Andrews that called for two years suspension, the execution of which was stayed, two years probation with conditions, and a 90-day actual suspension. (*In the Matter of Terrence W. Andrews*, *supra*, Supreme Ct. order filed Aug. 20, 1990 [Bar Misc. 5659].)

In conclusion, we analyze respondent's misconduct, the aggravating and mitigating circumstances, the applicable standards and Supreme Court cases we deem comparable, and the fact that respondent has already completed, during 1988, an approximate seven-month suspension ordered by the Supreme Court at the time of his conviction referral. **[9]** While suspension totaling one year might also have been justified in view of the standards, case law, the seriousness of the misconduct, and the time period involved, notwithstanding the compelling mitigation found, the recommendation of the referee is not inappropriate. In so determining we also are mindful that the on-again off-again character of an additional four plus months of suspension would in this case be disruptive and punitive rather than achieve the purpose of attorney discipline as set forth in standard 1.3 (protection of the public, courts and legal profession as well as rehabilitation in the proper case).

We therefore adopt the actual suspension recommendation of the hearing referee and also recommend that respondent be placed on probation to run concurrent with the remaining period of his four year federal probation, but that the probations conditions be those that are used by the State Bar Court.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law in this state for a period of two years; that execution of such order be stayed; and that respondent be placed on probation concurrent with the remainder of his four-year federal probation requirement on the following conditions:

1. That respondent be actually suspended from the practice of law in this state for the length of time he was placed on interim suspension by the Supreme Court, but that respondent be credited for that period of interim suspension, from March 25, 1988, to October 12, 1988, as fulfillment of this actual suspension condition;

2. That during the period of probation, he shall comply with the probation conditions of his federal court conviction, *United States* v. *Moriarty* (March 1, 1988) U.S.Dist.Ct., N.D.Cal. CR-87-0265-WWS-2;

3. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

4. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, Rules of Professional Conduct and the conditions of his federal probation since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act, Rules of Professional Conduct and the conditions of his federal probation since the effective date of said probation.

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

5. During the period of probation, Respondent shall maintain on the official membership records of the State Bar, as required by Business and Profes-

sions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by section 6002.1;

6. That, except to the extent prohibited by the attorney-client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court or designee at the Respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the Respondent and the Presiding Judge or designee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge or designee relating to whether Respondent is complying or has complied with these terms of probation;

7. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective;

8. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court shall be satisfied and the probation shall be terminated.

It is further recommended that Respondent be directed to take and pass the Professional Responsibility Examination given by the National Conference of Bar Examiners within one (1) year from the date of the disciplinary order in this matter, and furnish satisfactory proof of such to the probation department of the State Bar Court, Los Angeles, California.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT A

A Member of the State Bar

[No. 86-O-18356]

Filed November 26, 1990

SUMMARY

Following a recommendation for dismissal of a disciplinary proceeding charging respondent with alleged improper post-trial communication to jurors in violation of former rule 7-106(D) of the Rules of Professional Conduct, the former volunteer review department found culpability and remanded for further hearing. On remand, the referee heard additional evidence and recommended a private reproval. (Hon. Leland J. Lazarus (retired), Hearing Referee.)

The examiner sought review. On review, the review department adopted the referee's original recommendation of dismissal, holding that the former review department's non-final determination of culpability was not binding upon the current review department. Interpreting former rule 7-106(D) to require a showing of specific intent, the review department concluded, in light of the referee's credibility determinations, that the State Bar had failed to prove by clear and convincing evidence that respondent had the requisite subjective intent to harass or embarrass the jurors or to influence the jurors' actions in future jury service.

COUNSEL FOR PARTIES

For Office of Trials: Andrea T. Wachter

For Respondent: Kurt W. Melchior

HEADNOTES

[1 a-c] **130 Procedure—Procedure on Review**
166 Independent Review of Record
167 Abuse of Discretion
169 Standard of Proof or Review—Miscellaneous
192 Due Process/Procedural Rights
194 Statutes Outside State Bar Act
In administrative mandamus proceedings where the court is authorized to exercise independent judgment on the evidence, abuse of discretion by the lower tribunal is established if the court

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

determines that the findings are not supported by the weight of the evidence. Where the court is not authorized to exercise independent judgment, then it must determine whether the findings are supported by substantial evidence in the light of the whole record. In such cases, due process requires that the body deciding the case must at least review a transcript of the evidence. The argument that this standard had been violated on earlier review by the former review department was mooted by the full-time review department's de novo review of the record on a second review after the former review department's remand for further hearing.

[2] **139 Procedure—Miscellaneous**
194 Statutes Outside State Bar Act
State Bar proceedings are sui generis, and are not governed by the principles of administrative mandamus applicable to ordinary administrative proceedings.

[3 a-c] **139 Procedure—Miscellaneous**
166 Independent Review of Record
169 Standard of Proof or Review—Miscellaneous
199 General Issues—Miscellaneous
The doctrine of law of the case did not preclude the full-time review department from reconsidering a decision of the former, volunteer review department. Due to the non-finality of recommendations of the former State Bar Court review department, law of the case did not apply to them. Upon its independent de novo review, review department was not bound to follow earlier factual determinations made prior to remand. Review department was also free to reconsider prior review department's legal interpretation of rule of professional conduct, given flexibility of law of the case doctrine in California appellate courts.

[4 a-c] **148 Evidence—Witnesses**
166 Independent Review of Record
In evaluating the record on review, the review department is bound to give great deference to the referee's evaluation of the credibility of the witnesses. There is a strong presumption in favor of the referee's findings of fact regarding such credibility.

[5 a-d] **162.11 Proof—State Bar's Burden—Clear and Convincing**
164 Proof of Intent
199 General Issues—Miscellaneous
204.20 Culpability—Intent Requirement
343.00 Rule 5-320(D) [former 7-106(D)]
The difference in wording between the rules governing pretrial and mid-trial contact with jurors, and the rule governing post-trial contact, reflects a difference in the intent of the drafters as to the elements of each rule. In order to establish a violation of the rule governing post-trial contact, the State Bar must prove by clear and convincing evidence that the respondent subjectively had the specific intent to harass or embarrass the jurors or to influence the jurors' actions in future jury service. Where no such subjective intent was established, based on referee's findings as to witnesses' credibility, review department found no violation and dismissed proceeding without addressing question of rule's constitutional validity.\

[6 a, b] **163 Proof of Wilfulness**
164 Proof of Intent
204.10 Culpability—Wilfulness Requirement
204.20 Culpability—Intent Requirement
There is a distinction between the proof necessary to establish a rule violation where the only intent necessary is the intent to do the act, and the proof necessary to establish culpability of a disciplinary offense which requires proof of specific (i.e., subjective) intent. To prove a "wilful" breach of the Rules of Professional Conduct, it is only necessary to prove that the person charged acted or omitted to act purposely, that is, intended to commit the act. With respect to charges of which subjective intent is an element, however, such intent must be proven convincingly and to a reasonable certainty.

[7] **193 Constitutional Issues**
There are marked differences between civil and criminal trials and the corresponding need to restrict free speech in order to assure fairness.

[8] **193 Constitutional Issues**
204.90 Culpability—General Substantive Issues
490.00 Miscellaneous Misconduct
False statements made with reckless disregard of the truth do not enjoy constitutional protection under the First Amendment. Attorneys may be disciplined for making defamatory or disrespectful statements in pleadings or court papers which have no basis in fact and which are made with conscious disregard of their falsity or with intent to be maliciously contemptuous.

[9] **169 Standard of Proof or Review—Miscellaneous**
193 Constitutional Issues
As a rule, constitutional questions will not be reached if a decision can rest on a different ground.

[10] **196 ABA Model Code/Rules**
343.00 Rule 5-320(D) [former 7-106(D)]
Wording of California rule governing post-trial contact with jurors differs significantly from parallel rules in ABA Model Code and Model Rules.

[11 a, h] **343.00 Rule 5-320(D) [former 7-106(D)]**
An attorney who loses a jury trial has the right to contact jurors after the trial and develop facts by way of juror affidavits to impeach their own verdict. Jurors are the obvious, and usually the only, source of available sworn testimony by affidavit which the law requires as a basis for new trial on the ground of juror misconduct. Likewise, attorneys who win jury trials and wish to protect the verdict should not be barred from writing jurors after trial to request notice of any contact by the adverse side. Attorneys have a right to communicate with jurors after the trial, but should strive to avoid unnecessarily causing the jurors to develop ill feelings regarding their jury service.

ADDITIONAL ANALYSIS

Culpability
Not Found
343.05 Rule 5-320(D) [former 7-106(D)]

OPINION

PEARLMAN, P.J.:

This case is one of first impression involving an alleged improper posttrial communication to jurors in violation of former rule 7-106(D) of the Rules of Professional Conduct.[1] The referee originally recommended (by decision filed June 28, 1988) that the case be dismissed for lack of proof of culpable intent of the respondent,[2] holding that neither the communication (a letter), on its face, nor credible testimony established an "intent to harass or embarrass the jurors or influence their action in future jury service." The examiner sought review because the referee had excluded evidence of jurors' reactions to the letter, which the examiner contended were relevant to determining respondent's snbjective intent. Respondent's counsel countered with arguments addressing the constitutionality of inhibiting respondent's free speech under the First Amendment.

The prior, volunteer review department, by a seven-to-five vote, reversed the recommendation of dismissal and, upon de novo review, held that the letter on its face violated former rule 7-106(D) without resorting to subjective intent.[3] It remanded the matter for hearing and findings on evidence in mitigation and aggravation and for recommendation as to the appropriate discipline. The dissent would have adopted the referee's recommendation of dismissal "based on deference to the referee who saw and heard the witnesses below and resolved questions of testimonial credibility in Respondent's favor." (Review department decision filed April 18, 1989.)

On remand, the referee heard additional evidence and recommended a private reproval. The examiner sought review. We have conducted our own de novo review of the record, including determination of the central issue of whether subjective intent is relevant to culpability under former rule 7-106(D).[4] We hold that it is and therefore, based on the detailed findings of the referee, we adopt the referee's original recommendation of dismissal.

BACKGROUND

The two decisions of the retired judge who served as referee in this matter contain detailed findings concerning the circumstances of the incident in question. Respondent was found to be a diligent practitioner with an unblemished reputation and no prior record of discipline. He was admitted to the bar in 1979 at age 30 after working his way through college and law school. He had tried 38 criminal and civil cases prior to the case in question and had not been motivated to write to the jury on any prior occasion. In the civil jury trial that led to this proceeding, he had sought damages for permanent disability of the 18-year-old son of a family friend and, upon losing the trial, felt compelled to

1. Former rule 7-106(D) provided, "After discharge of the jury from further consideration of a case with which the member of the State Bar was connected, the member of the State Bar shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service." All references to rule 7-106(D) herein are to former rule 7-106(D) in effect through May 26, 1989. Current rule 5-320(D) recodifies rule 7-106(D) with minor modifications not pertinent to the issues raised in this case.

2. The recommended discipline in the decision under review was a private reproval. Had we adopted this recommendation, the respondent would have been entitled to have his name excluded from the publicized summary of the case. Since we conclude the matter should be dismissed, we have accommodated the respondent's request not to identify him by name in our opinion.

3. Among other things, the review department amended findings of fact numbers 7 and 8 of the hearing referee's decision, holding that: "On its face, the letter discloses that the writer, in sending the letter, intended to harass or embarrass the jurors . . . . The sole purpose [of the letter] was to make the nine recipients who voted against the Respondent's client feel bad." The majority concluded: "1. The facts in evidence, including the circumstances as to Respondent's conduct in writing his letter to the jurors indicate that his letter could only have been written for the purpose of embarrassing those jurors who voted against his client. 2. Respondent wilfully violated rule 7-106(D) . . . ."

4. We have reviewed the entire record, and accordingly, have relied freely on evidence introduced and findings made at the second hearing as well as at the first, on all questions including the key issue of respondent's subjective intent. In citing to the findings below, we refer to the referee's first decision as "Decision 1" and the referee's second decision as "Decision 2".

communicate to the dismissed jury by way of the disputed letter.

The trial judge had given the jurors the customary admonishment during the trial not to discuss the case with anyone and had further instructed them after their verdict was received that they were no longer under an admonishment and were free to discuss the case with anyone including the attorneys. (Decision 1, p. 4.) The foreman of the jury had voted in favor of respondent's client and spoke with respondent after the trial regarding his concerns about the deliberations and serious misconceptions that he thought some of the jurors had about some of the matters referred to at trial. (Decision 1, p. 4.)[5]

After this conversation and after discussing the matter with his wife and secretary, respondent felt it would be appropriate to write the jury a letter to provide the jurors with additional information.[6] The entire text of the letter (omitting only proper names) was as follows: "Dear Juror: [¶] "I am writing to inform each juror of several things not presented at trial. I normally would let things rest after a jury decision, but not this time.

"1. No workers' compensation insurance coverage is available for [the plaintiff] for this accident. The 'Contractor' was *uninsured* and *unlicensed*.

"2. Under California law an 'Employer' . . . must assure the safety of all workers where a peculiar risk or special risk of harm exists.

"3. I compliment the three jurors [naming those who voted in favor of the plaintiff] in their decision making process.

"4. The $11.50 you received daily was paid by my office and one-third of the cost of your lunch on Friday, June 20, 1986.

"5. An offer to settle was made before trial for the complete sum of $50,000 from which Medi-Cal would be paid $25,437, etc. The offer would result in [the plaintiff] receiving $15,000 for all his injuries and future problems. This decision would be wholly inadequate.

"Best to you all in the future." (Exh. 1, emphasis in original.)

Respondent testified that his motive in writing the letter was to communicate and inform, not to harass or embarrass the jurors. (6/3/88 R.T. pp. 171-172.) He further testified that his purpose in informing the jury that he had received a very low settlement offer was to give good justification for taking up five days of their time to try the case, which ultimately resulted in a defense verdict. (6/2/88 R.T. p. 108.) Jurors in other cases had often asked him that question after the trial was over. He further testified, "in hindsight I wish I had never sent this letter. It was a bad idea and I'll never do it again, scout's honor." (6/2/88 R.T. p. 112.) One of his other reasons for writing the letter was that Proposition 51 was the subject of active campaigning at the time and he perceived some of the advertisements as slanderous towards trial lawyers, characterizing them as being greedy and overreaching and never wanting to help. (6/2/88 R.T. p. 33.) He wanted to communicate to the jurors and let them know he had a lot of good intentions behind doing this trial. (6/2/88 R.T. pp. 33-34.)

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5. The parties stipulated that the foreman would testify that he initiated conversations with respondent after the trial and that he was disturbed about the jury's decision-making process. He felt they did not apply the law and that a juror had decided over the weekend to vote for the defendant without indicating why. It was also stipulated that he would testify that respondent expressed disappointment at the result of the trial, but expressed no bitterness or other negative feelings towards the jurors who voted against him. (6/2/88 R.T. p. 144.)

6. The parties stipulated that respondent's wife would testify that he spoke with her about the letter and his intention to inform the jurors of the effects of this accident and of the case upon his client and that he expressed no anger or resentment about the jurors or the verdict. (6/2/88 R.T. pp. 148-149.) They further stipulated that a freelance secretary who worked for respondent in the evenings would testify: "That he had lost cases before the [instant] case and there was no difference in his manner or attitude after he had lost this case from other cases that he had lost"; that he had asked her opinion of the letter and she had told him that she thought it was informative; and that "she knows that his attitude towards the law is very meticulous, that he follows it by the book and has a deeply committed sense to serve the interest of justice and practices law in that manner." (6/2/88 R.T. pp. 149-150.)

Respondent did not consider that it might be better not to send the letter at all. He testified that he drafted the letter very carefully in order not to make any offensive comments to the jurors about what they had done. (6/2/88 R.T. pp. 49-50.) The referee considered the letter "a one-time act done out of excessive professional zeal, and by a lawyer who became too emotionally involved in his client's case." (Decision 1, p. 6.) Nevertheless, he found that in sending the letter the respondent did not have any culpable intent to humiliate or embarrass the jurors or to influence their actions in future jury service. He concluded that it was an act of indiscretion, but not a disciplinable offense. (Decision 1, pp. 6-7.)

The issue was tried as one involving the question of respondent's subjective intent.[7] In ascertaining respondent's subjective intent, the referee rejected as irrelevant an offer of testimony of some of the trial jurors as to their individual responses or reactions to respondent's letter, noting that "it is well-established that such subjective intent may only be shown by testimony of statements of the accused, any inferences that may reasonably be drawn from statements made by him, or from his conduct and the surrounding circumstances at the time." (Decision 1, p. 6). On review of that decision, the majority of the review department deleted findings 9 and 10 of the referee's decision (which found lack of subjective intent) and found that on its face the letter violated the rule (without taking into account the jurors' testimony as to their reactions and irrespective of testimony relating to respondent's actual subjective intent). On remand, the referee heard or accepted written testimony of several jurors who reacted adversely to the letter and several witnesses presented by respondent in mitigation, including three witnesses who were consulted before he sent the letter (the foreman of the jury, his wife and secretary) and character witnesses. Considering himself bound by our predecessor review department's prior determination of culpability, the referee recommended a private reproval, from which the examiner sought review.

DISCUSSION

1. The Appropriate Standard on Review.

[1a] Respondent cites two cases on the proper standard of review. (*Le Strange* v. *City of Berkeley* (1962) 210 Cal.App.2d 313 and *Huang* v. *Board of Directors* (1990) 220 Cal.App.3d 1286.) Both cases applied the substantial evidence test in the context of a review of an administrative decision by writ of mandate. They did not involve independent de novo review on the record. However, *Le Strange* does stand for the proposition that due process requires that "the person or body who decides the case must know, consider and appraise the evidence. [Citations.] The requirements of due process are satisfied, however, if a board member [with quasi-judicial powers] who participates in a decision has read and considered the evidence, or a transcript thereof, even though he was not physically present when the evidence was produced. [Citations.]" (*Le Strange*, *supra*, 210 Cal.App.2d at p. 325.)[8] **[1b, 2 - see fn. 8]**

Respondent argues that this requirement was violated because not all of the members of the former review department read the record before voting to alter the findings. Respondent further argues that the former review department applied the wrong standard of review. **[1c]** We need not address these contentions; both arguments are mooted by the de novo review conducted by this review department.

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7. Unlike the majority of the former review department, the examiner was not of the opinion that the letter itself demonstrated a violation of the rule. At the original hearing she stated: "the letter . . . cannot stand by itself . . . . [B]y precluding [the jurors] from testifying to their reactions, we are also basically dismissing the case . . . ." (6/2/88 R.T. p. 81.) She acknowledged that the presence of specific intent appeared to be a necessary element to be proved. (6/3/88 R.T. p. 156.)

8. **[1b]** As the Court of Appeal noted in *Le Strange*, where the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion (by the lower tribunal) is established if the court determines that the findings are not supported by the weight of the evidence. Where, as in *Le Strange* and *Huang*, the court is *not* authorized to exercise its independent judgment, then it must determine whether the findings are supported by "substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).) **[2]** State Bar proceedings are sui generis, and are not governed by the principles of administrative mandamus applicable to ordinary administrative proceedings. (See *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300-302.)

2. Law of the Case.

[3a] The examiner argues that this review department is precluded by the law of the case doctrine from reconsidering the decision of the former review department. We reject this argument. The doctrine of law of the case has no applicability to trial level decisions in courts of record. The lack of finality of State Bar Court recommendations to the Supreme Court would suggest that the doctrine is inapplicable to the former review department's original minute order.

[3b] While the current posture of the case is a request for review of a recommendation of private reproval, the entire matter is before us for independent de novo review. Since upon de novo consideration of the record following the second hearing, the former review department would not have been bound to follow its own factual determinations on the first review, we are likewise free to evaluate the record below and satisfy ourselves whether, considering the record as a whole, the referee's findings are supported by the weight of the evidence. [4a] In so doing, we are bound to give great deference to the referee's evaluation of the credibility of the witnesses. (See, e.g., *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055.)

[3c] We also must be free to reconsider the legal determination made by the former review department regarding the proper interpretation of former rule 7-106(D). The examiner herself notes the flexibility of the law of the case doctrine in the California appellate courts. (*Searle* v. *Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434.) This review department would clearly not fulfill its functions if it abdicated responsibility for the interpretation of rule 7-106(D) based on "law of the case."

The issue here is one of first impression in a published court opinion as to the interpretation of the elements necessary to prove culpability of a rule 7-106(D) violation in light of a challenge based on the constitutional right to free speech. On this record, we can recommend discipline only if we conclude, as did the former review department: That rule 7-106(D) is violated merely by a showing that the communication was intentionally sent by the respondent; that the letter is on its face violative of the rule; and that the rule, as so interpreted, is constitutional. If, on the other hand, we interpret the rule as requiring proof of subjective intent, manifest injustice will occur if we do not reinstate the referee's original recommendation that the matter be dismissed. The former review department's findings clearly are not sufficient to support culpability in the face of the referee's contrary finding, based on testimonial evidence, that the respondent did not in fact act with culpable intent. [4b] A strong presumption must be accorded the referee's findings of fact evaluating the credibility of witnesses. (*Connor* v. *State Bar*, *supra*, 50 Cal.3d at p. 1055; *Young* v. *State Bar* (1990) 50 Cal.3d 1204, 1216; *Garlow* v. *State Bar* (1982) 30 Cal.3d 912, 916.)

3. Interpretation of Rule 7-106(D).

The text of rule 7-106(D) is set forth in footnote 1, *ante*. In proposing an amendment to that rule (which was not adopted), having the identical intent requirement as the current rule, the State Bar defended its wording of the rule to the Supreme Court in a brief, explaining that the requirement of "intent of harassing or embarrassing" meant: "In order to show professional misconduct, the State Bar will have the burden of showing that the accused attorney has the requisite intent. The proposed rule was not intended to catch within its sweep innocent communications which, although intended by the attorney to be courteous, somehow harass or embarrass the discharged juror." (Brief of the State Bar of California in Response to Request of the Court, In the Matter of the Proposed Amendments to Rule 7-106, Subdivision (D), Rules of Professional Conduct (Sup. Ct. No. Bar Misc. 4206 (March 26, 1980)), p. 54, quoted in respondent's brief at pp. 15-16.)

[5a] Unlike former rule 7-106(D), former rules 7-106(A) through 7-106(C) strictly prohibit communications with members of a jury panel prior to or during the course of a trial. Former rule 7-106(E) and current rule 5-320(E) are also couched differently to proscribe the conduct of an out-of-court investigation of a juror or venireman "of a type likely to influence the state of mind of such venireman or juror in present or future jury service." The difference in wording of the various subsections of the rule clearly

reflects a difference in the intent of the drafters as to the elements of each offense. "[W]hen different language is used in the same connection in different parts of a statute. . . . it is to be presumed the Legislature intended a *different* meaning and effect. [Citations.]" (*Life* v. *County of Los Angeles* (1990) 218 Cal.App.3d 1287, 1296, emphasis in original, citing *Charles S.* v. *Board of Education* (1971) 20 Cal.App.3d 83, 95 and *In re Connie M.* (1986) 176 Cal.App.3d 1225, 1240. See also 58 Cal.Jur.3d (rev.) Statutes, § 127, p. 521 and cases cited in fn. 91.) Accordingly, it would appear that in order to establish a violation of rule 7-106(D), the State Bar must prove by clear and convincing evidence that the respondent subjectively had the specific intent to harass or embarrass one or more jurors or to influence the juror's actions in future jury service.

In contrast, the former review department apparently interpreted rule 7-106(D) as if it were worded identically to rule 7-106(E), i.e., finding culpability based on the "type" of communication and not based on the intent of the member in making the communication. **[6a]** In her argument to the former review department, the examiner relied on a case which aptly summarizes the distinction between the proof necessary to establish a rule violation where the only intent necessary is the intent to do the act (in this case, to send the letter) and the proof necessary to establish culpability of a disciplinary offense which requires proof of specific (i.e. subjective) intent. (*Zitny* v. *State Bar* (1966) 64 Cal.2d 787.) In *Zitny*, the member was charged with violation of former rule 9 (commingling) and separately charged with committing acts of moral turpitude and dishonesty, in violation of Business and Professions Code sections 6067, 6068, subdivisions (a), (c), (d), and 6106, by soliciting bribes to obtain zoning changes. The Board of Governors, by a vote of 13 to 2, had recommended disbarment based on findings of fact approving the local committee's determination of culpability of two counts of soliciting bribes and one count of commingling. The charged solicitation of bribes had also been the subject of a criminal proceeding in which the respondent had been acquitted by a jury.

[6b] The Supreme Court adopted the rule 9 determination, holding that to prove a "wilful" breach of the Rules of Professional Conduct, it was only necessary to prove that "the person charged acted or omitted to act purposely, that is, that he . . . intended . . . to commit the act . . . ." (*Zitny* v. *State Bar*, *supra*, 64 Cal.2d at p. 792.) With respect to the solicitation charges, however, the court assumed that in order to prove solicitation of bribery, it is necessary to establish the subjective intent of the accused.[9] Most of the facts were sharply in dispute and the Supreme Court concluded that the undisputed facts were as consistent with Zitny's claimed innocence as his guilt and there was no "persuasive evidence of consciousness of guilt." (*Id.* at p. 800.) The Supreme Court went on to conclude: "We are unable to determine from our own evaluation of the record that any of the inconsistent testimony is incredible on its face or that the jury's determination is entitled to less weight than that of the local committee. Since we must resolve all reasonable doubts in favor of the accused, we conclude in the light of all the circumstances that the charges of soliciting bribes have not been 'sustained by convincing proof and to a reasonable certainty.' [Citation.]" (*Ibid.*) As a result, the Supreme Court merely issued a public reprimand for wilful violation of rule 9.

An even greater evidentiary problem exists here. Even if we agree that the letter on its face appears likely to embarrass or harass, we have a referee's finding, based on uncontroverted testimonial evidence, that respondent had no such intent. **[4c]** We cannot on this record find the testimony inherently incredible, but are bound to give great deference to the determination of the referee who heard and observed the witnesses. (*Connor* v. *State Bar*, *supra*, 50 Cal.3d at p. 1055; *Young* v. *State Bar*, *supra*, 50 Cal.3d at p. 1216.)

4. The First Amendment Issue.

The First Amendment issues framed by respondent are twofold: (1) whether the rule is facially overbroad, or (2) whether the rule is overbroad as

9. For a discussion of the difference between crimes of general and specific intent see *People* v. *Hood* (1969) 1 Cal.3d 444, 456-458; *People* v. *Hopkins* (1983) 149 Cal.App.3d 36, 41.

applied. Two cases cited by respondent deal with the constitutionality of gag rules restricting communications by lawyers with the press during trial. (*Hirschkop* v. *Snead* (4th Cir. 1979) 594 F.2d 356; *Chicago Council of Lawyers* v. *Bauer* (7th Cir. 1975) 522 F.2d 242.) [7] Both the *Hirschkop* and *Bauer* decisions note that there are marked differences between civil and criminal trials and the corresponding need to restrict free speech in order to assure fairness. In *Hirschkop*, the court upheld the constitutionality of restrictions on lawyers' free speech in criminal cases, but found the parallel civil rule unconstitutionally overbroad, noting "[t]he dearth of evidence that lawyers' comments taint civil trials." (*Hirschkop* v. *Snead, supra*, 594 F.2d at p. 373.) In *Bauer*, the court likewise struck as unconstitutional the restrictions on free speech in the rules for civil trials, including public comment during the trial indicating "'an opinion as to the merits of the claims or defenses of a party'" and a "catchall provision proscribing public comment on '[a]ny other matter reasonably likely to interfere with a fair trial of the action,'" observing that "Its chilling effect is obvious." (*Chicago Council of Lawyers* v. *Bauer, supra*, 522 F.2d at 259.)

In *Ramirez* v. *State Bar* (1980) 28 Cal.3d 402, the California Supreme Court, by a four-to-three vote, rejected the argument that an attorney's First Amendment rights precluded discipline for defamatory statements against three state Court of Appeal justices. (*Id.* at p. 411.) The defamatory statements were contained in a brief filed in the United States Court of Appeals for the Ninth Circuit and a subsequent petition for certiorari to the United States Supreme Court. The California Supreme Court imposed a one-year stayed suspension, one year probation and thirty days actual suspension against the attorney for violation of Business and Professions Code sections 6067 and 6068, subdivisions (b), (d) and (f), on the grounds that he falsely maligned the appellate justices in the course of his zealous representation of his clients. [8] The attorney's First Amendment argument was rejected by the Court on the basis that "'false statement[s] made with reckless disregard of the truth, do not enjoy constitutional protection.'" (*Id.* at p. 411, quoting *Garrison* v. *Louisiana* (1964) 379 U.S. 64, 75.) In rejecting the First Amendment argument in *Ramirez*, the Court also relied on its prior assertion of jurisdiction to discipline member attorneys for defamatory or disrespectful statements contained in pleadings or other court papers. (*Id.* at pp. 411-413, citing *Hogan* v. *State Bar* (1951) 36 Cal.2d 807, 810; *Peters* v. *State Bar* (1933) 219 Cal. 218; *In re Philbrook* (1895) 105 Cal. 471, 477-478.) All of these cases involved statements which were determined to have had no basis in fact and to have been made with "conscious disregard of their . . . falsity," or with "'intent to be maliciously contemptuous.'" (*Ramirez, supra*, 28 Cal.3d at p. 413, quoting *In re Philbrook, supra*, 105 Cal. at p. 478; *Peters* v. *State Bar, supra*, 219 Cal. at p. 223; see also *Hogan* v. *State Bar, supra*, 36 Cal.2d at p. 808.)

If we were to uphold the determination of culpability under rule 7-106(D) we would be squarely faced with the constitutional question. [9] However, as a rule, constitutional questions will not be reached if a decision can rest on a different ground. (*In re Snyder* (1985) 472 U.S. 634, 642-643.) In the *Snyder* case, an attorney had been ordered suspended from all courts of the Eighth Circuit for six months for refusal to show continuing respect for the court. The suspension was predicated on his refusal to apologize for a letter that he sent to a District Court judge criticizing the court's handling of attorney's fee payments for indigent appointments under the Criminal Justice Act. The Eighth Circuit characterized his statements as "'disrespectful'" and "'contumacious conduct'" disciplinable under Federal Rule of Appellate Procedure 46. (*Id.* at p. 641, quoting *Matter of Snyder* (8th Cir. 1984) 734 F.2d 334, 337.) The United States Supreme Court, in a unanimous decision (Justice Blackmun not participating), found it unnecessary to reach the constitutional issues raised by the petitioner under the First and Fifth Amendments, finding that petitioner's conduct and expressions did not warrant his suspension from

practice. (*In re Snyder*, *supra*, 472 U.S. at p. 647.)[10] **[5b]** Likewise, here, since we conclude that the drafters of rule 7-106(D) intended to require proof of subjective intent and respondent had no such intent, we need not reach the constitutional issue posed by respondent.

5. Relevant Case Law.

There are apparently no disciplinary cases construing rule 7-106(D). The parties were requested to address the potential applicability of the holdings in two published disciplinary decisions construing American Bar Association ("ABA") model rule DR 7-108(D) regarding post-trial communication with jurors: *State of Kansas* v. *Socolofsky* (1983) 233 Kan. 1020, 666 P.2d 725, and *In re Berning* (Ind. 1984) 468 N.E.2d 843.[11] **[10 - see fn. 11]** Both of these cases found violations of rules based on the ABA Model Code, DR 7-108(D). We are persuaded that both of these cases are factually distinguishable from the present case.

Both *Socolofsky* and *Berning* involved prosecutors in criminal cases who were found to have improperly attempted to influence jurors in trying criminal proceedings. In *Socolofsky*, the jury was called to serve for a five-month term and six or seven of the jurors were on a panel in another criminal case just two days after receiving an improper anonymous letter making the jurors aware that the man they had just acquitted had since pled guilty in an unrelated drug case. In *Berning*, the threatened impact on jurors was not as immediate, but it was much more pointed. The prosecutor specifically told the jurors that "'the State had the absolute best possible case it could ever have. . . . the message that I get from your decision as a juror is that I, as the prosecutor in this county, should not file domestic-type crimes at all.'" In other words, if the jurors served on another domestic crime case they were being preconditioned in advance to convict in order to preserve battered wives' access to the criminal justice system.

In short, in both *Socolofsky* and *Berning* the violation was predicated on a demonstrable intent by the prosecutor to influence the jurors' decisions in favor of the state in future criminal cases. In contrast, no attempt to influence the outcome of future jury service was asserted or evident here.

The recent case of *Lind* v. *Medevac, Inc.* (1990) 219 Cal.App.3d 516, cited by the examiner, appears to be the only California case that refers to former

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10. As the Supreme Court explained: "The letter was addressed to a court employee charged with administrative responsibilities, and concerned a practical matter in the administration of the [Criminal Justice] Act. The Court of Appeals acknowledged that petitioner brought to light concerns about the administration of the plan that had 'merit,' [citation], and the court instituted a study of the administration of the Criminal Justice Act as a result of petitioner's complaint. Officers of the court may appropriately express criticism on such matters. [¶] The record indicates the Court of Appeals was concerned about the tone of the letter; petitioner concedes that the tone of his letter was 'harsh,' and, indeed it can be read as ill-mannered. All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is 'not presently fit to practice law in the federal courts.' Nor does it rise to the level of 'conduct unbecoming a member of the bar' warranting suspension from practice." (*Id.* at pp. 646-647.) On remand, the Eighth Circuit vacated the suspension. (*Matter of Snyder* (8th Cir. 1985) 770 F.2d 743, 744.)

11. [10] The wording of California rule 7-106(D) differs significantly from the parallel rule included in the Model Code adopted by the ABA in 1969 which has been adopted in a majority of the states. ABA Model Code of Professional Responsibility, DR 7-108(D) provides: "After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury *that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.*" (Emphasis supplied.) In 1983, the ABA replaced the entire Model Code with the Model Rules of Professional Conduct. ABA Model Rules of Professional Conduct, rule 4.4 now provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ." The unofficial Model Code Comparison indicates that rule 4.4 of the Model Rules was intended to supplant DR 7-108(D) of the Model Code. This change has not been adopted by most states.

rule 7-106(D). It addressed the applicability of former rules 7-106(D) and 7-106(E) to a somewhat different issue than the one before us now. There, the precise issue was not whether there should be professional discipline,[12] but whether sanctions could be imposed by the court for bad faith actions or frivolous tactics as a result of a letter which warned the recently discharged jurors of potential "'sharp investigation tactics'" that might be used by plaintiffs' counsel to impeach the jury verdict. (*Id.* at p. 521, quoting letter sent by counsel.) The entire discussion by the court focused on the effect of such a letter on the jury's present jury service and, more importantly, on the evident intent of the letter's author to interfere with the right of the plaintiff to seek to impeach the jury verdict in an effort to obtain a new trial. The court held that "the true purpose of the letter was to achieve the chilling result of preventing attempts by the losing side to communicate with jurors after their discharge, in a legitimate effort to determine if juror misconduct existed as grounds for a new trial, and to obtain permitted affidavits concerning any such misconduct." (*Ibid.*)

[11a] Rather than protecting jurors from posttrial contact, *Lind* reaffirms the proposition that an attorney who loses a jury trial has the right to contact jurors after the trial and develop facts by way of juror affidavits to impeach their own verdict. "They are the obvious, and usually the only, source of available sworn testimony by affidavit, which the law requires as a basis for new trial on the ground of juror misconduct." (*Id.* at p. 520.) *Lind* also states that an attorney wishing to protect a verdict he won likewise "should not be barred from writing jurors post verdict, thereby requesting that he be notified of any posttrial contact with the jurors by the adverse side; and that he be further allowed either to be present for any interviews granted the adverse side, or to discuss with the juror any telephonic or written communications received from the adverse side." (*Id.* at p. 522.)

The *Lind* court approved the proper conduct of posttrial investigations into whether any jurors engaged in misconduct even though jurors presumably would be very indignant at being asked to prove up their own alleged misconduct. It appears to be the unstated premise of the *Lind* decision that the performance of the jurors' civic responsibility includes the potential of posttrial adversarial contact by the attorneys so long as there is no bad faith purpose in the contact which violates the Rules of Professional Conduct.

Here, respondent's communication with the jurors was not an exercise of his right to investigate for the purpose of impeaching the jury verdict. Nor was there any finding that the respondent intended to affect the jury in its present or future service. **[5c]** The sole question was whether respondent intended to harass or embarrass the jurors by sending the letter. The hearing referee found, upon assessing the credibility of the respondent and other witnesses, that respondent did not have such intent. Since we interpret former rule 7-106(D) to require clear and convincing proof of specific intent and the referee was in the best position to evaluate the credibility of the witnesses, we defer to his resolution of their testimony and find no violation of rule 7-106(D).

CONCLUSION

By adopting the referee's recommendation of dismissal, we, like the referee, by no means condone the conduct of respondent. Some of the jurors were seriously offended by his letter despite his lack of intent to produce such result. Jurors are very important to our system of government in both criminal and civil cases and ought to be treated with respect. **[11b]** Attorneys have a right to communicate with jurors after the trial, but should strive to avoid unnecessarily causing the jurors to develop ill feelings regarding their jury service.

As observed in *Lind*, "It is common knowledge that it is increasingly difficult to obtain willing citizens to serve as members of a jury. Letters such as the one sent by appellants in the present case... will only exacerbate the reluctance of some persons to undertake jury service...." (*Lind* v. *Medevac Inc.*, *supra*,

12. The Court of Appeal in the *Lind* case left it up to the trial judge whether to refer the matter to the State Bar discipline system. (*Lind* v. *Medevac, Inc.*, *supra*, 219 Cal.App.3d 516, 523.)

219 Cal.App.3d at p. 521.) The same could be said here. Such a result would be unfortunate. Respondent himself recognizes in hindsight that it was a mistake to send the jury the letter at issue here and has vowed not to act similarly if disappointed in a future jury verdict.

[5d] For the reasons stated above, upon our independent review of the record, including the record on remand, we find no violation of rule 7-106(D) of the Rules of Professional Conduct and therefore adopt the referee's recommendation of dismissal of this proceeding.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WILLIAM REAMY KENNON

A Member of the State Bar

[No. 86-O-15958]

Filed December 7, 1990

SUMMARY

Respondent failed to complete work for a client and retained unearned fees of $2,000. He failed to communicate with and thereafter abandoned a second client. Other charges were dismissed based on the hearing department's credibility findings. The hearing referee recommended a public reproval with conditions. (Elliot R. Smith, Hearing Referee.)

The review department concluded that the record supported the conclusions of culpability, with minor modifications, but that the recommended discipline was insufficient. After considering several Supreme Court decisions involving failure to perform services by attorneys without prior records of discipline, the review department concluded that respondent's misconduct merited a two-year suspension, stayed, a two-year probation period, 30 days actual suspension, and a law office management condition.

COUNSEL FOR PARTIES

For Office of Trials: James R. DiFrank

For Respondent: David A. Clare

HEADNOTES

[1] **166 Independent Review of Record**
Although the review department conducts independent review, it accords great weight to factual findings of the hearing department which turn on evaluations of credibility.

[2 a, b] **148 Evidence—Witness**
166 Independent Review of Record
Because the hearing department is in the best position to view witnesses and evaluate their truthfulness, the review department is reluctant to deviate from the hearing department's credibility findings. Reevaluation of witness credibility is limited by the nature of the review process, due to the effect of witness demeanor on credibility findings.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **148 Evidence—Witnesses**
165 Adequacy of Hearing Decision
The hearing department may properly give greater credence to a witness's testimony on some issues than on others.

[4 a, b] **142 Evidence—Hearsay**
Where there was no evidence in the record that respondent had knowledge of the contents of a letter from his client, respondent's failure to answer the letter did not constitute an adoptive admission.

[5] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Preliminary consultations with client created attorney-client relationship, but attorney was not culpable of misconduct for failure to proceed to file suit in absence of clear and convincing evidence that he had agreed to do so.

[6] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Where client denied seeing drafts or final copy of trust agreement which contained largely "boiler-plate" language and little if any unique or specially tailored provisions, record supported conclusion that respondent did not earn advanced fees for formation of family trust.

[7] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Attorney's failure to discuss case with client after assuring her that he would investigate it upon receiving a copy of complaint from her, and his inaction and eventual abandonment of her case, warranted finding of culpability of misconduct even though attorney had obtained extensions of time to answer in effort to protect client's rights.

[8] **162.11 Proof—State Bar's Burden—Clear and Convincing**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Client's issuance of check to attorney marked "for filing fees" was insufficient evidence to show clearly and convincingly that attorney was obligated to file suit on behalf of client.

[9] **162.11 Proof—State Bar's Burden—Clear and Convincing**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
280.50 Rule 4-100(B)(4)]
420.00 Misappropriation
Where hearing department found unpersuasive client's testimony that he did not consent to respondent's application of client trust funds to respondent's outstanding legal fees, State Bar did not demonstrate trust account irregularities or misappropriation by clear and convincing evidence.

[10] **220.10 State Bar Act—Section 6103, clause 2**
Section 6103 is not a charging provision, but rather provides that violation of a duty defined elsewhere is grounds for discipline.

[11] **214.30 State Bar Act—Section 6068(m)**
Attorney's failure to communicate with client prior to effective date of section 6068(m) did not violate that statute.

[12] **760.32 Mitigation—Personal/Financial Problems—Found but Discounted**
Failure of respondent's estranged wife, who worked as his secretary, to deliver telephone messages did not excuse respondent's abandonment of clients.

[13] **725.32 Mitigation—Disability/Illness—Found but Discounted**
725.33 Mitigation—Disability/Illness—Found but Discounted
760.32 Mitigation—Personal/Financial Problems—Found but Discounted
760.33 Mitigation—Personal/Financial Problems—Found but Discounted
Without evidence that death of respondent's parent resulted in disabling psychological distress, record did not show that attorney's failure to prepare trust documents was affected thereby.

[14] **521 Aggravation—Multiple Acts—Found**
535.10 Aggravation—Pattern—Declined to Find
Attorney's abandonment of two clients comprised multiple acts of wrongdoing but did not constitute a pattern of misconduct.

[15 a, b] **1091 Substantive Issues re Discipline—Proportionality**
1093 Substantive Issues re Discipline—Inadequacy
Recent Supreme Court precedent indicated that attorney with no prior discipline record who abandoned two clients within three years and improperly retained unearned advance fees should receive sanction greater than public reproval; two years stayed suspension, two years probation, and 30 days actual suspension were recommended.

[16] **172.11 Discipline—Probation Monitor—Appointed**
174 Discipline—Office Management/Trust Account Auditing
Chaotic state of respondent's records and business practices, and lack of written fee agreements and client correspondence, warranted imposition of requirement to submit law office management plan and of State Bar supervision in order to protect the public and prevent any future misconduct.

[17] **171 Discipline—Restitution**
Requirement that respondent return unearned fees to client was consistent with finding that respondent did little if any of the work he agreed to perform for client.

ADDITIONAL ANALYSIS

Culpability

Found

214.31 Section 6068(m)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]

Not Found

213.15 Section 6068(a)
214.35 Section 6068(m)
220.15 Section 6103, clause 2
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.05 Rule 4-100(A) [former 8-101(A)]

280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.54 Misappropriation—Not Proven

Aggravation

Found

582.10 Harm to Client
611 Lack of Candor—Bar

Mitigation

Found

710.10 No Prior Record

Standards

822.51 Misappropriation—Declined to Apply

Discipline

1013.08 Stayed Suspension—2 Years
1015.01 Actual Suspension—1 Month
1017.08 Probation—2 Years

Probation Conditions

1021 Restitution
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management

OPINION

STOVITZ, J.:

A hearing referee of the State Bar Court has recommended that respondent William Reamy Kennon be disciplined by a public reproval with conditions, including restitution to one client, passage of the Professional Responsibility Examination, and submission of a law office management plan. The referee found that respondent failed to complete work on creating a family trust and incorporating a Nevada business, and retained $2,000 in unearned fees advanced by a client, in violation of Business and Professions Code sections 6068 (a), 6068 (m), and 6103,[1] and former rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) of the Rules of Professional Conduct of the State Bar.[2] Respondent was also found to have failed to inform a second client that he would not file an answer in defense of a promissory note dispute, nor did he protect her rights when he withdrew from her case, contrary to sections 6068 (a), 6068 (m) and 6103 and rule 2-111(A)(2). The referee dismissed charges in two matters that alleged that respondent failed to file a lawsuit on behalf of each respective client and improperly withdrew from representation to the prejudice of the clients.

Before us are requests for review from both respondent and the examiner, representing the State Bar's Office of Trial Counsel. The examiner seeks review of the dismissal of the two charges and recommends imposition of additional discipline of a three-year suspension, stayed, and a three-year period of probation, including a one-year actual suspension. Respondent challenges the findings of culpability and requests dismissal of all charges. Alternatively, respondent argues that a public reproval with conditions is too harsh for the misconduct found.

We conclude that the record supports the basic findings of fact and, except for some minor amendments, also supports the conclusions of culpability of the hearing referee. We also conclude that a public reproval is insufficient discipline for the misconduct found in this case and will recommend that the respondent be suspended for two years, stayed on conditions including a thirty-day actual suspension.

FACTS

Respondent was admitted to practice law in California on December 20, 1973. He has no prior record of discipline. A two-count notice to show cause charged the respondent with misconduct in four matters concerning two sets of clients. With a few minor changes we shall detail below, we adopt the referee's factual findings noted under the headings "Count One" and "Count Two" at pages two through six and seven through eleven of the decision, respectively. To reflect chronological order, we outline the facts in reverse from the counts in the notice.

A. Ida Vida Matters (Count 2)

1. Garden Grove Lawsuit.

Respondent was involved in two matters concerning Mrs. Ida Vida. The first arose in the spring of 1984, when Mrs. Vida and her son, Michael Vida, met with the respondent regarding a possible lawsuit against the City of Garden Grove seeking civil damages to compensate for harm to Ida Vida's business, the Roundup Saloon, allegedly resulting from harassment and improper closures of the bar by the city.[3] Respondent agreed to represent the Vidas for a $3,500 retainer against services performed. On May 25, 1984, respondent filed a claim against Garden Grove on behalf of the Vidas which was rejected on

1. Unless otherwise stated, references to sections are to the sections of the Business and Professions Code.

2. References to the Rules of Professional Conduct herein are to the rules effective from January 1, 1975, through May 26, 1989.

3. There was a dispute in the testimony as to when the meeting took place. Respondent testified to an initial meeting with Michael Vida and others on January 26, 1983, to discuss the lawsuit against the City of Garden Grove, during which he advised that a $3,500 retainer would be necessary to undertake the litigation. (1 R.T. pp. 50, 94-96.) He insisted that the only time he met Ida Vida was on May 3, 1984, when he showed her the claim he later filed with the city (exh. 5) and received $1,000 in travelers checks from her. (1 R.T. pp.96-97, 100; exh. 4.) A receipt issued to Michael Vida for $1,000 in fees to the respondent dated March 20, 1984 (exh. 3) contains the statement "partial retainer on account—$1,000 due 4/19/84—$1,500 due 5/19/84." Ida Vida contended that she met with the respondent on March 20th and May 3d and paid him $1,000 on each occasion. (2 R.T. pp. 255-258.) Michael Vida could not remember his first meeting with respondent but indicated he saw respondent five to ten times after their initial meeting. (2 R.T. pp. 291-292.)

July 9, 1984, by letter from the Garden Grove city clerk dated July 13, 1984. (Exh. 6.) By that time Ida Vida had returned to her home in Michigan and her son, with her power of attorney, continued as her agent. (2 R.T. pp. 265-266.) Respondent testified that after the claim was rejected, he conducted additional investigation and concluded that the lawsuit would be difficult and time-consuming to litigate; the chances of success were slim; and the financial resources of, and ultimate rewards to, the Vidas were insufficient to make the litigation worthwhile. (1 R.T. pp. 117-120.) He maintained that he advised Michael Vida of his conclusions in late December 1984, just prior to the expiration of the statute of limitations,[4] and the two of them agreed not to go forward with the litigation. (*Id.*, p. 119; 2 R.T. pp. 361-363.) Michael Vida testified at the hearing that he understood that respondent was going to file the suit prior to the expiration of the statute of limitations. He denied any agreement to forgo litigation. (2 R.T. pp. 301, 318.) Ida Vida wrote to respondent in July 25, 1985, seeking, among other things, information as to the status of her case against the city. (Exh. 8.)

The hearing referee found that the examiner did not present clear and convincing proof that as to the Garden Grove litigation, respondent had violated Business and Professions Code sections 6068 (a), 6068 (m), and 6103, or rules 2-111(A)(2), 2-111(A)(3), 6-101(A)(2), 8-101(A) and 8-101(B)(4) and dismissed these charges.

Prior to the disputed meeting in December of 1984, a check dated November 14, 1984, payable to "William Kenton" [sic] for $112 from Ida Vida was given to respondent. Michael Vida wrote "for filing fees" on the memo portion of the check when he gave the check to respondent. (2 R.T. pp. 297-298.) The Vidas contend that respondent requested the check in late 1984. Respondent denied discussing filing fees after his initial meetings with the Vidas (1 R.T. pp. 122-124), but did deposit the check in his trust account in December 1984. Respondent maintains that Michael Vida agreed in their last meeting to apply the $112 to the $1,500 in fees owed, that respondent would accept the $2,112 as total payment and no further work would be done. (1 R.T. pp. 135-136; 2 R.T. p. 363.) The respondent thereafter transferred the $112 to his personal account (1 R.T. p. 136), although his trust records do not indicate a debit of that amount.

The hearing referee found that respondent did earn the fees paid to him and did not find respondent's retention of the $112 as a fee to be either a misappropriation under section 6106 or a failure to return funds owed to the client under rule 8-101(B)(4).

2. Maag Complaint.

The second alleged misconduct began when, in May 1984, Ida Vida was sued for allegedly failing to make payments on a promissory note held by Jean Garcia Maag. (Exh. 12.) The note was part of the purchase of the Roundup Saloon. Mrs. Vida testified that she called respondent after receiving the complaint and summons in the mail[5] and he assured her that he would take care of it. (2 R.T. p. 263, 276-277.) She did not have any further contact with him, could not remember if she forwarded the complaint or any other documents to him and admitted that no arrangements had been made to compensate respondent. (*Ibid.*) Mrs. Vida heard nothing further concerning the case until July 1985, when Maag called her to say the case had been resolved against her by default, and judgment had been entered against her on March 26, 1985, for over $11,000. (2 R.T. pp. 263-264; exh. 8.) Mrs. Vida wrote to respondent on July 25, 1985, seeking his explanation for his failure to represent her in the case. (Exh. 8.) She has since satisfied the Maag judgment. (2 R.T. p. 280.)

Respondent acknowledged that he discussed the case with Ida Vida, requested that she send him the complaint and promised her that he would look into it for her. (2 R.T. pp. 357-358.) Respondent contacted opposing counsel and was granted extensions of time to file an answer. (1 R.T. pp. 61-62; exhs. 8,

4. The Vidas had six months from the date of service of the rejection of their claim to file suit against Garden Grove. (Exh. 6; Gov. Code, § 945.6.)

5. These documents were presumably forwarded to her by her son, who received them at the Roundup Saloon. (2 R.T. p. 318.)

9.) In the interim, he secured additional information from Michael Vida and advised him that there was no viable defense to the action. (1 R.T. pp. 358-361.) Respondent did not contact Ida Vida and did not file an answer to the complaint.

The hearing referee found that respondent's failure to discuss the case with Ida Vida *after* receiving the complaint, failure to keep her apprised of the case generally and eventual abandonment of her case violated sections 6068 (a), 6068 (m), and 6103, as well as rule 2-111(A)(2).

B. Greene Matters (Count 1)

1. Family Trust and Incorporation.

Zane Greene hired respondent in August 1986 for advice on protecting his assets because of his involvement in litigation in Nevada concerning a mobile home park. Respondent advised him to establish a family trust as well as to create a corporation in Nevada that would be registered to do business in California. (1 R.T. pp. 162-163, 165; 2 R.T. pp. 208-209.) Respondent provided Greene with a sample of a family trust agreement (exh. 16) and agreed to do the work involved for $2,000. Greene paid respondent $2,000 in cash at a later meeting and respondent gave Greene a receipt.[6]

Respondent used a Nevada corporation processing firm, Laughlin Associates, Inc., to prepare and file the incorporation papers for Greene's corporation, Bulletin's, Inc. The fees for the service were billed directly to Greene's credit card. The articles of incorporation were filed on August 22, 1986, and the corporate kit was mailed to the respondent. Greene was given the corporate package, with the corporate seal, but later returned it to respondent at his request. (1 R.T. pp. 178-179.)[7] After September 1986, Greene maintained that he had no further word from respondent, despite his numerous calls in late 1986 to respondent's office. He also never saw or received any documents prepared concerning the family trust. (1 R.T. pp. 164-165.)[8]

In February 1987, Greene sent a letter to respondent requesting a refund of his $2,000. (Exh. 2.) The letter was returned and, after contacting the State Bar for a more recent address, he re-sent the letter to a Santa Monica address. The letter was not returned by the post office. Respondent denied receiving this letter. (1 R.T. pp. 39-41.) Greene also called the telephone number supplied by the State Bar three times in March and left messages for respondent, none of which were returned. (2 R.T. pp. 241-243.)

The hearing referee found that the only work respondent did on these matters was to arrange for the Nevada corporate processing firm to prepare and file the articles of incorporation in Nevada. The referee found that respondent's failure to complete the work he agreed to do, his abandonment of Greene, his lack of communication with him and failure to refund the advanced, unearned fees upon request in 1987 constituted violations of Business and Professions Code sections 6068 (a), 6068 (m) and 6103, and rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2).

2. Allied Fidelity Lawsuit.

At the same initial August 1986 meeting at which Greene hired respondent for the trust and corporate work, he discussed with respondent a possible suit against Greene's former employer, Al-

6. The date the receipt was provided and the amount of the fee charged by the respondent were sharply disputed at the hearing. Respondent maintained that he provided a receipt at the time he accompanied Greene to the bank to withdraw the $2,000 and that the receipt reflects their agreement that the total fee was to be $3,500. (Exh. 1.) Greene testified and the hearing referee found that the agreed fee was $2,000 and Greene received a receipt sometime after the payment was made.

7. Respondent disputes this finding, contending that the certificate of good faith necessary to register the company in California was sent directly to Greene so that he could file it. Respondent admits that he did no further work on the Nevada corporation and testified that he did not retrieve the corporate package from Greene. (1 R.T. p. 157-158.)

8. Respondent proffered two documents at the hearing which purported to be drafts of the trust. (Exhs. A and B.) Respondent did not produce a copy of the final draft and testified that he had no idea if the trust was ever executed. (1 R.T. pp. 30-31.)

lied Fidelity ("Allied"). Greene had been employed by Allied in 1983 after it purchased his insurance company and provided him with stock options. In March 1986, Greene was discharged by Allied and he was contemplating suit against it, the relevant subsidiaries and named Allied executives alleging, among other grounds, breach of contract, securities violations and fraud. (1 R.T. pp. 47-48, 157-158.) Another law firm had earlier represented Greene in connection with all his legal matters, but no actions had been filed as of August 1986. (2 R.T. pp. 204-207.)

Respondent was familiar with Allied in August 1986, having worked on a possible suit against them on behalf of his primary client at that time, a Mr. Parrish. (2 R.T. pp. 321-324.)[9] Greene testified that respondent agreed to take the case over from the previously retained law firm and proceed with the case on a contingency fee basis, although no written agreement was prepared. Respondent denied that any decision was made for him to prosecute the matter and the costs and complexity of the case were such that both Parrish and respondent were doubtful as to its success. (1 R.T. pp. 158-159; 2 R.T. pp. 326-328.)

The hearing referee concluded that there was not clear and convincing evidence that respondent had agreed to represent Greene in the Allied litigation. Therefore, it dismissed all charges of misconduct relating to the matter.

ISSUES ON REVIEW

1. Culpability.

The determination of culpability turns on the referee's findings of credibility, or lack of credibility, of the witnesses. The referee was explicit in his analysis of the testimony of each witness at the hearing and the crucial impact the credibility findings had on the ultimate findings of fact and conclusions of culpability in the case. **[1]** Although our review is independent, we must give great weight to the referee's findings resolving issues pertaining to testimony. (Rule 453, Trans. Rules Proc. of State Bar.) **[2a]** Because the hearing referee was in the best position to view the witnesses and evaluate the truthfulness of each, we should be reluctant to deviate from his findings. (*Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055-1056.)

Respondent's testimony was often unsupported by documentary evidence.[10] The hearing referee concluded that respondent was not candid at the hearing and, further, considered his lack of credibility to be an aggravating factor under standard 1.2(b)(vi), of the Standards for Attorney Sanctions for Professional Misconduct ("standard(s)") (Rules Proc. of State Bar, div. V). (Decision at p. 14.)

The referee concluded that the complaining witnesses were not uniformly reliable either. Michael Vida was found by the hearing referee to have had many problems remembering specific times, dates, places and related details. His mother, Ida Vida, had some limitations as well, but was credible, in the view of the hearing referee, as to her testimony concerning the Maag litigation. The referee considered Greene to be an excellent witness but a review of his testimony does reveal some inconsistencies concerning dates.

[2b] The reevaluation of a witness's credibility is limited by the nature of the reviewing process. Commenting on the effect of demeanor on credibility findings, a court of appeal noted, "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Meiner* v. *Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.) A review of the

9. Respondent's connection with Parrish was such that between February 1985 and February 1987, he operated his office in a foyer of Parrish's house. (2 R.T. pp. 211-212, 326-327.)

10. Respondent attributed the lack of some documents in this case to negligence. Portions of files were put in storage and later destroyed when the storage fees were not paid. Respondent has filed suit against the storage company. (Exh. 13.)

exhibits and the transcripts of the testimony offered in this case does not reveal any substantive basis for this department to overturn the hearing referee's carefully considered determinations of credibility. [3] Moreover, we see no error in the referee's decision giving greater credence to Ida Vida and Greene on certain matters but not others.

In connection with the Allied litigation, the examiner would have us conclude that respondent agreed to go forward with complex, expensive litigation on a contingency fee basis *and* agreed to advance costs as well despite uncontradicted evidence that in accepting work in the same consultation, respondent insisted on payment in cash because of his financial distress. (2 R.T. pp. 210-211.) The notes in exhibit N that the examiner relies upon in his brief to urge such a conclusion were not written contemporaneously with the meeting in 1986, but rather were constructed by respondent to prepare for his testimony at the disciplinary hearing. (2 R.T. pp. 369-370.) **[4a]** The examiner argues that respondent's failure to answer the letter written by Greene to respondent describing Greene's understanding of the Allied litigation constituted an adoptive admission of respondent's duty to perform services by respondent's failure to answer the correspondence. (Evid. Code, § 1221; 1 Witkin, Cal. Evidence (3d ed. 1986) § 653.) Respondent denied receiving the letter. (1 R.T. pp. 39-41.) The hearing referee therefore was justified in rejecting the adoptive admission argument.[11] **[4b - see fn. 11]** [5] While we modify the decision (page 6, lines 2-4) to find that an attorney-client relationship was created in Greene's preliminary consultations with respondent (*Beery* v. *State Bar* (1987) 43 Cal.3d 802, 811-812), we uphold the referee's decision that there was no clear and convincing proof that respondent agreed to go forward and file suit against Allied on behalf of Greene.

[6] The respondent proffered undated drafts of trust documents (exhs. A and B) to support his contention that he completed the work necessary to form the family trust for Greene, as he was hired to do. He could not remember exactly when the draft trust documents were produced or when they were allegedly shown to Greene. (1 R.T. pp. 142-144, 148-151.) He did not have a copy of the final or executed trust agreement nor did he explain why the copy was missing. The draft trust documents contain largely "boiler-plate" language and have little if any unique or specially tailored provisions. Greene produced at the hearing the sample trust agreement provided to him by respondent at their initial meeting. (2 R.T. pp. 236-237.) He categorically denied ever seeing the drafts (1 R.T. p. 164) or receiving a final trust agreement. (2 R.T. p. 236.) The drafts alone are not persuasive evidence that respondent did earn some of the $2,000 paid by Greene for the trust work. The referee weighed the drafts and respondent's testimony against that of Greene and concluded that no work had been done to earn the advanced fees. On this record, we agree.

[7] Concerning the Maag lawsuit, Mrs. Vida's testimony is largely corroborated by respondent's own admissions. She spoke to respondent about the case, sent him the complaint at his request and relied on his assurance that he would investigate the matter. In securing additional time from Maag's attorney to file Mrs. Vida's answer to the complaint, respondent did endeavor to protect her interests. However he did not keep her apprised of essential matters in the case and his inaction and abandonment of her case justify the finding of culpability.

On the Garden Grove matter, it is evident from the record that respondent had many meetings with Michael Vida, that respondent did do significant work on the case and that by the fall of 1984, the Vidas did not have the resources to proceed with the litigation. The sticking point is the $112 check for filing fees. [8] The fact that Mrs. Vida sent the check in November 1984 is evidence which supports the examiner's contention that respondent anticipated filing suit shortly. The check was deposited in the

11. **[4b]** Evidence of the statements in a letter in circumstances where the letter reasonably called for a reply can be admitted as an adoptive admission. (*Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 108-109; *Rose* v. *Hunter* (1957) 155 Cal.App.2d 319; *Simpson* v. *Bergmann* (1932) 125 Cal.App. 1, 8-9.) However, Evidence Code section 1221 requires that the party whose silence is being admitted as an adoptive admission have knowledge of the contents of that which has allegedly been adopted. Respondent testified that he had no knowledge of the contents of Greene's letter.

respondent's trust account. But we conclude that Mrs. Vida's issuance of the check in November 1984 is not sufficient evidence to show clearly and convincingly that respondent was obligated to pursue the Garden Grove matter.

The issue is much closer as to whether respondent was authorized to apply the $112 to his outstanding fees owed by the Vidas. Accepting the finding that Michael Vida agreed to abandon his mother's suit against Garden Grove, respondent's choice was to return advanced costs to Mrs. Vida or secure permission to retain the advancement as attorneys fees. Respondent's argument that consent was obtained from Michael Vida, his mother's agent, in December 1984 is undermined because respondent's trust account does not reflect a transfer of $112 out of the account. If there was consent, then the funds were either drawn out in combination with other fees in a timely fashion or they remained mingled with other client monies until May 1985, when the trust balance fell below $112.[12] Michael Vida disagreed, testifying that he did not consent to applying the $112 to respondent's outstanding fees. The examiner maintains that no consent was secured and the respondent thereby misappropriated the funds. [9] The hearing panel did not find clear and convincing evidence that there were any trust account irregularities, apparently influenced by Michael Vida's unpersuasive testimony. Given the hearing panel's assessment of Vida's credibility, we agree that the State Bar has not met its burden in this case to show misconduct by clear and convincing evidence.

2. Modification of Culpability Findings.

[10] Section 6103 is not a charging provision, but rather provides that violation of a duty defined elsewhere is grounds for discipline. (*Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 617-618; *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561; *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815.) Therefore, we find no violation of Business and Professions Code section 6103. We also amend the hearing panel's decision to strike the findings on culpability under section 6068 (a), consistent with our ruling in *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, and our readings of *Sugarman* v. *State Bar*, *supra*, 51 Cal.3d at p. 617; *Middleton* v. *State Bar*, *supra*, 51 Cal.3d at p. 561; *Baker* v. *State Bar*, *supra*, 49 Cal.3d at pp. 814-816, and *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931.

[11] We also strike the finding that respondent violated Business and Professions Code section 6068 (m) in the Maag lawsuit. Subdivision (m) was not added to section 6068 until January 1, 1987. (Stats. 1986, ch. 475, § 2, pp. 1772-1773.) Respondent's conduct occurred in 1984, before the effective date of that subdivision. However, respondent did fail to return phone calls and correspondence from Greene in the early part of 1987 and thus we affirm the finding of culpability as to that misconduct under section 6068 (m).

3. Discipline.

The examiner argues that the standards call for a minimum one-year actual suspension largely based upon his proposed finding that the respondent misappropriated funds. The examiner also urges imposition of a three-year probationary period to protect the public and assist respondent in his rehabilitation and adoption of a restitution requirement. In contrast, respondent maintains that if any misconduct is ultimately found in this case, it is mitigated by the stressful circumstances of the deterioration of his marriage in 1984 through May 1985, and the death of his mother in September 1986. Respondent's wife was his legal secretary and allegedly did not advise respondent of telephone messages received during the period prior to their separation. Respondent testified that he visited his mother in a nearby hospital once or twice a week during 1986. (3 R.T. pp. 432-433.)

The discussion by the hearing referee of the mitigating and aggravating factors and the applicable standards, at pages 12-15 of the decision, is thorough. Respondent's prior, 11-year, unblemished record was recognized as a mitigating factor. (Deci-

12. There was no charge of commingling in the notice to show cause.

sion at p. 12; *Waysman* v. *State Bar* (1986) 41 Cal.3d 452, 457.) The panel rejected respondent's arguments that the break-up of his marriage in 1985 and his mother's illness and death in September 1986 were causal factors in his misconduct. (Decision at pp. 12-13.) **[12]** As the referee found, failing to get phone messages from respondent's estranged spouse does not explain or excuse respondent's abandonment of Mrs. Vida or have any connection with his misconduct related to Zane Greene. **[13]** The death of respondent's parent, without additional evidence as to the psychological distress which may have disabled respondent, was not shown to affect the preparation, or lack thereof, of the Greene family trust documents.

[14] In aggravation, the misconduct was not a single, isolated incident. Rather, there were multiple acts of misconduct, but they cannot be said to constitute a pattern. (Standard 1.2(b)(ii).) The referee did find some harm to Mrs. Vida because of the entry of the default and assessment of attorneys fees, as well as the $2,000 in unearned fees from Greene retained by the respondent. As noted *ante*, respondent's lack of candor at the hearing was also considered an aggravating circumstance.

[15a] Although we have found no recent published attorney disciplinary opinion of our Supreme Court dealing with the exact misconduct and disciplinary factors we have in this case, we are guided by several recent opinions involving failure to perform services with lack of prior discipline in reaching our conclusion that respondent's abandonment of two clients in less than three years, with $2,000 in unearned fees retained from one of the clients, merits a greater sanction than a public reproval.

In *Matthew* v. *State Bar* (1989) 49 Cal.3d 784, 791, the attorney abandoned two clients without completing legal services and retained unearned fees from them. He also completed the work for a third client more than four years after he was hired. The Supreme Court increased the discipline recommended by the State Bar Court from a three-year suspension, stayed, with three years of probation, refunds to the clients involved and no actual suspension, to include sixty days of actual suspension. (*Id.* at pp. 787, 792.) The aggravating circumstances cited by the Court included the financial harm to the clients from the attorney's refusal to return unearned fees and his indifference to the fee arbitration process. (*Id.* at p. 791.)

Similarly, in another case more serious than the present one but with more mitigating factors, *Gadda* v. *State Bar* (1990) 50 Cal.3d 344, the attorney had been found culpable of unreasonable client neglect in three immigration matters aggravated by deceit in two of the matters and the publication of a misleading advertisement. The Court considered further aggravating, the attorney's failure to recognize the seriousness of his misconduct but noted in mitigation his very active and generous pro bono immigration legal work. The Supreme Court ordered a two-year suspension stayed on conditions including a six-month actual suspension and until restitution was made.

In a case less serious than the present, involving an attorney's single act of failure to perform requested legal services, coupled with failure in that matter to communicate with the client, but without serious adverse consequences to the client, the Supreme Court imposed a six-month suspension stayed entirely on probation with no actual suspension. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921.)

[15b] Given that respondent's conduct here is less serious than that found in either *Matthew* or *Gadda*, but more serious than found in *Van Sloten*, we propose a two-year suspension, stayed on conditions of a two-year probation period including thirty days of actual suspension. **[16]** The conditions set forth by the hearing panel are appropriate, considering the chaotic state of the respondent's records and business practices. Correspondence with his clients and written fee agreements appear nonexistent in the matters before us. Submission of a law office management plan and State Bar supervision should, over time, remedy that problem and serve to protect the public. **[17]** Return of the $2,000 in fees to Mr. Greene is consistent with our affirmation of the finding that respondent did little if any work in drafting the family trust or incorporating the related Nevada corporation and qualifying it in California.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, William Reamy Kennon, be suspended from the practice of law in the State of California for a period of two years, that execution of the suspension order be stayed, and that respondent be placed on probation for two years under the following conditions:

1. That during the first 30 days of said period of probation, he shall be suspended from the practice of law in the State of California;

2. That within one year from the effective date of the Supreme Court's order in this matter, respondent shall make restitution to Zane Greene, in the amount of $2,000 plus interest at the rate of 10% per annum from March 1987, until paid in full and furnish satisfactory evidence of restitution to the Probation Department, State Bar Court, Los Angeles;

3. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

4. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

5. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar.

6. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

7. That respondent shall promptly report, and in no event in more than 10 days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

8. That respondent develop a law office management/organization plan that meets with the approval of his probation monitor within ninety (90) days from the date on which respondent is notified of the assignment of his probation monitor. This plan must include procedures for the adoption of written fee agreements to send periodic status reports to clients, the documentation of telephone messages received and sent, file maintenance, the meeting of deadlines, the establishment of procedures to withdraw as attorney, whether of record or not, when

clients cannot be contacted or located, and for the training and supervision of support personnel.

9. That respondent provide satisfactory evidence of completion of a course on law office management which meets with the approval of his probation monitor within one year from the date on which the order of the Supreme Court in this matter becomes effective.

10. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective;

11. That at the expiration of the period of this probation if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of two years shall be satisfied and the suspension shall be terminated.

It is further recommended that respondent be ordered to take and pass the Professional Responsibility Examination given by the National Conference of Bar Examiners within one (1) year from the effective date of the Supreme Court's order and furnish satisfactory proof of such to the Probation Department of the State Bar Court within said year.

It is further recommended that costs incurred by the State Bar in the investigation, hearing and review of this matter be awarded to the State Bar pursuant to Business and Professions Code, Section 6086.10.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RUDOLPH LOUIS DYSON

A Member of the State Bar

[No. 86-O-11410]

Filed December 18, 1990

SUMMARY

After respondent settled a personal injury case for two clients, he cashed the settlement checks and paid each client their portion of the funds. He deposited the remainder of the funds in his personal checking account, including approximately $4,700 which was owed to the clients' doctor under a medical lien.

About six months later, the doctor learned about the settlement from the insurer, and contacted respondent to request payment. Respondent gave the doctor a check drawn on respondent's personal account, with the words "subject to verbal confirmation" handwritten on the check. The doctor deposited the check twice and it was returned both times for insufficient funds. Respondent did not pay the doctor in full until almost a year and a half later, after the doctor had hired legal counsel and contacted the State Bar.

Respondent was found culpable of failing to deposit the funds to pay medical liens into his trust account, commingling entrusted and personal funds in his personal bank account, failing to pay the doctor promptly upon demand, and committing acts involving moral turpitude. Based on these findings, the hearing referee recommended a three-year stayed suspension, three years probation, and a six-month actual suspension. (Byron C. Finley, Hearing Referee.)

Both parties sought review. The review department declined to credit respondent's contention that at the time of his misconduct, he believed he was entitled to treat the doctor as his own creditor based on his prior practice of paying the doctor out of his own general account. The court concluded that respondent had an ongoing fiduciary duty to his client to hold in trust the remaining settlement funds and that there was no excuse for placing the funds subject to the medical liens in his own general account at any time because at no time did the funds belong to respondent.

On the question of appropriate discipline, the review department gave little weight to respondent's pro bono activities as mitigation because the evidence was insufficient. It rejected the referee's finding of mitigation based on restitution, because the payment was made after a State Bar complaint had been filed and a lawsuit threatened. Respondent's lack of prior discipline also was not a significant mitigating factor because he had only been in practice for eight years. However, the review department concluded that since the dishonored check was drawn in a way that labelled it as non-negotiable, its issuance was not a factor in

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

aggravation. Based on Supreme Court precedent in cases involving a single act of misappropriation, the review department increased the recommended actual suspension period from six months to one year. The review department also modified the probation conditions to require detailed trust account reporting.

COUNSEL FOR PARTIES

For Office of Trials: Mara Mamet

For Respondent: Rudolph L. Dyson, in pro. per.

HEADNOTES

[1 a-c] **194 Statutes Outside State Bar Act**
490.00 Miscellaneous Misconduct
545 Aggravation—Bad Faith, Dishonesty—Declined to Find
605 Aggravation—Lack of Candor—Victim—Declined to Find
695 Aggravation—Other—Declined to Find
Under applicable provisions of Commercial Code, handwritten notation on attorney's check stating that it was issued "subject to verbal confirmation" destroys its negotiability and prevented attorney from being criminally liable for issuance of check drawn on insufficient funds. Dishonor of such check due to insufficient funds was not an aggravating factor, because check was issued in non-negotiable form and there was no clear evidence that payee was misled regarding nature of check.

[2 a-c] **280.00 Rule 4-100(A) [former 8-101(A)]**
430.00 Breach of Fiduciary Duty
An attorney's practice of paying personal injury clients' doctor out of the attorney's own general account, including in some instances making such payments even before the clients' cases had closed, did not entitle the attorney to treat the doctor as the attorney's own creditor. The debt to the doctor was owed by the clients, and the attorney had a duty to honor the clients' agreement. Even with the doctor's consent, the attorney could not transform settlement funds earmarked for payment of medical liens into general funds.

[3 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**
430.00 Breach of Fiduciary Duty
Attorney's fiduciary duty to personal injury clients did not end with payment to them of their share of the recovery in their cases; the attorney had an ongoing fiduciary duty to hold in trust the remaining settlement funds, subject to clients' directions regarding disbursement. This duty did not end until the clients' debt to their treating physician was paid.

[4] **280.00 Rule 4-100(A) [former 8-101(A)]**
430.00 Breach of Fiduciary Duty
Assuming that an attorney was entitled to delay payment to a medical lienholder until resolution of a dispute with the clients' insurance company regarding settlement funds, the attorney was required nonetheless to place the amount earmarked for satisfaction of the medical lien in the attorney's trust account until payment to the lienholder in accordance with the terms of the lien.

[5] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.00 Misappropriation
Respondent's conduct in placing trust funds in his personal account, using such funds, and delaying payment thereof to his clients' medical lienholder for a year and a half after demand for payment constituted commingling and misappropriation and involved moral turpitude.

[6] **745.51 Mitigation—Remorse/Restitution—Declined to Find**
Restitution coming on the heels of threats of a lawsuit and after a State Bar complaint has been filed is not a mitigating factor.

[7] **710.53 Mitigation—No Prior Record—Declined to Find**
An attorney's unblemished record for eight years prior to the attorney's misconduct was not long enough to constitute strong mitigation.

[8] **165 Adequacy of Hearing Decision**
765.31 Mitigation—Pro Bono Work—Found but Discounted
Where attorney testified to involvement in pro bono activities, but hearing referee's findings did not specify extent of such involvement and evidence in record was sketchy, review department accorded such evidence little weight as mitigation.

[9] **165 Adequacy of Hearing Decision**
545 Aggravation—Bad Faith, Dishonesty—Declined to Find
605 Aggravation—Lack of Candor—Victim—Declined to Find
Where referee made no finding that respondent misled clients' doctor about status of clients' case, and evidence in record was unclear, review department declined to find such misrepresentation as an aggravating factor.

[10] **801.30 Standards—Effect as Guidelines**
The Standards for Attorney Sanctions for Professional Misconduct are guidelines for the State Bar Court and are not applied in "talismanic fashion" by the Supreme Court.

[11] **822.39 Standards—Misappropriation—One Year Minimum**
1091 Substantive Issues re Discipline—Proportionality
Pursuant to Supreme Court precedent, only the most serious instances of repeated misconduct and multiple instances of misappropriation have warranted actual suspension, much less disbarment; a year of actual suspension, if not less, has been more commonly the discipline imposed in cases involving but a single instance of misappropriation.

[12] **807 Standards—Prior Record Not Required**
822.10 Standards—Misappropriation—Disbarment
1092 Substantive Issues re Discipline—Excessiveness
A single act of very serious misconduct can and has resulted in disbarment even absent a prior disciplinary record; where a respondent's culpability is egregious and inexplicable, disbarment is appropriate even for a single misappropriation.

[13] **822.39 Standards—Misappropriation—One Year Minimum**
A one-year actual suspension was appropriate where respondent had committed a single act of misappropriation and had fully participated in the disciplinary proceedings, and there was no strong mitigating evidence justifying departing from the standards by recommending a shorter suspension.

[14] **174 Discipline—Office Management/Trust Account Auditing**
Requirement of detailed trust account reporting as condition of probation was appropriate in matter involving misappropriation of entrusted funds.

ADDITIONAL ANALYSIS

Culpability

Found

221.19 Section 6106—Other Factual Basis
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.19 Misappropriation—Other Fact Patterns
430.01 Breach of Fiduciary Duty

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2

Discipline

1013.09 Stayed Suspension—3 Years
1015.06 Actual Suspension—1 Year
1017.09 Probation—3 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing

OPINION

PEARLMAN, P.J.:

Before us is a hearing referee decision concluding that respondent Rudolph L. Dyson misappropriated approximately $4,700 in trust funds subject to medical liens and recommending that respondent be suspended for three years, stayed, subject to a three-year probationary term, with conditions including a six-month actual suspension, passage of the Professional Responsibility Examination, and a trust fund reporting requirement. Both the Office of Trial Counsel and the respondent have requested review of the decision. The examiner argues that a lengthier suspension is warranted in light of the misconduct found and also requests imposition of rule 955 reporting requirements. The respondent contends that he did not, at the time he acted, believe he was engaging in misconduct by delaying payments to the doctor for nearly two years after depositing trust funds payable to the doctor into his own personal account and, in any event, the recommended discipline is too severe.

We find that the record supports the finding that respondent committed serious misconduct in his handling of funds subject to the doctor's liens at issue here; and that in accordance with Supreme Court precedent the recommended discipline should be increased to one year actual suspension, with the addition of a rule 955 reporting requirement (Cal. Rules of Court, rule 955) and detailed trust account reporting for a period of three years.

FACTS

We adopt the essential findings of the referee below, restate them and make more specific findings as follows. Respondent was admitted to practice on November 29, 1978, and has no prior record of misconduct. Respondent represented two individuals, Clarence Clemons, III and Maria Reeves, who were injured in an automobile accident in June 1986. Each was medically treated by Dr. Arnold Ellis. To pay for the doctor's services, respondent's clients executed respective lien agreements on June 26, 1986 (exhs. 5 and 6) directing respondent to withhold from any settlement proceeds funds sufficient to pay their medical bills. The respondent admits to signing one of the liens (exh. 6; R.T. p. 16), has identified as his secretary's writing the signature on the second lien (exh. 5; R.T. p. 16) and acknowledged that he authorized his secretary to sign doctor liens. (*Ibid.*) He also admitted signing the letter that returned both executed agreements to Dr. Ellis. (Exh. 7; R.T. pp. 16-17.)

Respondent negotiated settlement of the client matters with the Farmer Group of Insurance Companies in November 1986 and two checks dated November 14, 1986, were issued; one for $6,900 was payable to respondent and Clarence Clemons, III (exh. 8), and a second payable to respondent and Maria Reeves for $7,700. (Exh. 9.) On or about that same date, the respondent accompanied his clients to his bank, cashed both checks and paid each their portion of the settlements (Clemons $2,100; Reeves $3,500). The respondent deposited the remainder of the settlement funds in his personal checking account. (Exh. 4; R.T. pp. 15-16.) The funds deposited to respondent's personal account included approximately $4,700 in funds payable to Dr. Ellis pursuant to his medical lien.[1]

At the time respondent cashed the checks at his bank and paid his clients their portion of the settlement, according to respondent, an unresolved problem had occurred which impacted the settlement. The insurance company representative belatedly realized that one of the plaintiffs, Maria Reeves, was still a minor[2] and had threatened to dishonor the bank drafts until a guardian ad litem was appointed. (R.T. p. 18.) Respondent had informed his clients of the situation before he cashed the checks. Respondent took the risk of personal liability to his bank if the

1. The exact amount of the lien is disputed. Dr. Ellis submitted bills to respondent totalling $4,770. (Exhs. 12 and 13.) There are handwritten notations on each billing excluding a total of $90 in reporting fees charged by a physician consulted by Dr. Ellis. The respondent eventually paid Dr. Ellis $4,670, plus his attorney's fees. (Exhs. 17 and 18.)

2. Maria Reeves was seventeen at the time she received her portion of the settlement of her case. (R.T. p. 19.)

checks were not honored by the insurance company. (R.T. pp. 19-20.)

The record does not reflect the precise date at which the insurance company decided to forego the requirement of a guardian ad litem, although it apparently did so well before April of 1987. Dr. Ellis had not been informed by respondent about the receipt of the checks in November, but was advised when he contacted the insurance company that the case had been settled "a few months" earlier. (R.T. p. 41.)

After contacting respondent in April 1987 and being told at that time that the case was settled, Dr. Ellis was given a check for $4,600 drawn on the respondent's personal account with the words "SUBJECT TO VERBAL CONFIRMATION" handwritten on the bottom below the signature line. (R.T. pp. 41-42; exh. 11.)[3] **[1a - see fn. 3]** Respondent testified that at the time respondent gave the check to Dr. Ellis, he advised Dr. Ellis that there were not sufficient funds in the account to cover it and asked him to wait to deposit it. The referee below made no finding on this issue, but such testimony is consistent with the legend on the check. Dr. Ellis denied being told this, and we are not in a position to resolve their conflicting testimony on this point. Dr. Ellis deposited the check twice and it was returned both times for insufficient funds. Thereafter, Dr. Ellis hired legal counsel and was paid by respondent in full, plus legal fees, in September 1988, after Dr. Ellis had also contacted the State Bar. (Exhs. 16, 17 and 18; R.T. pp. 52-53, 55-56.)[4] **[1b - see fn. 4]**

The State Bar filed a notice to show cause against respondent on February 2, 1989, charging respondent with one count of failure to perform services for a different client which was later dismissed, and one count of misappropriation from Dr. Ellis. The referee found that respondent had failed to deposit the funds to pay Dr. Ellis's liens into his trust account, contrary to former rule 8-101(A),[5] commingled entrusted and personal funds in his personal bank account, in violation of rule 8-101(A), failed to deliver to Dr. Ellis the client funds to pay the lien promptly, contrary to rule 8-101(B)(4), committed acts involving moral turpitude contrary to Business and Professions Code section 6106, and violated section 6068 (a).[6]

ISSUES ON REVIEW

Culpability

[2a] On review, respondent argues that, while he now regrets his action, at the time he acted he believed he was entitled to treat Dr. Ellis as his own

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3. **[1a]** For a check to be a negotiable instrument, it must (1) be in writing, (2) be signed by the maker or drawer, (3) be drawn on a bank, (4) be payable on demand to order or bearer, and (5) contain an unconditional promise to pay or order to pay a sum of money *and no other promise*, except as provided in the California Uniform Commercial Code. (Cal. U. Com. Code, §§ 3104, 3112.) A promise or order is not unconditional if it states that it is subject to or governed by any other agreement. (Cal. U. Com. Code, § 3105; 3 Witkin, Summary of Cal. Law (9th ed. 1987) Negotiable Instruments, §§ 40-41, pp. 306-308.) Handwritten terms control over printed or typed terms. (Cal. U. Com. Code, § 3118(b).) The handwritten statement "subject to verbal confirmation" on respondent's check destroys the check's negotiability because it is subject to the respondent's subsequent affirmance and is not payable on demand.

4. **[1b]** Dr. Ellis also went to the Inglewood Police Department to press criminal charges against respondent for the returned check. (R.T. p. 43.) After investigation, he was advised by the police detective that because the check had the words "subject to verbal confirmation" on it, there was no criminal case against the respondent. (R.T. pp. 50-51.) Under Penal Code section 476 (checks, drafts, orders on banks; insufficient funds) there must be a showing of specific intent to defraud, and disclosure of present insufficiency of funds to cover the check is a defense to the criminal charge. (*People* v. *Poyet* (1972) 6 Cal.3d 530.)

5. Unless otherwise noted, all references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

6. The notice to show cause on count two also charged respondent with a violation of Business and Professions Code section 6103. (All further statutory references are to the Business and Professions Code unless otherwise noted.) The referee made no finding on that charge and the State Bar has not sought review on that issue. We find that the charge should be dismissed since section 6103 defines no duties. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815; *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931; *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561.)

creditor based on his prior practice of payment to Dr. Ellis out of his own general account. He contends that, contrary to the express provisions of the medical liens which he co-signed (exhs. 5 and 6), that he and Dr. Ellis had developed a business relationship where, in many instances, checks were issued by respondent to Dr. Ellis prior to the close of the case and on respondent's business account.[7] Respondent also challenges any separate attribution of misconduct based on the dishonored check.

There is scanty evidence in the record to support respondent's description of his "open book" reimbursement procedure with Dr. Ellis (R.T. p. 17) which the referee rightfully rejected as a defense in any event. **[2b]** Respondent's argument entirely misperceives the nature of his fiduciary duty and the nature of Dr. Ellis's claim. The debt to Dr. Ellis was not incurred by respondent but by respondent's clients, who remained obligated to Dr. Ellis despite respondent's agreement to honor Dr. Ellis's medical liens. This continuing obligation is specified in the lien agreements themselves. (Exhs. 5 and 6.)

[3a] Respondent appears to have lost sight of the scope of his duty to his clients. It did not end with payment to them of their ultimate share of the recovery. He had an ongoing fiduciary duty to his clients to hold in trust the remaining settlement funds subject to their directions regarding disbursement. **[2c]** Even with Dr. Ellis's consent, respondent could not transform the settlement funds earmarked for payment of the medical liens into general funds. Respondent's responsibilities to his clients required him to honor the clients' agreements with Dr. Ellis. He thereby undertook the same duty as he was obligated to undertake with any other client funds: to segregate the funds in a trust account, maintain and render complete records and pay or deliver the funds promptly on request. (*Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 652; *Kennedy* v. *State Bar* (1989) 48 Cal.3d 610, 612-614, 617; *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1.)

[3b] Respondent's duty to his clients to use *their* settlement funds to discharge *their* debt to Dr. Ellis remained unmet until Dr. Ellis was paid. **[4]** Even assuming that respondent was entitled to delay payment to Dr. Ellis until the insurance company dispute was fully resolved, respondent was still unquestionably required to place the amount earmarked for satisfaction of the liens in his trust account until payment to Dr. Ellis in accordance with the terms of the liens respondent agreed to honor. Respondent simply has no excuse for placing the funds subject to the medical liens in his own general account at *any* time because at *no* time did the funds belong to him.

[5] Respondent's conduct in placing trust funds in his personal account, using such funds and delaying payment to the doctor for a year and a half after demand for payment constitutes commingling and misappropriation and involves moral turpitude. (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 240-241, 245; *Hipolito* v. *State Bar* (1989) 48 Cal.3d 621, 624, 626; *Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 109.) Based on these findings, there is sufficient evidence in the record to support the referee's conclusions that respondent violated rule 8-101(A) and section 6106. The record also supports respondent's culpability under rule 8-101(B)(4) for failure to pay the funds to Dr. Ellis promptly on demand after the insurance company dropped its objection. (See *Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 979; *In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 10.)

We do, however, modify the decision to find that respondent's misconduct does not amount to a separate violation of his duties under section 6068 (a) to "support the Constitution and laws of the United States and of this state." (*Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060; see also *Middleton* v. *State Bar*, *supra*, 51 Cal.3d 548; *Sands* v. *State Bar*, *supra*, 49 Cal.3d 919.)

7. The State Bar has not charged respondent with any misconduct in connection with this admission concerning his prior practices.

Findings in Aggravation and Mitigation

The referee made no findings in aggravation. He did find in mitigation that respondent repaid the funds in full after a proceeding was filed with the State Bar Court. He also described pro bono activity testified to by the respondent, but apparently did not attribute much significance to it.

[6] We agree with the examiner that respondent's eventual restitution coming on the heels of threats of a lawsuit and after a State Bar complaint has been filed is not a mitigating factor. (*Rosenthal* v. *State Bar* (1987) 43 Cal.3d 658, 664; *Howard* v. *State Bar* (1990) 51 Cal.3d 215, 222; *Hipolito* v. *State Bar*, *supra*, 48 Cal.3d at p. 628.) **[7]** Respondent had an unblemished record for eight years prior to the present incident which is not long enough to constitute strong mitigating evidence. (*In re Naney* (1990) 51 Cal.3d 186, 196; *Matthew* v. *State Bar* (1989) 49 Cal.3d 784, 792; *Ridge* v. *State Bar* (1989) 47 Cal.3d 952, 963-964.) **[8]** Respondent did testify to and was found by the referee to have been involved in pro bono activities, although the findings did not specify the extent of his involvement and the evidence in the record was sketchy. We therefore accord it little weight. (*Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 607-608.)

The examiner argues that the record discloses factors in aggravation which were not found by the referee. We have carefully considered her arguments but cannot agree. **[1c]** We are unable to conclude that the dishonored check is a factor in aggravation here since it was non-negotiable (see fn. 3, *ante*), nor is the evidence clear that Dr. Ellis was misled as to the nature of the check. **[9]** Nor can we conclude that respondent misrepresented the status of the case to Dr. Ellis absent any finding by the referee in that regard since Dr. Ellis's testimony was vague on dates and the record does not indicate when the insurance company notified respondent that it considered the matter closed.

Sufficiency of Recommended Discipline

Unfortunately, the referee's decision is devoid of any discussion of how he arrived at the recommendation of six months actual suspension, either by application of the standards or analysis of comparable cases. We start our analysis with the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ["standards"]). They provide that where a member is found to have wilfully misappropriated entrusted funds, disbarment is the appropriate sanction unless there is a finding of compelling mitigating circumstances or misappropriation of an "insignificantly small" amount of funds, in which case, the standards recommend no less than one year of actual suspension irrespective of mitigating circumstances. (Standard 2.2(a).)

The amount of funds misappropriated, $4,700, was not insignificantly small. **[10]** However, the standards are guidelines for the State Bar Court and are not applied in "talismanic fashion" by the Supreme Court. (*Howard* v. *State Bar*, *supra*, 51 Cal.3d at p. 221; *In re Young* (1989) 49 Cal.3d 257, 268.)

The examiner has ably analyzed both the standards and the case law and recognizes that disbarment is inappropriate here in light of relevant precedent. Rather she argues for lengthier suspension in this case based on *Hipolito* v. *State Bar*, *supra*, 48 Cal.3d at p. 628; *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1366; *Alberton* v. *State Bar* (1984) 37 Cal.3d 1, 15, and on this department's decision, *In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. 1.

In *Hipolito*, the attorney had likewise engaged in a single act of misappropriation ($2,000) from a client. In addition, he abandoned another client. The Supreme Court imposed only the minimum actual suspension called for by standard 2.2(a), despite the fact that the amount misappropriated was not "insignificantly small." In ordering Hipolito suspended for a period of three years, stayed, with actual suspension of one year, the court noted that: **[11]** "This conclusion is consistent with our prior cases, in which only the most serious instances of repeated misconduct and multiple instances or misappropriation have warranted actual suspension, much less disbarment. [Citations.] A year of actual suspension, if not less, has been more commonly the discipline imposed in our published decisions involving but a single instance of misappropriation." (*Hipolito* v. *State Bar*, *supra*, 48 Cal.3d at p. 628,

citing *Lawhorn* v. *State Bar*, *supra*, 43 Cal.3d at pp. 1367-1368.)[8] **[12 - see fn. 8]**

In addition to the Supreme Court decisions, the examiner also relies on our prior decision in *In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. 1. There, an attorney misappropriated funds to pay doctor liens from two separate client settlements—acts involving moral turpitude, dishonesty and corruption, contrary to section 6106 and rule 8-101(A)(2)—and failed to promptly pay the doctor and client involved, contrary to rule 8-101(B)(4). We found as aggravating evidence, Mapps's failure to participate in the formal disciplinary proceedings and his act of bad faith subsequent to the misappropriation in providing a bad check to his client. We rejected disbarment as inappropriate under controlling Supreme Court precedent in light of mitigating evidence in the record, including lack of a prior record of discipline, prompt acknowledgement of the debts to the parties, initiation of payments to the doctor and client before a complaint was filed with the State Bar, and full payment made to both prior to the filing of the notice to show cause. (*Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 12-14.) Instead, we recommended that Mapps be suspended from practice for five years, stayed, with an actual suspension of two years, probation conditions be imposed and a showing be made under standard 1.4(c)(ii) prior to Mapps's resumption of the practice of law. Our recommendation was adopted by the Supreme Court on November 29, 1990. (*In the Matter of Mapps*, order filed Nov. 29, 1990 (S016265).)

[13] In this case, we are not dealing with multiple acts of misappropriation by a defaulting respondent but a single act of misappropriation and a respondent who has fully participated in these proceedings. In light of all these circumstances, it is our view that, as in *Hipolito* and numerous other Supreme Court decisions involving a single instance of misappropriation of the type here, the recommended discipline of one year actual suspension is appropriate. This is consistent with the minimum set forth in standard 2.2(a). The referee's recommendation of six months actual suspension is not supported by strong mitigating evidence, as was the case in *Howard*, and such departure from the standards does not appear justified on this record. (Cf. *Bates* v. *State Bar*, *supra*, 51 Cal.3d 1056, 1061 fn. 2.) **[14]** We therefore increase the recommended actual suspension from six months to one year and also modify the recommended sanction in this case to require detailed trust account reporting as a condition of his three-year probationary term.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Rudolph Louis Dyson, be suspended from the practice of law in the State of California for a period of three years, that execution of the suspension order be stayed, and that respondent be placed on probation for three years under the following conditions:

1. That during the first year of said period of probation, he shall be suspended from the practice of law in the State of California;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by

8. In *Hipolito*, the Court was addressing single acts of misappropriation of similar magnitude to that involved here. **[12]** Although not discussed in *Hipolito*, a single act of very serious misconduct can and has resulted in disbarment even absent a prior disciplinary record. (See *Kelly* v. *State Bar* (1988) 45 Cal.3d 649; see also *In re Rivas* (1989) 49 Cal.3d 794; *In re Lamb* (1989) 49 Cal.3d 239.) The Supreme Court held in *Kelly* that where a respondent's culpability is both "egregious and inexplicable," disbarment is appropriate even for a single charged count of misappropriation. (In that case approximately $20,000 was depleted from a client's account over a five-month period.) (*Kelly* v. *State Bar*, *supra*, 45 Cal.3d at p. 657 and fn. 9.)

affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

4. That he shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

5. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

6. That he shall promptly report, and in no event in more than ten days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

7. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by each quarterly report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) Money received for the account of a client and money received for the attorney's own account;

(2) Money paid to or on behalf of a client and money paid for the attorney's own account;

(3) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "clients' funds account";

(c) That respondent has maintained a permanent record showing:

(1) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof:

(2) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "clients' funds account(s)" as appears in monthly bank statements of said account(s)'

(3) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) Monthly reconciliations of any differences as may exist between said monthly total bal-

ances and said monthly listings, together with the reasons for any differences;

(d) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

8. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective;

9. That at the expiration of the period of this probation, if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of three years shall be satisfied and the suspension shall be terminated.

We further recommend that within one year of the effective date of the Supreme Court's order in this case, respondent be required to take and pass the examination in professional responsibility prescribed by the State Bar and provide proof thereof to the Clerk of the State Bar Court, Los Angeles.

Finally we recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this case.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ANDREW J. MARSH

A Member of the State Bar

[No. 86-O-19485]

Filed December 19, 1990

SUMMARY

In a default matter, the respondent was found culpable of one count of failing to perform services, failing to return unearned advance fees, and failing to communicate with his client, and a second count of failing to cooperate with the State Bar's investigation of the client abandonment charges. Both the examiner and the hearing judge mistakenly believed that the respondent had only been disciplined once previously, when in fact he had been suspended twice by the Supreme Court.

The hearing judge recommended that the respondent be placed on actual suspension until he paid restitution and for nine months thereafter, and that he be required to pass the Professional Responsibility Examination. Contrary to the examiner's recommendation, however, the hearing judge declined to place the respondent on disciplinary probation. The judge reasoned that the respondent's failure to appear in the State Bar proceeding indicated that he was not amenable to probation. (Hon. Ellen R. Peck, Hearing Judge.)

The examiner requested review, contending that the judge should have recommended that respondent be placed on probation for three years. On review, the review department modified the hearing judge's findings and conclusions. It deleted the finding of failure to communicate, because it was based on misconduct occurring prior to the effective date of the statute allegedly violated, and also deleted the conclusion that the respondent had violated his statutory duty to uphold the law by violating various Rules of Professional Conduct. The review department also deleted a finding of failure to perform services that was based on facts not charged in the notice to show cause.

On the question of discipline, the review department remanded to the hearing judge to take evidence on and consider the effect of the respondent's entire prior disciplinary record. In so doing, it stated that as a matter of policy, defaulting respondents should not necessarily be precluded from receiving probation as part of their recommended discipline. Rather, each attorney's suitability for probation should be evaluated on a case-by-case basis, bearing in mind the functions of probation in connection with public protection as well as rehabilitation.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

COUNSEL FOR PARTIES

For Office of Trials: Teri Katz

For Respondent: No appearance (default)

HEADNOTES

[1 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where notice to show cause failed to charge respondent with failing to perform services in a certain matter, and notice to show cause was not amended to conform to proof at hearing, review department struck hearing department's finding of culpability with respect to that matter.

[2] **171 Discipline—Restitution**
1099 Substantive Issues re Discipline—Miscellaneous
Typically, Supreme Court orders actual suspension for an appropriate period and until restitution is made, rather than ordering suspension until restitution is made and then for an additional fixed term.

[3] **214.30 State Bar Act—Section 6068(m)**
Attorney whose failure to communicate with client occurred prior to effective date of statute requiring such communication could not be found culpable of violating that statute.

[4] **106.30 Procedure—Pleadings—Duplicative Charges**
213.10 State Bar Act—Section 6068(a)
When misconduct violates a specific Rule of Professional Conduct, it is unnecessary to allege the same misconduct as a violation of the attorney's statutory duty to uphold the law.

[5 a, b] **165 Adequacy of Hearing Decision**
513.90 Aggravation—Prior Record—Found but Discounted
802.69 Standards—Appropriate Sanction—Generally
806.59 Standards—Disbarment After Two Priors
1099 Substantive Issues re Discipline—Miscellaneous
The Supreme Court has expressed concern with assuring that the record in disciplinary proceedings reflects the correct evidence and finding of prior discipline or lack thereof. Accordingly, where only one of respondent's two prior disciplinary proceedings was made a part of the record and weighed by the hearing judge, it was necessary for the review department to remand the matter to the hearing judge to take evidence on the other prior discipline and consider its effect on the recommended discipline.

[6] **172.19 Discipline—Probation—Other Issues**
179 Discipline Conditions—Miscellaneous
802.30 Standards—Purposes of Sanctions
802.50 Standards—Reasonable Conditions
The goals of the State Bar's probation program are: (1) public protection; (2) rehabilitation of the respondent; (3) maintaining integrity of the legal profession; (4) enforcement of restitution orders;

(5) aiding future enforcement and (6) partially alleviating discipline. These goals are to be realized by use of probation conditions which are innovative, individualized, rehabilitative and flexible and which are implemented using the efforts of volunteer probation monitor referees.

[7] **802.30 Standards—Purposes of Sanctions**
The fundamental purposes of attorney discipline are protection of the public and legal community and the maintenance of high professional standards and public confidence in the legal system. Rehabilitation of the attorney is also a permissible goal of discipline as long as the rehabilitative sanction does not conflict with the primary aims of attorney discipline. Unlike the criminal justice system, punishment is not one of the objectives of attorney discipline.

[8 a-c] **107 Procedure—Default/Relief from Default**
172.19 Discipline—Probation—Other Issues
802.69 Standards—Appropriate Sanction—Generally
1099 Substantive Issues re Discipline—Miscellaneous
As a matter of policy, not all attorneys who fail to participate in disciplinary proceedings should be precluded from receiving discipline containing probation conditions. Defaulting attorneys do present a problem for the hearing department in that the cause of their misconduct is not always evident on the record, thus making it difficult to determine which probation conditions or duties would further the goals of discipline. Nonetheless, the view that an attorney's default is prima facie evidence that the attorney is not amenable to probation runs contrary to the duty to consider each case on its own merits to determine appropriate discipline, and also precludes the use of probation monitoring as an effective means of public protection.

[9] **802.69 Standards—Appropriate Sanction—Generally**
1099 Substantive Issues re Discipline—Miscellaneous
In determining recommended discipline, matters should be considered on a case-by-case basis, balancing the relevant factors, including the facts, gravity of misconduct and mitigating and aggravating evidence, and considering them in light of the objectives of attorney discipline.

[10] **801.20 Standards—Purpose**
802.69 Standards—Appropriate Sanction—Generally
1091 Substantive Issues re Discipline—Proportionality
Despite the need to examine cases on an individual basis to determine appropriate discipline, it is also a goal of disciplinary proceedings that there be consistent recommendations as to discipline, a goal that has been achieved in large measure through the application of the Standards for Attorney Sanctions for Professional Misconduct.

[11] **172.19 Discipline—Probation—Other Issues**
176 Discipline—Standard 1.4(c)(ii)
179 Discipline Conditions—Miscellaneous
802.69 Standards—Appropriate Sanction—Generally
1099 Substantive Issues re Discipline—Miscellaneous
Probation is not mandated in all cases where an actual suspension is imposed. When a lengthy period of actual suspension is recommended, imposing the provisions of standard 1.4(c)(ii) in lieu of a probation grant may serve adequately to protect the public and test the attorney's rehabilitation. Probation may not be indicated by virtue of the nature of the misconduct, the passage of time since the misconduct or clear evidence of the attorney's rehabilitation.

[12] **172.15 Discipline—Probation Monitor—Not Appointed**
Appointment of probation monitor may not be necessary where only routine, simple periodic reporting conditions are recommended, or are coupled with a rule 955 requirement and/or passage of the Professional Responsibility Examination.

[13] **172.19 Discipline—Probation—Other Issues**
1099 Substantive Issues re Discipline—Miscellaneous
A respondent should not be admitted to disciplinary probation when there is clear evidence that the respondent will not comply with its conditions.

ADDITIONAL ANALYSIS

Culpability
Found
213.91 Section 6068(i)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
Not Found
213.15 Section 6068(a)
214.35 Section 6068(m)
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Aggravation
Found
511 Prior Record
541 Bad Faith, Dishonesty
591 Indifference
611 Lack of Candor—Bar
Standards
802.40 Sanctions Available

OPINION

STOVITZ, J.:

The issue raised on review is one of first impression: whether probation is an appropriate discipline where, as in this case, the respondent attorney has defaulted. The State Bar Court hearing judge rejected probation; the State Bar's examiner representing the Office of Trial Counsel argues that it should be imposed in this case. Upon independent review of the record, we modify the decision to delete the culpability findings on Business and Professions Code section 6068, subdivisions (a) and (m), and to strike an uncharged violation that respondent failed to perform real estate work. We remand this matter to the hearing judge to provide the examiner with an opportunity to introduce additional evidence concerning a prior disciplinary case the record of which was not introduced by the examiner and therefore not considered by the hearing judge; and for the hearing judge to modify, if appropriate, her recommendation as to the discipline in this case.

1. FACTS

A. Introduction

Respondent Andrew J. Marsh was admitted to practice law in California on January 9, 1957. As we shall discuss *post*, he has two prior disciplinary suspensions.

In the instant proceeding, a two-count notice to show cause charged respondent with misconduct involving one client (count one) and failure to cooperate with the State Bar (count two). Respondent failed to answer the notice and his default was entered on September 6, 1989. On October 30, 1989, a default hearing was held. At that hearing, the judge granted the examiner's motion to deem admitted the misconduct alleged in the notice. (Bus. & Prof. Code, § 6088; rule 552.1(c), Trans. Rules Proc. of State Bar.) In addition, the examiner offered documentary evidence, the testimony of one witness and argument relating to the asserted misconduct. The facts concerning the misconduct as found by the hearing judge and adopted by us are at pages 3-10 of the hearing judge's corrected decision.[1] We summarize those facts as follows.

B. Abandonment of Client

Prior to January 1985, Jose Larios Aguilar was arrested and charged with first degree murder. (Exhibits 7-8 [attachment A], hereinafter "declaration"; R.T. pp. 15-16.) Soon after Aguilar's arrest, respondent met with Aguilar to discuss representing him in the case. Aguilar did not retain respondent for his trial and instead was represented by Joseph Lax. Aguilar was convicted of involuntary manslaughter and because he was then on probation for previous state and federal criminal matters, the conviction violated his probation as well. Aguilar was sentenced to three years in prison for the involuntary manslaughter, two years for the use of a firearm in the commission of the offense, and three years for violation of state probation.

Although Lax believed an appeal of the manslaughter conviction had merit (R.T. p. 17) and did prepare the notice of appeal for Aguilar's signature which was filed October 22, 1985 (exh. 5), Lax did not want to handle the appeal. On October 29, 1985, Lax sent respondent a copy of the notice of appeal and notice of application for bail pending appeal and order (exh. 6), so that respondent could represent Aguilar on the appeal. Lax also advised respondent to file an appeal of the violation of state probation. (Exh. 4.)

Aguilar sent his sister on his behalf to meet with respondent and to pay him $3,000 as a partial payment of fees to represent Aguilar on the state appeals, in his federal probation violation case and on an unrelated real estate matter.[2] **[1a - see fn. 2]** Aguilar's

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1. The first decision in this case was filed on March 12, 1990. A corrected decision, rectifying a typographical error, was filed the same day and is the decision we review.

2. **[1a]** The notice to show cause did not charge the respondent with failing to perform any work on the Yorba Linda real estate matter, nor was the notice amended to conform to proof at the hearing. Consequently, we strike this finding from the decision. (*Rose* v. *State Bar* (1989) 49 Cal.3d 646, 654.)

sister met respondent on February 22, 1986, and received a receipt for $3,000. (Declaration, exh. A.) Shortly thereafter, respondent visited Aguilar in prison to discuss his case and Aguilar gave him a letter from the federal authorities offering to allow his federal sentence to run concurrently with his state incarceration. (Declaration at p. 2.)

Aguilar never heard from respondent again. When advised by the state Court of Appeal that it had no record of an attorney appearing on his behalf, Aguilar wrote on April 6, 1986, from prison that respondent was his attorney and provided respondent's address. (Declaration, exh. B.) The Court of Appeal appointed Mary G. Swift as counsel for Aguilar in the summer of 1986. She was unable to contact respondent concerning the case nor could she obtain from him the record on appeal, which the court had forwarded to respondent as counsel for Aguilar. (Exh. 9.)

Aguilar wrote a number of letters to respondent receiving no response and finally wrote to the federal authorities concerning his federal probation violation. As a result, he stated, "the Judge sent for me . . . ." (Declaration at p. 3.) Mr. Lax represented Aguilar at the federal probation violation proceedings, having heard through Aguilar's sister that respondent had failed to appear at an earlier scheduled court proceeding and that a federal public defender had been appointed. (R.T. pp. 27-29.) Lax later met respondent and asked him why he was not working on the Aguilar matter. Respondent told Lax that he needed more money to continue to work on the case. (R.T. p. 24.)

C. Failure to Cooperate With State Bar Investigation

A State Bar investigator contacted respondent by mail twice in 1987 in connection with the investigation of the Aguilar representation. Investigator Ysabel Naetzel wrote to respondent on August 11, 1987, advising him that a complaint had been filed against him and seeking information and an explanation within two weeks. (Exh. 10, attached exh. A.) No response was received and investigator Naetzel again wrote to respondent on August 31, 1987. (Exh. 10, attached exh. B.) In that letter, she advised him of his duty to cooperate with the State Bar under Business and Professions Code section 6068 (i) and again asked for his reply within two weeks. She received no reply to this letter. Both letters were sent to respondent's State Bar membership address and neither was returned as undeliverable. (Exh. 10 at p. 2.)

D. Hearing Judge's Findings, Conclusions and Recommendation

The hearing judge found that respondent had (1) failed to perform services contrary to rule 6-101(A)(2)[3]; (2) withdrawn his services without protecting his client from foreseeable prejudice, in violation of rule 2-111(A)(2); (3) failed to return unearned fees, contrary to rule 2-111(A)(3); (4) failed to communicate with his client, contrary to section 6068 (m); (5) violated section 6068 (i) by failing to cooperate in the State Bar investigation; and (6) violated section 6068 (a) by virtue of the three rule violations in connection with his Aguilar representation.

The hearing judge did not find any evidence in mitigation of respondent's misconduct. As evidence in aggravation, she found respondent's actions concerning his client Aguilar to be in bad faith. (Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(iii); hereafter "standards".) She also found that respondent was indifferent toward rectifying the harm his misconduct caused his client (std. 1.2(b)(v)) and failed to cooperate with the State Bar in its disciplinary proceedings. (Std. 1.2(b)(vi).) The hearing judge also sought to weigh respondent's prior record of discipline as an aggravating factor (stds. 1.2(b)(i) and 1.7), but weighed the effect of only one, rather than two prior disciplinary suspensions.

Exhibit 11 is a certified copy of a portion of the State Bar's computerized public record of

3. Unless otherwise noted, all references to rules are to the Rules of Professional Conduct of the State Bar in effect January 1, 1975, to May 26, 1989, and all references to sections are to the Business and Professions Code.

respondent's membership status. That document shows that effective August 27, 1979, the Supreme Court suspended respondent from the practice of law for three years, stayed, with three years probation and an actual suspension for six months and passage of the Professional Responsibility Examination. (Bar Misc. No. 4154.) That suspension predated by less than a year the one disciplinary suspension considered by the hearing judge as a prior record, *In the Matter of Andrew Marsh* (Bar Misc. No. 4244).[4] (Exh. 12, p. 14.)

The one prior discipline record which was considered by the hearing judge resulted in respondent's two year suspension stayed on conditions including a three-month actual suspension. The record of that discipline showed respondent's failure to perform legal services and communicate with clients in a personal injury case between 1975 and 1977. (Exh. 13.) Because the examiner did not introduce in evidence the records of respondent's first prior suspension, we have no knowledge of respondent's misconduct therein. We know only that it resulted in discipline more severe than his second prior which the judge considered.[5]

The hearing judge's recommended discipline, was a nine-month suspension to commence after respondent pays Aguilar $3,000 in restitution with respondent to be suspended until restitution is made;[6] **[2 - see fn. 6]** notifications to clients, courts and counsel under subsections (a) and (c) of rule 955, California Rules of Court; and successful passage of the Professional Responsibility Examination within one year. The recommendation was based in large measure on the single prior misconduct the judge considered and the respondent's default in the instant case. She found imposition of a term of probation inappropriate because of respondent's failure to appear and participate in the disciplinary proceedings. Regarding probation, the judge wrote as follows in her decision: "Respondent's failure to appear in these proceedings is prima facie evidence that he is not amenable to probation at this time. Respondent's non-appearance has deprived the Court of the opportunity to evaluate what probationary conditions might be adequate to protect the public, and in his absence, I cannot speculate what they should be. [¶] The public, the courts, and the profession are not protected by meaningless grants of probation to attorneys who have demonstrated that they are unwilling to participate in the process." (Decision at p. 24.)

2. DISCUSSION

A. Findings and Conclusions

Before addressing the issues of discipline raised on review, we first adopt necessary changes to the hearing judge's findings and conclusions. **[3]** First, we delete the conclusions that respondent violated section 6068 (m) by failing to communicate with Aguilar and that his conduct overall violated section 6068 (a). (Conclusions A4 and A5; decision, pp. 16-17.) The former is inconsistent with *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815, in that the record

4. In fact, the Disciplinary Board's decision in the second case referred to the first case then pending in the Supreme Court and the hearing panel made an alternative recommendation in light of the pending matter. (Exh. 12, p. 14.)

5. Although the examiner introduced in evidence respondent's computerized State Bar public record, she appeared to misread the exhibit which listed respondent's two prior disciplinary suspensions. She thought that respondent's other prior proceeding only showed a dismissal of a referral proceeding under rule 955, California Rules of Court. (R.T. pp. 11-12.) While such a proceeding was dismissed, respondent had been disciplined as stated above, had been ordered to comply with rule 955 as part of that discipline and that discipline was separate from the one other prior discipline considered by the judge. (Compare exh. 11 with exh. 12.) Another circumstance supporting our conclusion that the examiner mistakenly assumed that respondent had only one prior disciplinary suspension is the absence of any reference in the examiner's briefs or the judge's decision to standard 1.7(b), providing for disbarment, absent the most compelling mitigation, if culpability is found in a case where respondent has been twice previously disciplined. (See *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 607; but see *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 788-789.)

6. **[2]** Although we express no opinion at this time on the propriety of an open-ended period of suspension until restitution followed by a fixed term of suspension, we note that this order of discipline is the converse of the phraseology typically used by the Supreme Court in such matters: an appropriate period of actual suspension and until restitution of the specified amount is made and satisfactory proof is provided to the State Bar Court.

demonstrates that respondent failed to communicate with his client prior to the summer of 1986, when the Court of Appeal appointed another attorney to represent Aguilar. Therefore, section 6068 (m) is not an appropriate basis for discipline since it was not in effect at the time of his misconduct. (Stats. 1986, ch. 475, § 2, pp. 1772-1773, eff. January 1, 1987; see also *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 902-903.)

[4] If, as in this case, misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of section 6068, subdivision (a). (*Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060; see also *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562 [no factual basis in record for finding of culpability under section 6068 (a)].)

[1b] The culpability findings and conclusions (decision, finding 10, conclusion A.1.a. and A.1.b.) suggest that respondent failed to perform legal services contrary to former rule 6-101(A)(2) because he did not do any work on the Yorba Linda real estate matter. Since the notice to show cause did not charge a failure to perform services in any civil matter, nor was the notice amended at the hearing (*Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1151-1152), we delete from the cited finding and conclusions any reference to respondent's performance of services in that civil matter. (See decision, pp. 5 and 10.)

B. Issues Concerning Probation

[5A] Although we must remand this matter to the hearing judge to take evidence on and consider the effect of respondent's other disciplinary suspension on her ultimate recommendation, in the event that she should deem a stayed suspension appropriate discipline, we shall discuss the issue of probation raised by the examiner. The examiner requested review of the decision on the ground that the discipline was insufficient because the recommendation did not include a period of probation, with conditions. As noted, *ante*, the hearing judge had rejected probation.

The examiner urges imposition of a three-year probation period in addition to the recommended sanction. She argues that otherwise the respondent can benefit by defaulting. If defaulting results in removing respondent from the ongoing scrutiny which probation would require, respondent will benefit if probation is not granted. In her view, respondent has avoided bar scrutiny into his conduct as a suspended attorney by his noncooperation and default.

She contends that the hearing judge applied the standards for imposing criminal probation in this case, rather than precepts for attorney discipline. When mitigation is shown or where it will serve the "ends of justice," the criminal probation system properly considers such factors as the defendant's willingness and ability to comply with probation imposed. (Pen. Code, § 1203, subd. (b).) In contrast, probation in the attorney discipline system, while presumably rehabilitative, is applied primarily as an additional measure to protect the public, courts and the legal profession. (See stds. 1.3 and 1.4(c)(i).) Rather than characterizing disciplinary probation as a "privilege" (decision at p. 24), the examiner sees it as a burden on the attorney. In her view, it is particularly important to require probation and reporting conditions in cases where it is not evident what caused the attorney's misconduct. Without some type of monitoring, the examiner argues, the disciplinary system cannot gauge whether the actual suspension has adequately protected the public and the respondent is fit to resume the practice of law.

The origin and use of probation as a means of attorney discipline have not yet been addressed by this review department. Nor has the subject been addressed by the California Supreme Court. Prior to 1963, attorney discipline short of disbarment consisted of actual suspensions, imposed by order of the Supreme Court, and public or private reprovals, imposed by the State Bar. (Bus. & Prof. Code, §§ 6077 and 6078.) The first reported California Supreme Court decision ordering a term of probation in an attorney discipline case was *Di Gaeta* v. *State Bar* (1963) 59 Cal.2d 116. In that case, the Court reviewed a challenge to the reasonableness of a recommendation of the Board of Governors of the State Bar (the predecessor body to the Disciplinary Board and the State Bar Court) to suspend an attorney from the practice of law for six months, but to stay the effect of the suspension order upon certain

probation conditions. (*Di Gaeta* v. *State Bar*, *supra*, 59 Cal.2d at p. 120.) The conditions provided for restitution to the victims of the attorney's misconduct within three months, and an actual suspension from law practice of three months and until restitution was paid (but not to exceed six months total actual suspension). (*Ibid.*) The Court sustained the recommended sanction and rejected the attorney's challenge that the discipline was excessive. (*Ibid.*)

In increasing numbers of cases thereafter, the Board of Governors of the State Bar recommended, and the Supreme Court imposed, stayed orders of suspension subject to probation conditions. Initially, the probation conditions required self-declarations filed with the State Bar, usually on a quarterly basis, and the program was administered without any formalities or policy guidelines. By 1981, after the creation of the State Bar Court, disciplinary cases in which an actual suspension was ordered without probationary conditions were rare. In that year, the Board of Governors recognized the inadequacies of the informal probation program and in response created the probation department within the State Bar Court by adopting additions and amendments to the Rules of Procedure of the State Bar, effective February 1, 1982. (Rules Proc. of State Bar, rules 100, 101, 103.1, 110, 230, 262, 573, 610, 611, 612 and 613.) **[6]** The State Bar committed itself to expand the probation program and to achieve six goals for the operation of probation. As set forth in the Board's resolution, they are: (1) the protection of the public; (2) the rehabilitation of the respondent; (3) the integrity of the legal profession; (4) the enforcement of restitution orders; (5) an aid to future enforcement; and (6) the partial alleviation of discipline. (Resolution of the Board of Governors of the State Bar, dated January 16, 1982.) Those goals were to be realized through the use of conditions of probation which were "innovative, individualized, rehabilitative, and flexible" and to be implemented with the efforts of volunteer probation monitor referees. (*Ibid.*) This is the system presently in use.

[7] While the fundamental purposes of attorney discipline are the protection of the public and legal community and the maintenance of high professional standards and public confidence in the legal profession, rehabilitation of the member is also a permissible goal of discipline as long as the rehabilitative sanction does not conflict with the primary aims. (Std. 1.3.) The Supreme Court has noted the rehabilitative aim of probation in disciplinary matters (*Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 319; *In re Nevill* (1985) 39 Cal.3d 729, 738, fn. 10),[7] as well as noting implicitly the benefit of probation monitoring. (*Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at p. 319.) Unlike the criminal justice system, punishment is not one of the objectives of attorney discipline. (*Id.* at p. 318.)

[8a] We are not prepared as a matter of policy to preclude all attorneys who fail to respond to disciplinary charges from receiving discipline containing probation conditions. **[9]** In determining the nature and degree of discipline, our Supreme Court instructs us that we must examine the facts in each case and consider the gravity of the misconduct, including the mitigating and aggravating evidence, in light of the purposes of discipline. (*In re Aquino* (1989) 49 Cal.3d 1122, 1129.) These relevant factors are balanced on a case-by-case basis. (*Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 618.) **[10]** Nevertheless, the Supreme Court has often expressed the need to assure consistency in disciplinary cases. (See *In re Naney* (1990) 51 Cal.3d 186, 190; *In re Lamb* (1984) 49 Cal.3d 239, 245.) This has been achieved in large measure through the application of the Standards for Attorney Sanctions for Professional Misconduct, adopted as part of the Rules of Procedure of the State Bar Court. (*Ibid.*; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11, 268.)

[8b] Defaulting attorneys do present a problem for hearing judges at the time disciplinary sanctions are fashioned and imposed. As both the hearing judge in her decision and the examiner in her brief

7. However, the Court noted in *In re Nevill*, "The rules [of procedure of the State Bar concerning probation] do not provide for revocation of probation when the *rehabilitative objective of probation* is not being met despite compliance with the probation conditions." (*In re Nevill*, *supra*, 39 Cal.3d at p. 738, fn. 10, emphasis added.)

acknowledge, the record of a default hearing often does not reveal the source of a member's misconduct so as to enable the State Bar to determine which, if any, probation conditions or duties would further the goals of discipline.

[8c] Despite the problems occasioned by defaulting attorneys, we are not of the view that when a default order is entered in a case, it in and of itself constitutes "prima facie evidence that he [respondent] is not amenable to probation at this time." (Decision at p. 24.) That finding runs contrary to the duty of the State Bar Court to consider each case on its own merits to determine the appropriate discipline. It also, as the examiner has noted, precludes the use of an effective means to safeguard the public—the monitoring of the respondent's practice by an experienced probation monitor to assure that the respondent has "reformed his conduct to the ethical strictures of the profession." (*Arden* v. *State Bar* (1987) 43 Cal.3d 713, 728.)

In this case, attorney Lax testified that he had seen respondent about six or seven weeks before the October, 1989, disciplinary hearing. Lax believed respondent was still practicing law, as Lax saw him "in and out of courtrooms" in the Ventura courthouse. (R.T. pp. 25-26.) If, on remand, the judge deems stayed suspension appropriate, she should consider whether on the facts probation would be appropriate for public protection.

[11] We do not construe probation to be mandated in all cases where an actual suspension is imposed. Where a lengthy actual suspension is recommended, the provisions of standard 1.4(c)(ii) may adequately protect the public and test the attorney's rehabilitation. Probation may not be needed or appropriate by virtue of the nature of the misconduct, the passage of time since the commission of the violations or clear evidence of an attorney's successful rehabilitation. **[12]** Even where probation is recommended, use of a probation monitor may not be necessary where only routine, simple, periodic "reporting" conditions are recommended or are coupled with a rule 955 requirement and/or passage of the Professional Responsibility Examination. **[13]** We would also agree that a respondent should not be admitted to disciplinary probation where there is clear evidence that he or she will not comply with its conditions. In this case, respondent has apparently complied satisfactorily with past probation orders and the present record does not clearly demonstrate that he will not comply with probation. It is the facts in the given case which must guide the appropriate discipline.

[5b] As we stated earlier, a significant matter of aggravation, respondent's additional prior record of disciplinary suspension, was not made a part of the record nor weighed by the hearing judge.

The Supreme Court has expressed its concern with assuring that the record reflects the correct evidence and finding of prior discipline or lack thereof. (*In re Mostman* (1989) 47 Cal.3d 725, 741.) We act on the Court's concern by ordering this matter remanded to the hearing judge.

3. DISPOSITION

With the changes to the judge's findings and conclusions set forth above, we remand this matter to the hearing judge to take evidence on the nature of respondent's prior suspension in Bar Misc. No. 4154 and for a discipline recommendation considering the effect, if any, that the additional prior discipline should have on the degree of discipline. (See std. 1.7(b); *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 607; *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 788-789.) If suspension is again recommended, then the issue of probation should be readdressed in light of the principles set forth in this opinion.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GARTH FARR HEINER

A Member of the State Bar

[Nos. 84-O-14336, 88-O-12250]

Filed December 31, 1990

SUMMARY

After consideration together of two matters consolidated on review, the review department reached the conclusion that both matters were tainted by improper findings which required further hearing. The matters were remanded for further consolidated proceedings consistent with the guidelines set forth in the review department's opinion.

The first matter involved respondent's request for review of the hearing referee's disbarment recommendation in an original disciplinary matter. (Hon. Lloyd S. Davis (retired), Hearing Referee.) The matter involved charges which had earlier resulted in respondent's transfer to involuntary inactive enrollment pursuant to Business and Professions Code section 6007 (c). The review department remanded the underlying disciplinary case, holding that: (1) preliminary findings prepared by the referee after the close of the State Bar's case, coupled with a more than year-long delay before the recommencement of the trial and presentation of respondent's defense case, gave the appearance that a decision had been reached as to basic facts before respondent had an opportunity to testify; (2) on remand the hearing judge should consider whether respondent's use of an ATM card to withdraw his share of funds from his client trust account was an aggravating factor and if so, what weight it should be afforded; (3) references in the referee's findings to Penal Code violations were improper since the criminal statutes were not charged in the notice to show cause; (4) evidence of marital difficulties could be raised by lay testimony and on remand, respondent should be afforded the opportunity to put on additional evidence in mitigation, and (5) the referee's recommendation as to discipline was to be disregarded and a new recommendation made after the issues remanded were resolved. The case was remanded for retrial of those counts that turned on the credibility of conflicting testimony of witnesses, and for other proceedings consistent with the review department's opinion.

The second matter involved charges of unlawful practice stemming from respondent's appearance in court after the effective date of his involuntary inactive enrollment. The review department sustained the referee's findings of culpability as to sections 6068 (a), 6125 and 6126 of the Business and Professions Code (Joe Nick Bavaro, Hearing Referee), but declined to find culpability as to additional charges. Specifically, the review department held that the section 6103 charge was redundant; that respondent's single court appearance while evidently unaware of his inactive status did not establish that respondent acted with moral turpitude or with intent to deceive the court; and that rule 3-101(B) was not designed to apply to unauthorized appearances

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

in California state courts, but rather unauthorized appearances in courts other than California state courts. The review department further held that neither the section 6007 (c) proceeding nor any of the unproven charges underlying it should have been relied upon as aggravation. The proceeding was remanded for a recommendation as to the appropriate discipline for both matters combined.

Lastly, the review department held that whether the discipline recommendation on remand was suspension or disbarment, respondent should be given credit for the time served on involuntary inactive enrollment.

COUNSEL FOR PARTIES

For Office of Trials: Erica Tabachnick, Geri Von Freymann

For Respondent: Kenneth C. Kocourek

HEADNOTES

[1] **116 Procedure—Requirement of Expedited Proceeding**
139 Procedure—Miscellaneous
2210.40 Section 6007(c)(2) Proceedings—Underlying Proceeding Expedited
Where lapse of time between sessions of hearing in disciplinary matter resulted from respondent's own actions, and respondent never complained about delay, respondent waived right to speedy determination of charges underlying involuntary inactive enrollment.

[2] **130 Procedure—Procedure on Review**
159 Evidence—Miscellaneous
Where document was marked as exhibit at hearing and clearly related to central issue in case, and both parties referred to it in briefs on review, review department had it made part of official court file despite offering party's failure to move it into evidence.

[3] **103 Procedure—Disqualification/Bias of Judge**
120 Procedure—Conduct of Trial
139 Procedure—Miscellaneous
194 Statutes Outside State Bar Act
Rule 232 of the California Rules of Court contemplates preparation of a tentative decision after the completion of the trial, not in midstream, as a preliminary stage in the procedure for requesting a statement of decision. Therefore, rule 232 does not support the legitimacy of issuing a tentative decision when only one side has presented evidence.

[4 a-d] **103 Procedure—Disqualification/Bias of Judge**
120 Procedure—Conduct of Trial
Duty of trial judge differs from that of juror with respect to expressing opinions on aspects of case before its submission, and there is nothing wrong with preparing tentative findings after culpability phase of hearing. However, where referee prepared preliminary findings before defense had put on its case, and lengthy delay ensued which referee indicated had affected the fact-finding process, this gave the appearance that a decision had been reached as to the basic facts at issue before respondent testified. When tentative findings were prepared and presented to the parties after only one side had presented evidence, it gave the appearance that the judge did not truly retain an open mind. Thus, certain of referee's findings were improperly reached.

[5] **103 Procedure—Disqualification/Bias of Judge**
Cases holding judges to have acted prejudicially are generally ones in which judges have refused to hear evidence at all on a certain point, or have indicated that they will not grant certain relief even if the party requesting it is legally and factually entitled to it.

[6 a, b] **103 Procedure—Disqualification/Bias of Judge**
120 Procedure—Conduct of Trial
162.90 Quantum of Proof—Miscellaneous
165 Adequacy of Hearing Decision
Although referee indicated that he had not reached a final decision despite preparation of draft findings, he appeared to have placed a greater burden of proof on the respondent than permitted by law. If a trier of fact imposes the wrong burden of proof, that itself can constitute reversible error.

[7] **162.11 Proof—State Bar's Burden—Clear and Convincing**
State Bar must prevail by clear and convincing evidence; if it is equally likely that respondent is telling the truth about controverted facts, State Bar has not met its burden.

[8] **165 Adequacy of Hearing Decision**
166 Independent Review of Record
It is the duty of the review department to conduct an independent review of the record. The review department is therefore able to make its own findings on issues that turn on documentary evidence or are undisputed. However, as to issues where conflicting testimony requires credibility determinations which were not made by the hearing department, such issues must be remanded for resolution.

[9 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**
Practice of keeping minimal amounts of attorney's personal funds in "dormant" client trust accounts violates rule against commingling personal funds in trust accounts, regardless of rationale for so doing. Exception to this rule permitting trust accounts to contain non-client funds to extent necessary to pay bank charges has been strictly construed.

[10] **142 Evidence—Hearsay**
Where complaining witness was in prison and deposition could not be arranged, hearing referee properly excluded witness's declaration on hearsay grounds.

[11] **221.00 State Bar Act—Section 6106**
The knowing issuance of a check drawn on insufficient funds is a proper basis for finding an act of moral turpitude. Where such check was immediately negotiable on its face, respondent was culpable regardless of whether or not respondent orally instructed recipient to delay cashing it.

[12 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
106.90 Procedure—Pleadings—Other Issues
192 Due Process/Procedural Rights
563.10 Aggravation—Uncharged Violations—Found but Discounted
Aggravating factors are not required to be separately charged. However, facts that could have formed the basis for an additional charge omitted from the notice to show cause cannot be relied on in aggravation in a default matter, because respondent is not fairly put on notice that such facts will be relied on.

[13 a-c] **280.00 Rule 4-100(A) [former 8-101(A)]**
420.00 Misappropriation
An attorney who repeatedly withdraws small amounts of cash for personal use from his or her trust account strongly indicates by such conduct that the attorney is improperly treating the trust account as a personal or general office account, and either allowing the attorney's own funds to remain in the trust account longer than they should (thus violating the rule against commingling), or misappropriating funds that properly belong to his or her clients. This is true regardless of the means by which the withdrawals are accomplished. Use of an ATM card for this purpose may slightly increase the risk of inadequate recordkeeping, but is not itself improper. Use of ATM cards to transfer funds from client trust accounts is not precluded by the Rules of Professional Conduct provided that the transfer is proper and adequate records are kept.

[14] **280.00 Rule 4-100(A) [former 8-101(A)]**
691 Aggravation—Other—Found
If respondent displayed a reckless or indifferent attitude toward his recordkeeping duties with regard to client trust funds, by using an ATM card to make repeated cash withdrawals of personal funds from his client trust account, this could constitute a factor in aggravation of commingling charges.

[15] **199 General Issues—Miscellaneous**
695 Aggravation—Other—Declined to Find
Respondent's withdrawal of his resignation with charges pending should not have been relied on as an aggravating factor. Respondents should be permitted to submit their resignations without fear that if a resignation is subsequently withdrawn, the respondent will be penalized by the court's reliance on that fact as an aggravating factor.

[16] **106.20 Procedure—Pleadings—Notice of Charges**
194 Statutes Outside State Bar Act
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
420.00 Misappropriation
In finding respondent culpable of misappropriating trust funds and of knowingly issuing a check drawn on insufficient funds, the referee's statement that respondent's acts constituted crimes involving moral turpitude was improper since the criminal statutes were not charged in the notice to show cause.

[17] **760.12 Mitigation—Personal/Financial Problems—Found**
Supreme Court precedent has not laid down a per se rule that serious marital difficulties cannot be raised in mitigation without the aid of expert testimony. The Supreme Court has often accepted lay testimony regarding marital difficulties as appropriate mitigation.

[18] **107 Procedure—Default/Relief from Default**
135 Procedure—Rules of Procedure
162.19 Proof—State Bar's Burden—Other/General
In a default matter, the well-pleaded allegations in the notice to show cause must be deemed admitted even if the State Bar did not so request. (Rules Proc. of State Bar, rule 552.1(d)(iii).)

[19] **107 Procedure—Default/Relief from Default**
162.90 Quantum of Proof—Miscellaneous
204.90 Culpability—General Substantive Issues
In a default matter, to the extent that evidence negates allegations of notice to show cause, it is evidence and not allegations that controls findings of fact.

[20] **213.10 State Bar Act—Section 6068(a)**
230.00 State Bar Act—Section 6125
231.00 State Bar Act—Section 6126
Respondent's violation of statutes prohibiting unauthorized practice of law was established by unanswered charges and uncontroverted evidence showing that respondent appeared in court after the effective date of his involuntary inactive enrollment.

[21] **220.00 State Bar Act—Section 6013, clause 1**
Where respondent was found culpable of violating statutes prohibiting unauthorized practice of law, charge of violating statute requiring obedience to court orders was redundant.

[22] **164 Proof of Intent**
204.20 Culpability—Intent Requirement
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]
Appearing in court while suspended or enrolled inactive does not inherently involve moral turpitude; nor does it necessarily involve deception of the court, if the attorney is unaware of his or her inactive status. Evidence that an attorney made a single court appearance while ignorant of his or her inactive status is insufficient to establish clearly and convincingly that the attorney acted with moral turpitude or intent to deceive the court.

[23] **252.10 Rule 1-300(B) [former 3-101(B)]**
(Former) rule 3-101(B) of the Rules of Professional Conduct, by its terms, appears to have been designed to permit the California State Bar to discipline its members for making unauthorized appearances in courts other than California state courts, and is not a proper basis for disciplining members for appearing in California state courts while suspended or inactive.

[24] **515 Aggravation—Prior Record—Declined to Find**
565 Aggravation—Uncharged Violations—Declined to Find
695 Aggravation—Other—Declined to Find
2290 Section 6007(c)(2) Proceedings—Miscellaneous
Neither a respondent's section 6007(c) inactive enrollment itself nor the unproven charges underlying it should be relied upon as aggravation in a subsequent disciplinary proceeding.

[25] **139 Procedure—Miscellaneous**
179 Discipline Conditions—Miscellaneous
1099 Substantive Issues re Discipline—Miscellaneous
2210.90 Section 6007(c)(2) Proceedings—Other Procedural Issues
Where respondent had been placed on involuntary inactive enrollment pursuant to section 6007(c) prior to hearing on underlying charges, and after review, proceeding on underlying charges was remanded for partial rehearing and new discipline recommendation, review department directed that on remand, whether suspension or disbarment was recommended, respondent should receive credit for time spent on inactive enrollment.

[26] **135 Procedure—Rules of Procedure**
139 Procedure—Miscellaneous
2210.40 Section 6007(c)(2) Proceedings—Underlying Proceeding Expedited
Upon respondent's application for retransfer to active status from involuntary inactive enrollment under section 6007(c), based on delay in processing of disciplinary proceeding on underlying charges, hearing judge must determine to what extent respondent or respondent's counsel was responsible for such delays, and whether circumstances otherwise justified any delays. (Trans. Rules Proc. of State Bar, rules 799, 799.7, 799.8.)

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a)
214.31 Section 6068(m)
221.11 Section 6106—Deliberate Dishonesty/Fraud
230.01 Section 6125
231.01 Section 6126
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
Not Found
213.15 Section 6068(a)
213.95 Section 6068(i)
214.35 Section 6068(m)
220.05 Section 6103, clause 1
220.15 Section 6103, clause 2
221.50 Section 6106
252.15 Rule 1-300(B) [former 3-101(B)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
320.05 Rule 5-200 [former 7-105(1)]
Other
2221 Section 6007(c)(2) Proceedings—Inactive Enrollment Ordered

OPINION

PEARLMAN, P.J.:

This proceeding involves two matters consolidated on review. Respondent was placed on involuntary inactive enrollment effective May 14, 1988, under Business and Professions Code section 6007 (c). Case number 84-O-14336 ("the underlying case") came before the review department on respondent's request for review of the original disciplinary matter involving the charges underlying the involuntary inactive enrollment. After respondent's involuntary inactive enrollment became effective, he appeared in a marital dissolution case which he was attempting to settle. Case number 88-O-12250 ("the unlawful practice case") is the disciplinary proceeding arising out of respondent's unlawful practice of law on that occasion.

Respondent defaulted in the unlawful practice case and it originally reached the review department for ex parte review under rule 452(a) of the Transitional Rules of Procedure of the State Bar. We set that matter for briefing and oral argument on our own motion under rule 452(b) because of concerns about the reliance by the referee on the section 6007 (c) order as prior discipline and his resulting recommendation of disbarment.[1] In the interim, the decision on the merits of the underlying case was issued and respondent requested review. We have considered both matters together and have reached the conclusion that both recommendations were tainted by improper findings which require further hearing. We therefore remand the two consolidated cases for further consolidated proceedings consistent with our rulings as set forth in this opinion.

DISCUSSION

I. The Underlying Case (No. 84-O-14336)

The underlying case involved 13 counts. Respondent was found culpable on 10 counts,[2] 9 of which were also included among the 13 complaints that had been relied on to support the section 6007 (c) inactive enrollment ("the 6007 (c) case").[3] Respondent was also found culpable in the underlying case of one count (count three) that was not relied on in the 6007 (c) case.[4] In addition, the decision in the underlying case relies on the decision in the unlawful practice case as prior discipline, while the unlawful practice case in turn used some of the same counts in the underlying proceeding as aggravating factors in arriving at the recommended discipline therein.

The referee's factual findings and legal conclusions as to culpability on the 10 counts are all challenged on review, based on respondent's contention that the referee improperly prejudged respondent

1. The clerk's office, at the instructions of the review department, invited the examiner to submit "a brief on the following issues: [¶] 1. What was the factual basis for the referee's finding in aggravation that 'Respondent has previously been discipline[d] by the Supreme Court'? [¶] 2. Was the referee's use of Respondent's involuntary inactive enrollment as an aggravating factor appropriate in light of (1) the fact that inactive enrollment is a necessary element of the underlying offense of practicing law while inactively enrolled, and (2) the opinion of the California Supreme Court in *Conway* v. *State Bar* (1989) 47 Cal.3d 1107 (*see id.* at 1119)? [¶] 3. If the aggravating circumstances relied on by the referee and the allegations relied on in support of Respondent's involuntary inactive enrollment are disregarded, what is the appropriate degree of discipline in this matter?"

2. Count six was dismissed on the examiner's motion. The examiner has not requested review of the referee's findings of no culpability on counts nine and thirteen. We see no reason to disturb them.

3. The complaints relied on in the 6007 (c) case on which respondent was not found culpable in the underlying case were as follows. First, the 6007 (c) case involved three separate complaints alleging that respondent had aided the unauthorized practice of law by one Riley F. Williams (investigation matters 86-O-12317, 86-O-14644, and 86-O-14791). In the underlying case, what was left of these complaints was all subsumed into count six of the notice to show cause, and this count was dismissed on the examiner's motion. Second, respondent was found not culpable in the underlying case on count nine of the notice to show cause, which was equivalent to the Moore matter (investigation matter 87-O-11140) presented in the 6007 (c) case.

4. There was one additional count (count 13) in the underlying case that was not involved in the 6007 (c) case. This count charged respondent with repeatedly accepting employment when he did not have the time, resources, and/or experience to perform competently. Respondent was found not culpable on this count.

culpable and issued a preliminary decision to that effect before the respondent put on any evidence. After considerable delay, the remainder of the hearing was held (some 14 months later) and the referee then modified his preliminary decision and issued it as his decision.

II. Respondent's Contentions On Review

Respondent's contentions on review fall into five categories: (1) the referee was prejudiced against him and denied him a fair trial; (2) the referee relied on improper aggravating factors; (3) the referee's findings on culpability make improper references to Penal Code violations; (4) the referee gave inadequate weight to respondent's evidence in mitigation, and (5) the recommended discipline (disbarment) is excessive, and in any event, respondent should get credit for the time he has spent on inactive status (since May 14, 1988).

A. Denial of Fair Trial.

Respondent's claim that the referee was prejudiced, and denied him a fair trial, is based on the following facts. After the State Bar completed the presentation of nearly all of its evidence in October 1988, there was a significant lapse of time before the proceedings recommenced in December 1989.[5] **[1 - see fn. 5]** When the proceedings recommenced, the referee presented the parties with a set of preliminary findings and conclusions prepared in October of 1988 based on the evidence presented up to that point.[6] **[2 - see fn. 6]**

Respondent promptly made a motion for mistrial based on the preliminary findings and argues on review that the preparation of this document demonstrated prejudicial misconduct, because it indicated that the referee had prejudged the case before hearing the defense evidence, and had improperly shifted the burden of proof to the defense.[7] Respondent asks the review department to rule that his motion for a mistrial based on the preparation of the preliminary findings should have been granted.

The examiner argues that preparation of tentative decisions is countenanced by California court rules and case law, and that the referee made clear that the findings were only tentative and his mind was still open and could be changed by defense evidence.

The examiner's position is not supported by the authorities cited. **[3]** Rule 232 of the California Rules of Court contemplates preparation of a tentative decision *after the completion of the trial*, not in midstream, as a preliminary stage in the procedure for requesting a statement of decision. (See generally 7 Witkin, California Procedure (3d ed. 1985) Trial §§ 394, 395, pp. 401-403; *id.* (1989 supp.) pp. 57-60.) It

5. **[1]** This lapse of time resulted largely from (1) respondent's request for a continuance to put on his defense case, and (2) respondent's subsequent aborted resignation. Respondent never complained about any of the periods of delay. On the contrary, he requested additional continuances which were not granted. Respondent therefore appears to have invited much, if not all, of the delay in the hearing department prior to the completion of his hearing and to the extent he or his counsel caused such delay, respondent waived his right to a speedier determination on the merits of the charges underlying his involuntary inactive enrollment. (See *Conway* v. *State Bar* (1989) 47 Cal.3d 1107, 1120-1122.)

6. **[2]** Respondent's counsel had this document marked as exhibit C, discussed it with the referee, and moved for a mistrial based on it. (12/12/89 R.T. pp. 3-6.) However, he never moved it into evidence. We have requested the clerk to make it part of the official court file nevertheless, since it clearly relates to a central issue in the case, and both parties have referred to it in their briefs.

7. At the hearing on December 12, 1989, when respondent's new counsel moved for a mistrial based on the judge's preliminary decision as a prejudgment of culpability, the judge stated that: "My practice here is, when I receive a file, I'll set up a skeleton findings on my computer. And then, as I hear the evidence, I check off matters *as to whether they've been found true or not*, or whether there's evidence to support them." (12/12/89 R.T. p. 4 (emphasis supplied).) He further stated that count seven "was still open". He acknowledged that respondent had not yet put on his defense on any count, and that the other findings would be open to change but would remain his findings "unless they're rebutted." The referee subsequently stated "Well, what do you anticipate putting on in the way of a defense here? I mean, we heard these charges way back in October of 1988. *The time to put on the defense was at that time while everything was still fresh.*" (12/12/89 R.T. pp. 11-12 (emphasis supplied).)

therefore does not support the legitimacy of issuing a tentative decision when only one side has presented evidence.

United Pacific Ins. Co. v. *Hanover Ins. Co.* (1990) 217 Cal.App.3d 925 also provides no support for the action taken here because in that case the tentative decision was issued after all the evidence was in. (*Id.* at p. 932.) The issue addressed by the Court of Appeal was the extent to which the wording of the tentative decision could be relied on in determining the validity of the judgment, and it was in that context that the court stated that the tentative decision may not be used to impugn later findings or the judgment. (*Id.* at pp. 932, 934.)

The other case cited on this point by the examiner is a superior court appellate department decision which refers in passing, without addressing the propriety of the procedure, to the fact that the appellate department had issued a tentative decision on the merits of the appeal before it, but had then raised sua sponte an issue regarding its jurisdiction to hear the appeal. (*People* v. *Columbia Research Corp.* (1980) 103 Cal.App.3d Supp. 33, 37 [disapproved on another point in *In re Geer* (1980) 108 Cal.App.3d 1002, 1004-1006, 1010-1011].)

Respondent is incorrect, however, in relying on Code of Civil Procedure section 611 and equating the referee's duty with that of a juror. **[4a]** "The duty of a trial judge differs from that of a juror with respect to expressing an opinion on any subject of the case before its submission." (*Gary* v. *Avery* (1960) 178 Cal.App.2d 574, 579.) **[5]** Generally, the cases holding judges to have acted prejudicially are ones in which judges have refused to hear evidence at all on a certain point, or have indicated that they will not grant certain relief even if the party requesting it is legally and factually entitled to it. (See 7 Witkin, California Procedure (3d ed. 1985) Trial § 228, and cases cited therein.) Nothing of that sort occurred in this case. **[4b]** Nevertheless, the preliminary findings give the appearance that a decision had been reached as to the basic facts at issue before respondent testified. This is compounded by the lengthy delay which the referee indicated affected the fact finding process. (See *ante*, fn. 7.)

[4c] While there is nothing inherently wrong with a judicial officer preparing tentative findings after the culpability phase, it is extremely problematic when tentative findings have been prepared and presented to the parties after only one side has presented evidence. It gives the appearance that the officer does not truly retain an open mind. **[6a]** The referee in this matter did state that he had not reached a final decision on any of the issues, notwithstanding the preparation of the draft findings, but he appears to have placed a greater burden on the respondent than the law permits (see *ante*, fn. 7)[8] **[6b - see fn. 8]** and failed to resolve a number of conflicts in the testimony. **[7]** It is the State Bar which must prevail by clear and convincing evidence. If respondent made it equally likely that he was telling the truth, the State Bar would not have met its burden. Thus, even though the examiner points out the preliminary decision in fact *was* modified in some respects to reflect evidence presented by the defense, it did not evaluate respondent's testimony, but often just recited it while leaving the preliminary adverse findings intact.

[4d] While we conclude that certain findings were improperly reached, we do not require that all counts be retried. **[8]** It is our duty to conduct an independent review of the record. As respondent concedes, we can therefore make findings of our own on issues that turn on documentary evidence or are undisputed without regard to the assessment of the credibility of conflicting testimony of witnesses. As a consequence, we have been able to determine that certain findings and conclusions by the referee are established by clear and convincing evidence. Conflict in the testimony on other issues makes it difficult for us to resolve those issues on the basis of the record before us because it turns on the credibility of witnesses we have not had the opportunity to observe. Such issues are remanded with directions.

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8. **[6b]** If a trier of fact imposes the wrong burden of proof, that itself can constitute reversible error. (7 Witkin, California Procedure (3d ed. 1985) Trial § 281, and cases cited therein.)

The following summary of the current record is set forth for the guidance of the parties and the hearing judge on remand. If the parties are able to stipulate to additional facts which are not truly in controversy, the hearing should proceed much more expeditiously on the remaining disputed issues as to each count.

Frierson Matter (Count One). Judith Frierson hired respondent in October 1983 to represent her in asserting her rights under a lease. (10/18/88 R.T. p. 110; 12/20/89 R.T. pp. 5-6.) She paid him $700 as an advance fee; any additional compensation was to be on a contingency basis. (10/18/88 R.T. pp. 111-114; 12/20/89 R.T. p. 6.) There is a conflict in the evidence as to whether the arrangement had been confirmed by letter. However, there is no dispute that respondent wrote a letter to Frierson's landlord and discussed the case with her. Subsequently, however, Frierson testified that she had great difficulty reaching respondent to discuss the status of her case. (10/18/88 R.T. pp. 116-124, 128, 131; exh. 6-8; 12/20/89 R.T. pp. 6-7.) The referee did not expressly determine her credibility, but merely summarized her testimony. Ultimately, in April 1984, Frierson wrote to respondent and demanded that he either file the complaint or send her money back. (Exh. 9.) The referee found that respondent did draft a complaint but it was not filed because by then Frierson had terminated his services. (Hearing dept. decision in Case No. 84-O-14336 [hereafter "decision"], p. 3, ¶5; 12/20/89 R.T. pp. 7-8; exh. D.)

Frierson initiated fee arbitration proceedings under the auspices of the Los Angeles County Bar Association.[9] Respondent failed to appear, and Frierson was awarded $700. Respondent did not pay the award, which was not reduced to judgment. (10/18/88 R.T. pp. 124-125, 133; 12/20/89 R.T. pp. 13-14.)

The testimony below was in unresolved conflict regarding whether respondent had performed enough work to earn the advance fee. Respondent stipulated that the arbitration occurred, that an award was made and the examiner then chose not to introduce the arbitration file as an exhibit. (10/18/88 R.T. pp. 125, 133.) As a result, there is no evidence regarding whether the award was properly served on respondent pursuant to the requirements of Business and Professions Code section 6203 (a).[10] We cannot defer to the referee on resolution of issues of fact disputed by respondent's testimony and therefore order count one to be retried on the charges of violating rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) of the former Rules of Professional Conduct.[11]

Porsch Matters (Counts Two and Three). The facts we find established regarding count two are as follows. In January 1984, respondent was retained by the grandmother of Thomas Porsch to represent Porsch and his three brothers in obtaining a share of their mother's estate. (10/18/88 R.T. pp. 135-137; 12/20/89 R.T. pp. 16-17.) Respondent obtained a settlement, and the four brothers went to respondent's office to sign the settlement agreement on November 8, 1984. (10/18/88 R.T. pp. 140-142; exh. 10.)

Respondent had received the $4,961.45 settlement check (exh. 12), along with the settlement papers, sometime between October 30, 1984, when they were sent to him from North Carolina, and November 6, 1984. (10/18/88 R.T. pp. 166, 186, 193; 12/20/89 R.T. p. 19; exh. 11.) He deposited the check in his trust account on November 6 (exh. 17), but did not disburse the funds to Porsch and his brothers until

9. The referee's decision states that Frierson contacted the State Bar and was advised to initiate arbitration. (Decision, p. 3.) Whether or not Frierson contacted the State Bar first, however, the testimony makes clear that the actual arbitration was conducted by the local bar in Los Angeles. (10/18/88 R.T. pp. 124-125, 133; 12/20/89 R.T. p. 11.)

10. Respondent attempted to justify or explain his failure to pay the award on several grounds including that respondent had spent ten to fifteen hours on the matter and felt that he had earned the $700 fee. (12/20/89 R.T. pp. 8, 14-16.) He also testified that he had severe financial problems at the time. (12/20/89 R.T. pp. 14-16.)

11. We reject culpability under sections 6068 (a) and 6103 of the Business and Professions Code charged under all counts on the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815-816; *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931; *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562.

April through July 1985,[12] and admittedly did not maintain an adequate trust account balance in the interim. (Exh. 17; 10/18/88 R.T. p. 193-194; 12/20/89 R.T. pp. 19-20, 22-26; exh. G.)[13] Although respondent did obtain receipts from the brothers for the payments he made to them, he did not provide them with an accounting of the disbursements (including his fee). (10/18/88 R.T. p. 191; exh. G.) The referee found respondent culpable of violating former rules 8-101(A), 8-101(B)(1), 8-101(B)(3) and 8-101(B)(4) of the Rules of Professional Conduct and of violating Business and Professions Code sections 6068 (a), 6103 and 6106.[14] The rule 8-101(A) finding is supported by the fact that respondent admittedly withdrew his share of the settlement in installments over a period of time rather than at the earliest reasonable time after his interest in it became fixed. The other rule violations are also supported by clear and convincing evidence. Respondent did not notify his clients of the receipt of funds in a timely fashion as required by rule 8-101(B)(1); did not render appropriate accounts to his clients as required by rule 8-101(B)(3) and did not promptly deliver the funds when requested to do so as required by rule 8-101(B)(4).

The section 6106 charge was apparently based both on respondent's misappropriation of the Porsch family funds and on respondent's alleged misrepresentation to Porsch that he had not received the funds. Again, we cannot defer to the referee on the misrepresentation issue since he appears to have assessed Porsch's credibility without taking into account respondent's contrary testimony.[15] We therefore remand for retrial on this point.[16]

Count three was based on the following related events. In January 1985, while Porsch and his brothers were waiting for their share of the estate settlement, Porsch requested that respondent advance him $250 from the settlement to pay a fine in a municipal court matter. Respondent gave Porsch the money in the form of a trust account check made payable to the municipal court. (10/18/88 R.T. pp. 146-148; exh. 13.) The check was drawn on a different trust account than the one into which the settlement check had been deposited and it was returned for insufficient funds. (10/18/88 R.T. p. 148; exh. 14, 16.) Respondent admitted that he did not know whether there was a sufficient balance in the account when he wrote the check. (12/20/89 R.T. pp. 27-28.) Respondent never replaced the invalid $250 check with other funds, so that although he later paid Porsch $600, Porsch never received all of his $850 share of the estate settlement. (10/18/88 R.T. pp. 155-156.)

Based on these facts, the referee found respondent culpable of violating sections 6068 (a), 6103, and 6106, and rule 8-101(A). (Decision, pp. 6, 18-19.)[17] We have determined that the charge of violating section 6106 requires retrial.

Respondent's culpability on the rule 8-101(A) charge is less problematic. Based on respondent's

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12. The decision below states that Porsch was paid part of his share in June 1984. This is in error; the payment was made in July 1985, and the payments to the other brothers were made in April through July 1985. (10/18/88 R.T. p. 154; exh. 15; exh. G.)

13. Porsch stated that respondent told him he had used the money to buy a house. (10/18/88 R.T. pp. 151, 183.) Respondent denied this. (12/20/89 R.T. pp. 22-26.) The referee did not definitively resolve this conflict, but appears to have considered it unnecessary to do so because respondent admitted his trust account balance had fallen below the amount of the brothers' share of the settlement. (See decision, p. 5.)

14. Unless otherwise noted, all statutory references hereafter are to the Business and Professions Code, and all references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

15. We decline to adopt the referee's finding that respondent made misrepresentations to Porsch because of the manner in which such finding was made. Porsch testified that respondent told him at that time that respondent had not yet received the settlement funds; respondent denied this. The referee had already indicated that he had accepted Porsch's testimony on this point before respondent testified. (10/18/88 R.T. pp. 140, 143; 12/20/89 R.T. p. 26; decision, p. 4; exh. C (preliminary decision) pp. 3-4.)

16. For the reasons stated *ante*, fn. 11, we reject culpability under sections 6068 (a) and 6103.

17. We do not adopt the section 6068 (a) and 6103 findings. (See *ante*, fn. 11.)

own testimony, the issuance of the $250 check as a "loan" to Porsch drawn on a different client trust account than the one in which the settlement proceeds had been deposited was in clear violation of the rule. Respondent testified that the account on which the check was drawn was not in fact being used as a client trust account and did not contain any funds belonging to clients. (12/20/89 R.T. p. 27.) [9a] He explained that he had a practice of keeping minimal amounts of his own funds in "dormant" client trust accounts, just to keep the accounts available for use when needed. (See 12/20/89 R.T. p. 27.) This practice constituted a violation of rule 8-101(A)'s prohibition against attorneys maintaining any personal funds in a client trust account, regardless of their rationale for so doing. (See *Silver* v. *State Bar* (1974) 13 Cal.3d 134, 145 & fn. 7 [maintenance of "buffer" funds in client trust account to prevent checks being returned for insufficient funds constituted prohibited commingling].)[18] [9b - see fn. 18]

Moreover, the evidence in support of count two, which was incorporated by reference in count three, established that the settlement funds were already available for distribution at the time the "loan" was requested and thus that Porsch should have been paid out of the trust account in which the settlement had been deposited. These facts, taken together, demonstrate a violation of the strict separation between personal and client funds which is required by rule 8-101(A). We therefore uphold culpability under rule 8-101(A). However, as with count two, we remand count three for redetermination of the charge of violating section 6106.

Gilliland Matter (Count Four). In July 1983, respondent was hired by Warren Gilliland to represent him in attempting to recover funds he had lent based on a defective financial statement furnished by a loan broker. (10/20/88 R.T. pp. 26-32.) Gilliland paid respondent a total of $1,266. (10/20/88 R.T. pp. 34-35, 37; exh. 33, 34.)

Respondent did some work on the case and filed a complaint,[19] but the testimony is thereafter in conflict as to respondent's alleged subsequent abandonment of the matter, except that Gilliland unsuccessfully requested the return of his fees (10/20/88 R.T. pp. 42, 62-65) and later hired another attorney to take over the case. Respondent testified that at the agreed-upon rate of $95 per hour, he had earned what Gilliland had paid him, and more. (12/20/89 R.T. pp. 32, 36-37.) The notice to show cause did not charge respondent with failing to return an unearned advance fee or with violating rule 2-111(A)(3). Thus, no findings can be entered against respondent on this issue absent an amendment of the charges. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 928-929.)

We remand for a retrial on the charged violations of rules 2-111(A)(2) and 6-101(A)(2).[20] Consideration of any motion to amend the notice to show cause we leave to the sound discretion of the hearing judge.

Gardner Matter (Count Five). Larry Gardner consulted respondent in July 1984 regarding a problem Gardner was having getting an insurance

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18. [9b] Rule 8-101(A)(1) permits trust accounts to contain non-client funds *only* to the extent necessary to pay bank charges. This exception has been strictly construed. (See *Silver* v. *State Bar*, *supra*, 13 Cal.3d at p. 145 & fn. 7.)

19. The referee's finding that respondent "failed to make reasonable efforts to serve a defendant" (decision, p. 7) is ambiguous. If it means that respondent did not serve *any* defendants, it is inconsistent with respondent's uncontroverted testimony that at least some of the defendants were served, after much difficulty. (12/20/89 R.T. pp. 32-33.) If it means that there was one particular defendant whom respondent did not make adequate efforts to serve, it is not supported by any evidence in the record. This finding does not appear essential to the culpability findings, in any event, and the facts can be clarified on remand.

20. The other charges pleaded in count four need not be retried. With respect to sections 6068 (a) and 6103, see footnote 11, *ante*. With respect to predecessor rule 6-101(2) of the Rules of Professional Conduct, there does not appear to be any basis in the record before us for charging a violation of this rule, which was superseded effective October 23, 1983. It appears that Gilliland hired respondent in July 1983, and that any abandonment which may have occurred did not take place until sometime in early 1984. However, if there is evidence to support this charge, it may be introduced on retrial.

company to pay for injuries he had suffered on a friend's property, which Gardner believed should have been covered by the friend's homeowner's policy. (10/19/88 R.T. pp. 99-100.) Gardner suggested that respondent handle the matter on a contingent fee basis. (10/19/88 R.T. pp. 100-101, 123-124.)

The testimony as to whether respondent failed to provide services or advise Gardner unambiguously that he was not accepting the case was in conflict. We remand for a retrial on the charged violation of rules 2-111(A)(2) and 6-101(A)(2).[21]

Terry Matter (Count Seven).[22] **[10 - see fn. 22]** Respondent was retained to defend Willie Terry in a murder case, and was paid the sum of $5,000 by Terry's family. The case was a difficult one, because defendant had confessed to having killed his wife intentionally. (12/20/89 R.T. pp. 52, 54.) Respondent testified, without contradiction, that he had put in approximately 100 hours of work on the case, including successful motions to reduce bail and to obtain the services of a court-appointed forensic expert. (12/20/89 R.T. pp. 53-55.)

Respondent was charged with failing to render the services for which he was retained; missing court appearances in the matter, and failing to refund the unearned portion of his advance fee when he was discharged. (Notice to show cause, pp. 6-7.) While the referee did not decide count seven in advance of the respondent's testimony, his finding of culpability again turns on the credibility of the respondent which the referee did not resolve. He just summarized respondent's testimony, including an erroneous characterization that respondent admitted missing a number of scheduled hearings. (Decision, p. 9.) The current record does not support a finding by clear and convincing evidence of failure to render services competently and abandonment.

Respondent testified that he put in over 100 hours of work on the case; this testimony was uncontroverted, and was not inconsistent with his description of what he did. However, we cannot resolve on this record the question whether respondent was culpable of failing to return the unearned portion of an advance fee. This issue is closely intertwined with that of the adequacy of respondent's representation of Terry, and cannot be resolved independently.

Accordingly, we remand for new trial the charges that respondent violated rules 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2).[23]

Martel Matter (Count Eight). Kim Martel hired respondent on September 19, 1984, to represent her in a marital dissolution. (10/18/88 R.T. p. 8; 12/20/89 R.T. p. 59.) She paid him a total of $1,000 in fees, plus an unstated amount for service of process costs. (10/18/88 R.T. pp. 15, 42-44; exh. 1, 2; 12/20/89 R.T. p. 59.)[24] Respondent performed some work on

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21. None of the other charged violations will be at issue on retrial. As to sections 6068 (a) and 6103, see *ante*, fn. 11. The predecessor rule 6-101(2) violation was not properly charged, as a matter of law, since Gardner did not even consult respondent until July 1984, over eight months after the effective date of the revised version of the rule. (See *ante*, fn. 20.)

22. The only evidence put on on this count by the State Bar was a copy of the court file in the underlying criminal matter. (Exh. 37.) **[10]** The complaining witness, Willie Terry, was in prison, and his deposition could not be arranged. (See 10/20/88 R.T. pp. 77-82.) The examiner offered Terry's declaration, but the referee properly refused to admit it on hearsay grounds. (12/12/89 R.T. pp. 18-19; 12/20/89 R.T. p. 4.) Nevertheless, the court file provided evidence to support the charges of failing to make court appearances, so respondent proceeded to testify about this count during the presentation of his defense. (12/20/89 R.T. pp. 51-58.) On remand, if Terry can be located and subpoenaed to testify and/or deposed, the State Bar will have another opportunity to present his testimony regarding this count.

23. The section 6068 (a) and 6103 violations charged in this count are not to be retried. (See *ante*, fn. 11.) Respondent was also charged on this count with a violation of section 6068 (i), but no proof of this charge was offered by the examiner and the referee did not address it at all in his decision. The same was also true for counts 8, 11 and 12 (discussed *post*). The State Bar did not establish culpability on the 6068 (i) charge on any of these counts. Accordingly, we dismiss the section 6068 (i) charges as to counts 7, 8, 11, and 12.

24. The basis for the referee's finding that Martel paid $25 for costs (decision, p. 10) is unclear, though she did testify she paid a small sum for the service of the summons, in addition to the $1,000. (10/18/88 R.T. pp. 15, 42.) Respondent admitted receiving the $1,000, but said that some $500 of it went for the cost of Martel's husband's deposition. (12/20/89 R.T. p. 59.) The referee appears to have disregarded this testimony. Respondent did not produce any documentation regarding the cost of the deposition and there was no evidence that he had obtained a transcript.

the matter; he filed the dissolution petition, had settlement discussions, and took the husband's deposition. (10/18/88 R.T. pp. 37, 43, 64-65.)

Meanwhile, respondent became increasingly difficult to reach, failed to keep appointments to meet with Martel, and failed to take action in the proceeding as she directed. (10/18/88 R.T. pp. 38-39, 44-50.) In October and November 1986, Martel wrote respondent to express her frustration and demand that he take further action to move the matter along. (Exh. 3, 4.) Eventually, respondent moved his office without giving Martel his new address and telephone number, and after December of 1986, she did not hear from him again. (10/18/88 R.T. pp. 52-53.) In December 1987 or January 1988, respondent called Martel to tell her the case was set for trial in a week, but by then Martel had decided to hire another attorney to take over the matter. (10/18/88 R.T. pp. 53-54; 12/20/89 R.T. p. 69.)

Respondent testified that the delays in the case were due to a deliberate strategy of waiting to see what happened to certain community assets that might significantly increase in value. (12/20/89 R.T. pp. 60-61.) To some extent, Martel corroborated this testimony; she admitted that there was a change of strategy during the course of the case, that it became more litigious, and that her husband eventually hired a lawyer. (10/18/88 R.T. p. 73.) Nonetheless, respondent's own testimony demonstrated his abandonment of the case. He admitted that after he failed to file an order to show cause in October 1986 as Martel had insisted, and especially in light of Martel's complaint to the State Bar, he *assumed* she had replaced him, even though he had not received a substitution of counsel form and had not moved to withdraw. (12/20/89 R.T. pp. 63-64, 69-72.)

The referee concluded that the facts of the Martel matter established violations of rule 6-101(A)(2) and of sections 6068 (a), 6068 (m), and 6103. (Decision, pp. 11, 20.)[25] The rule 6-101(A)(2) conclusion appears supported by clear and convincing evidence that he failed to file an order to show cause as Martel had insisted. We further find a violation of rule 2-111(A)(2) on this count, as charged in the notice to show cause and supported by clear and convincing evidence. The section 6068 (m) violation is sustained on the basis of a failure to communicate which extended past the effective date of that statute. (See *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815.) We therefore adopt the findings of culpability of rule 6-101(A)(2) and section 6068 (m) and add a finding of a rule 2-111(A)(2) violation.[26]

Jackson Matter (Count Ten). In June 1985, Gwendolyn Jackson hired respondent to file a bankruptcy on her behalf, for which she paid him a $500 fee. (10/19/88 R.T. pp. 86-87; 12/20/89 R.T. pp. 79-80.)

In October 1986, Jackson filed an action in small claims court to recover her $500. (10/19/88 R.T. p. 89; Exh. 26.) There is a dispute as to whether Jackson served respondent by certified mail. (12/20/89 R.T. pp. 82-83.) Jackson admitted respondent had never been served with the judgment. (10/19/88 R.T. pp. 92-93.)

Respondent testified that he had prepared a bankruptcy petition, but that he had advised the client not to file it because he had managed to put off her creditors and the bankruptcy was unnecessary and would adversely affect her credit rating. (12/20/89 R.T. pp. 81-82.) Respondent also testified that he had done enough work to earn the $500 fee. (12/20/89 R.T. p. 83.)

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25. In his conclusions of law, the referee referred to a failure to return unearned fees that is not referenced in the findings of fact. (Compare decision, pp. 10-11 with *id.*, p. 20.) Based on respondent's description of the services he rendered, there is no clear and convincing evidence that any portion of what Martel paid him remained unearned when their relationship ended. On the contrary, Martel's November 1986 letter reflects an agreement that additional fees would be due for further work. (Exh. 4.) This implies that the advanced fees had already been exhausted by the work up to that point. In any event, the referee's reference to unreturned unearned fees is not accompanied by a conclusion that respondent violated former rule 2-111(A)(3). We decline to find that there were any unreturned unearned fees, and we find respondent not culpable on the rule 2-111(A)(3) charge pleaded in this count.

26. We do not adopt the findings of section 6068 (a) and 6103 violations. (See *ante*, fn. 11.)

We cannot resolve the conflicts in the evidence to conclude on review of the current record that respondent failed to provide the services for which he was paid and/or to return unearned advance fees. We remand for determination of whether respondent violated rules 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2). On remand, the examiner may also introduce evidence and argue culpability as to the section 6106 charge since the referee's findings and conclusions as to the section 6106 charge were inconclusive. (Compare decision, p. 13 with *id.*, p. 21.) However, the section 6068 (a) and 6103 charges are not to be retried. (See *ante*, fn. 11.)

Williams/Rego Matter (Count Eleven). This matter involves a single insufficient funds check for $5,430, issued on respondent's personal account for reasons unrelated to his law practice. (12/20/89 R.T. p. 85; see exh. 19, 25.) The check was presented by its payee, Wilford Williams, at a commercial check cashing facility in Highland, east of San Bernardino. (10/19/88 R.T. pp. 25-26.) The complaining witness, Alfred Rego, the owner of the check cashing business, called respondent before cashing the check to verify the genuineness of the check and the identity of the payee, which respondent confirmed. (10/19/88 R.T. pp. 26-27, 36-37.)

Respondent admittedly knew there were insufficient funds in the account to cover the check at the time it was presented, but there was a conflict in the testimony as to whether he instructed Rego to delay in cashing it. (12/20/89 R.T. pp. 87-88.)[27]

It is undisputed that Rego cashed the check, and it was later returned for insufficient funds. (10/19/88 R.T. pp. 26-27.) Rego called respondent about the matter, and sent him a demand letter. (10/19/88 R.T. pp. 28-29; exh. 20.) Respondent agreed to pay off the amount of the check in monthly payments of $1,000, but failed to do so. Instead, he sent one payment for $100, and a second $100 payment in the form of a check drawn on insufficient funds (which he later replaced with $100 in cash). (10/19/88 R.T. pp. 30-34; exh. 21; see 12/20/89 R.T. pp. 86-87.) Respondent made further promises of payment, but none were kept. (10/19/88 R.T. pp. 32-35.) Respondent testified at the hearing that he recognized the debt, and still intended to pay the rest of the money, but was unable to do so due to his lack of funds. (12/20/89 R.T. p. 88.)

[11] The knowing issuance of a check drawn on insufficient funds is a proper basis for finding a section 6106 violation. (See *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815-816; *Jones* v. *State Bar* (1989) 49 Cal.3d 273, 278, 280-281, 285-286, 289.) We therefore do not need to remand for determination of the conflict in testimony on this count. The fact that respondent knowingly issued the check to Williams, which on its face was immediately negotiable, itself supports his culpability of violating section 6106 regardless of what respondent instructed Rego.[28]

Floyd Matter (Count Twelve). In April 1987, Louise Floyd hired respondent to represent her in a custody matter. She dropped the custody matter shortly thereafter, but requested that respondent take over her defense in a criminal case[29] and apply the fees paid for the custody matter to the criminal matter, to which respondent agreed. (10/19/88 R.T. pp. 7-10; 12/20/89 R.T. pp. 89-91.)[30] Floyd ultimately paid respondent a total of $1,000. (10/19/88 R.T. pp. 8-10, 14-15; 12/20/89 R.T. pp. 90-91.)

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27. The referee found, based on Rego's testimony, that respondent did not reveal the lack of sufficient funds when he called. (Decision, p. 13; see 10/19/88 R.T. p. 36 [according to Rego, respondent did not affirmatively state that the check *was* covered].) Respondent vehemently denied this. (12/20/89 R.T. p. 87.) Again, it is not our role to resolve the credibility conflict which the referee preliminarily resolved in Rego's favor *before* respondent testified. (Exh. C [preliminary decision], p. 11.)

28. We do not find respondent culpable on this count of violating sections 6068 (a), 6068 (i), or 6103. (See *ante*, fns. 11 & 23.)

29. Floyd was charged with a felony for allegedly violating Penal Code section 4573.6, arising out of her allegedly having removed marijuana from official custody while employed by the Police Department. (See 12/20/89 R.T. p. 89; 10/19/88 R.T. p. 10; exh. 18.)

30. This account differs from the referee's findings, but is based on the consistent testimony of both Floyd and respondent. The difference is not material, in any event.

During the months of June and July 1987 respondent missed two court appearances in Floyd's case, and showed up late on two other occasions. (10/19/88 R.T. pp. 11-15.) Respondent admitted missing the two appearances, but stated that he had the flu on one occasion and car trouble on the other. (12/20/89 R.T. pp. 91-92.) However, respondent apparently did not inform the court or his client of his inability to appear, or the reasons for it. Respondent also admitted that he had been fined for arriving in court late. (12/20/89 R.T. p. 93.) Eventually, respondent failed to appear for Floyd's trial, and a public defender was appointed. (10/19/88 R.T. pp. 16, 23.)

Respondent did not return any of the fees Floyd had paid him. (10/19/88 R.T. pp. 16-17.) Respondent testified, without contradiction, that he had done 16 hours of work on Floyd's case, and made three court appearances, and Floyd admitted that respondent had represented her at the preliminary hearing. (12/20/89 R.T. pp. 91-92; 10/19/88 R.T. pp. 20-22.) Respondent testified that the $1,000 Floyd paid him was only part of the $1,500 he was supposed to receive for services through the preliminary hearing. (*Id.*)

The referee found respondent culpable of failing to provide services he had agreed to provide, of failing to advise the court of his inability to appear, and of failing to return unearned fees. (Decision, pp. 15, 21.) The latter finding, and the corresponding conclusion that respondent violated rule 2-111(A)(3), are not supported by clear and convincing evidence; respondent appears to have earned the $1,000 he received. The conclusions that respondent violated rule 2-111(A)(2) and 6-101(A)(2) are appropriate, based on his failure to appear for trial and to call the court when he was unable to make other court appearances.[31]

B. Aggravating Factors.

We also provide guidance to the parties and the hearing judge on remand on two issues in aggravation. The referee relied in aggravation on (1) respondent's use of an ATM card in making frequent, undocumented withdrawals from client trust accounts, and (2) respondent's submission and then withdrawal of a resignation from the State Bar. Respondent argues that these factors were improperly relied on.

1. Use of ATM card. Respondent testified that he used his automatic teller machine ("ATM") card to withdraw from the trust account the share of the settlement that represented his attorney's fees. This evidence was not controverted. Respondent's argument is largely that the use of the ATM card is an improper finding in aggravation because it was not charged in the notice to show cause. However, the referee did not find the use of the ATM card itself to be an aggravating factor, but found that its use coupled with the failure to produce any accounts or ledger sheets showing deposits or withdrawals on behalf of his clients demonstrated respondent's apparent lack of appreciation of his obligation to maintain careful accounts and not to commingle client funds with his own.

[12a] Aggravating factors are not required to be separately charged.[32] **[12b - see fn. 32]** In any event, we consider the evidence that respondent used an ATM card to make cash withdrawals from his trust account to be fairly encompassed within the issues

31. We do not find respondent culpable on this count of violating sections 6068 (a), 6068 (i), or 6103. (See *ante*, fns. 11 & 23.) We also decline to find culpability, or to remand, on the section 6068 (m) violation charged in this count. The referee did not address this charge in his decision. Based on the record before us, there is no basis to find respondent culpable of failing to communicate with his client. Floyd's own testimony indicates that she apparently was able to contact respondent reasonably quickly at all times. (See 10/19/88 R.T. pp. 6-17.)

32. **[12b]** However, facts that could have formed the basis for an additional, different charge which was omitted from the notice to show cause cannot be relied on in aggravation in a default matter, because in such a case the respondent is not fairly put on notice that the additional uncharged facts will be used against him. (See *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207.) In the present matter, on the other hand, respondent appeared and contested the charges, and had an adequate opportunity to respond to the evidence regarding his accounting practices and ATM use (which evidence became part of the record in part through his own testimony).

raised by the charges (in count two) that respondent "failed to maintain [the Porsch client funds] in trust pending distribution to [the Porsch brothers]," "misappropriated said funds" and "failed to provide an accounting to [his] clients."

We thus consider whether respondent's use of an ATM card may properly be viewed as an aggravating factor in conjunction with the violations charged in count two of which we have already concluded that respondent was culpable. **[13a]** An attorney who repeatedly withdraws small amounts of cash for personal use from his or her trust account strongly indicates by such conduct that the attorney is improperly treating the trust account as a personal or general office account, and either allowing the attorney's own funds to remain in the trust account longer than they should (thus violating rule 8-101(A)), or misappropriating funds that properly belong to his or her clients. This is true regardless of the means by which the withdrawals are accomplished—check, ATM card, withdrawal slip, or other means.

[13b] While use of an ATM card may slightly increase the risk that proper records of the transaction will not be kept, **[14]** the factor in aggravation is not the use of the card per se, but whether the respondent thereby displayed a reckless or indifferent attitude toward his recordkeeping duties with regard to client trust funds. Accordingly, on remand the hearing judge may consider, as did the referee below, whether respondent's use of an ATM card to make repeated cash withdrawals from his trust account was, under the circumstances, an aggravating factor and, if so what weight it should be given apart from the inherent blameworthiness of the underlying misconduct.[33] **[13c - see fn. 33]**

2. *Withdrawal of resignation.* **[15]** The examiner concedes that respondent's withdrawal of his resignation should not have been treated as an aggravating factor.In California, voluntary resignations from membership in the State Bar with charges pending have been allowed for many years. While they entail immediate transfer to inactive status and, if accepted by the Supreme Court, operate to relinquish membership in the State Bar, they do not admit the truth of any pending charges. (See Cal. Rules of Court, rule 960.) In a discipline case which might result in disbarment, a member may well choose to submit his or her resignation, rather than incur the time, expense and uncertainty of proceeding to hearing. To encourage such an option, respondents should be permitted to submit their resignations without fear that if a resignation is subsequently withdrawn, the respondent will be penalized by the court's subsequent reliance on that fact as an aggravating factor.

C. Improper References to Penal Code Violations.

[16] In finding respondent culpable on two counts of misappropriating trust funds and one count of knowingly issuing a check drawn on insufficient funds, the referee also stated that respondent's acts constituted crimes involving moral turpitude. (See decision, pp. 5, 6, 14 (counts two, three, eleven).) Respondent argues that the references to his acts as crimes and the citations to Penal Code sections are improper.

The examiner concedes that such findings should be deleted and we have not adopted them in making our limited determinations of culpability herein since the criminal statutes were not charged in the notice to show cause. (*Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 903.)

D. Inadequate Consideration of Mitigation.

In case number 84-O-14336, respondent will have a second opportunity to put on evidence in mitigation so we need not deal with the issues he has raised as to the showing made on the current record.

The examiner raises another issue regarding mitigation. Respondent did not present any expert testimony regarding the emotional problems he was having at the time of his misconduct, nor regarding

33. **[13c]** In addition, we emphasize that our holding does not imply that all use of ATM cards in connection with client trust accounts is inherently improper or even suspect. For example, we do not read the Rules of Professional Conduct to preclude the use of an ATM card to accomplish a transfer of funds from a client trust account to a general office account otherwise proper under rule 8-101 (now rule 4-100), provided that adequate records are kept.

his subsequent recovery from those problems. (See Standards for Attorney Sanctions for Professional Misconduct ["standards"], Trans. Rules Proc. of State Bar, div. V; standard 1.2(e)(iv).) The examiner argues that lay testimony on such matters is inadequate to establish mitigation, relying on *Bercovich* v. *State Bar* (1990) 50 Cal.3d 116.

Bercovich was disbarred for violating rule 955 of the California Rules of Court. His physical/emotional disability defense was rejected as untimely presented, inadequately supported, and inconsistent with some of his other testimony and arguments. (*Bercovich, supra*, 50 Cal.3d at pp. 125-129.) **[17]** However, the Supreme Court in *Bercovich* did not lay down a per se rule that the oft-relied on "serious marital difficulties" factor cannot be raised in mitigation without the aid of expert testimony. On the contrary, notwithstanding standard 1.2(e)(iv), the Supreme Court has often accepted lay testimony regarding marital difficulties as appropriate mitigation. (See, e.g., *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1364.)

On remand, respondent should be given a fair opportunity to put on evidence in mitigation, including the extent of his prior practice without incident and evidence in support of his claim that his misconduct was the result of unusual stress which he has since recognized and overcome. (Cf. *Young* v. *State Bar* (1990) 50 Cal.3d 1204, 1220-1221; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667.) We express no opinion as to the effect or weight to be given whatever mitigating evidence may be offered on remand.

E. Appropriate Discipline.

Because so much of this matter remains unresolved pending retrial, the referee's recommendation as to discipline must be disregarded and a new recommendation must be made by the judge on remand after the remaining issues are resolved.

III. The Unlawful Practice Case

In the unlawful practice case, respondent defaulted and his motion to set aside the default was properly denied for lack of a showing of good cause.[34] The State Bar did not request review of the referee's ruling and respondent was precluded from doing so by virtue of his default. However, as part of the transition to the new State Bar Court system, this review department must independently review the record of State Bar proceedings in matters such as this which were tried before former referees of the State Bar Court, but assigned to this department after September 1, 1989. (Trans. Rules Proc. of State Bar, rules 109 and 452(a).)

Upon our initial review of the record, we had a number of concerns regarding the referee's decision (see *ante*, fn. 1) which we deemed substantial within the meaning of rule 452(b) of the Transitional Rules of Procedure of the State Bar. We therefore set the matter for hearing on our own motion together with respondent's request for review of the referee's decision in case number 84-O-14336.

At the default hearing before the referee below, the State Bar did not request that the allegations of the notice to show cause be deemed admitted. **[18]** Nonetheless, well-pleaded allegations must be deemed admitted and "no further proof shall be required . . . ." (See rule 552.1(d)(iii), Rules Proc. of State Bar.) In any event, the examiner introduced documentary evidence in support of the allegations, including the declaration of the opposing counsel in the matter in which respondent appeared improperly. (Exh. 6.) **[19]** To the extent that the evidence negates allegations of the notice to show cause, it is the evidence and not the allegations that controls the findings of fact. (*Remainders, Inc.* v. *Bartlett* (1963) 215 Cal.App.2d 295.)

The evidence established, and the referee found, that after the effective date of respondent's involuntary inactive enrollment (May 14, 1988), respondent appeared in superior court in one domestic relations matter on two occasions, June 9, 1988, and July 7, 1988. After June 9, respondent's opposing counsel in the matter read in a legal newspaper that respondent had been placed on involuntary inactive enrollment. The opposing counsel contacted the judge and respondent, and at the next hearing date in the matter,

34. Accordingly, in analyzing the evidence on this count we have not considered the facts put forward by respondent in connection with his unsuccessful motion to set aside his default.

July 7, 1988, respondent was substituted out and his client was substituted in propria persona. The opposing counsel stated that when he discussed the inactive enrollment with respondent, evidently sometime after the June 9 appearance, respondent "disavowed knowledge of his inactive enrollment."

Based on this evidence, the referee found respondent culpable of violating all of the statutes and rules charged in count one of the notice to show cause,[35] to wit, sections 6068 (a), 6103, 6106, 6125, and 6126, and rules 3-101(B) and 7-105.

[20] We sustain respondent's culpability as to sections 6068 (a), 6125, and 6126; culpability on these charges is established by the unanswered charges and the uncontroverted evidence that respondent appeared in court after the effective date of his involuntary inactive enrollment. (See *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 604; *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 236-237.)

However, we do not find respondent culpable of violating sections 6103 or 6106, or rules 3-101(B) or 7-105.[36] [21] The section 6103 charge is redundant. (*In the Matter of Trousil*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 237.) [22] As to the section 6106 and rule 7-105 charges, appearing while suspended or enrolled inactive does not inherently involve moral turpitude. (*Id.* at p. 239.) Nor does it necessarily involve deception of the court, if the attorney is unaware of his or her inactive status. Since involuntary inactive enrollment orders do not have to be served by personal service, it is not impossible that an attorney may practice while inactive without being aware of that fact. Evidence that an attorney made a single court appearance while ignorant of his or her inactive status is insufficient to establish clearly and convincingly that the attorney acted with moral turpitude (section 6106) or intent to deceive the court (rule 7-105).

In the present matter, there is no charge in the notice to show cause or any evidence regarding respondent's state of mind at the time of his June 9 court appearance. The record contains the opposing counsel's statement that respondent later contended he had *not* been aware, at the time of that appearance, of the fact that his involuntary inactive enrollment had been ordered. (Exh. 6.) As for the July 7 appearance, the record reflects that respondent was substituted out on that occasion, and there is no evidence that he resisted the substitution or denied his inactive enrollment at that time. Accordingly, the record does not establish by clear and convincing evidence that respondent violated section 6106 or rule 7-105.[37]

[23] Rule 3-101(B) states that members of the State Bar shall not practice law in jurisdictions in which they are not entitled to do so under the regulations of that jurisdiction. By its terms, the rule appears to have been designed to permit the California State Bar to discipline its members for making unauthorized appearances in courts other than California state courts. We are not aware of any decision of the California Supreme Court holding that rule 3-101(B) may be used as a basis for disciplining members of the California State Bar who appear in California state courts while suspended or inactive. Moreover, rule 3-101(B) is superfluous when used for this purpose, since it is redundant of sections 6125 and 6126. Accordingly, we decline to find respondent culpable of violating rule 3-101(B). We thus find respondent culpable in case number 88-O-12250 only of violating sections 6068 (a), 6125 and 6126.

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35. A second count charged respondent with violating section 6068 (i) by failing to cooperate with the State Bar's investigation of his unlawful appearance. This count was properly dismissed by the referee because there was no admissible evidence establishing that an investigator's letter had been sent to respondent.

36. Since these issues were not called to the examiner's attention in the clerk's letter (fn. 1, *ante*), if the examiner considers that the review department overlooked relevant authority to the contrary in reaching its conclusion on these issues, a motion for reconsideration under rule 455 can be brought for such purpose.

37. Because of the absence of proof of violation of section 6106 and rule 7-105, we do not need to address the sufficiency of notice of factual allegations supporting such charges and to support the findings upon respondent's default. (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929; *In the Matter of Morone*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 217.)

The only issues remaining on review of the unlawful practice case are the appropriateness of relying on the section 6007 (c) proceeding as aggravation and the appropriate degree of discipline. [24] In her brief on review, the examiner has acknowledged that neither the section 6007 (c) inactive enrollment itself nor the unproven charges underlying it should have been relied on in aggravation, and we concur. We therefore omit any disciplinary recommendation at this time and by consolidating this proceeding with the underlying case, permit the hearing judge to assess the appropriate aggregate discipline for both cases. Because it would not be feasible or serve the interests of justice to attempt to do otherwise, on remand we permit respondent to participate fully in the discipline share of these consolidated cases while being limited to addressing culpability only as to those issues in case number 84-O-14336, which have been remanded for further proceedings.

IV. Credit For Time On Inactive Enrollment

[25] Respondent argues that "whatever discipline is imposed" he should get credit for time on inactive enrollment by analogy to *In re Young* (1989) 49 Cal.3d 257. In *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, opn. filed on den. rehg., 1 Cal. State Bar Ct. Rptr. 19, recommended discipline adopted, Nov. 29, 1990 (S016265), we recommended to the Supreme Court that time on inactive status under 6007 (c) should be credited to Mapps's two-year actual suspension. We similarly conclude that, whether suspension or disbarment is recommended by the judge on remand, credit should be accorded respondent for time spent on inactive enrollment. [26] Respondent also has the right under rule 799.8 of the Transitional Rules of Procedure of the State Bar of California, adopted effective March 3, 1990, to apply for retransfer to active status. At oral argument in this proceeding, his counsel indicated that such an application might be made upon remand. It will therefore be for the hearing judge on remand to determine to what extent respondent or his counsel was responsible for delays in processing of this case beyond the deadlines imposed by rule 799.7 (see *ante*, fn. 5), and whether circumstances otherwise justified any delays. In this regard, we observe that neither respondent nor his counsel caused delay on review in the handling of these consolidated proceedings. We express no opinion about the other issues which the judge to be assigned on remand must consider under rules 799.8 and/or 799.

DISPOSITION

To summarize, we remand case number 84-O-14336 for a further hearing de novo on culpability before a judge appointed under section 6079.1 of the Business and Professions Code, with respect to the following charges: count one, the charges of violating rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2); counts two and three, the charge of violating section 6106; count four, the charges of violating rules 2-111(A)(2) and 6-101(A)(2); count five, the charges of violating rules 2-111(A)(2) and 6-101(A)(2); count seven, the charges of violating rules 2-111(A)(2), 2-111(A)(3) and 6-102(A)(2); and count ten, the charges of violating rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) and section 6106. We also remand both case number 84-O-14336 and case number 88-O-12250 for recommendation of appropriate discipline in these consolidated cases and for any other proceedings not inconsistent with this opinion.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

WILLIAM H. TEMKIN, JR.

A Member of the State Bar

[No. 86-O-15265]

Filed January 25, 1991

SUMMARY

Respondent was a partner in a limited partnership. The creditors of another partner in the partnership contended that their debtor had fraudulently transferred his partnership interest to respondent. In the ensuing civil litigation, respondent filed a declaration asserting the validity of the transfer. Ultimately, the civil courts found that the purported transfer had been a fraud intended to deceive the transferor's creditors.

In the State Bar disciplinary proceeding, respondent was charged with filing a false declaration in the civil litigation, and with participating in the preparation of documents used to fraudulently conceal the purported transferor's interest in the partnership. After a hearing, the State Bar Court referee found that respondent had failed to exercise due diligence in preparing and signing the declaration he filed in superior court. The referee concluded that such conduct violated rule 7-105(1) of the Rules of Professional Conduct and sections 6103, 6068 and 6068(b) of the Business and Professions Code, in that respondent employed conduct and methods that tended to mislead the trial judge in the case. However, the referee did not find respondent's conduct to have constituted an act involving moral turpitude, dishonesty or corruption. (Kevin G. Lynch, Hearing Referee.)

On review, the review department found that the referee's findings and conclusions of law were incomplete and in some instances irreconcilable, and remanded the matter to the hearing department of the full-time State Bar Court for retrial of the charges. The review department noted that, in almost every case, a violation of rule 7-105(1) would also constitute an act of dishonesty proscribed by section 6106, and that on the facts of the instant case the referee's finding of culpability under rule 7-105(1) could not be reconciled with his finding of non-culpability on the section 6106 charge.

COUNSEL FOR PARTIES

For Office of Trials: Loren J. McQueen

For Respondent: Gert K. Hirschberg

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a-d] **165 Adequacy of Hearing Decision**
166 Independent Review of Record
Where hearing referee's findings and conclusions were incomplete and in some instances irreconcilable with each other, and referee failed to make critical determinations regarding credibility of respondent's testimony asserting his innocence, which testimony conflicted with determinations of civil courts in related litigation, review department could not make its own findings and conclusions based on documentary evidence, but found it necessary to remand for new trial, including reassessment of witness credibility and weight of documentary evidence in light of such assessment.

[2 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
213.20 State Bar Act—Section 6068(b)
Where notice to show cause did not charge violation of statute requiring attorneys to maintain respect for courts and their officers, and no motion to amend was made at hearing, referee's conclusion that respondent violated the statute was inappropriate.

[3 a-c] **106.30 Procedure—Pleadings—Duplicative Charges**
213.10 State Bar Act—Section 6068(a)
220.10 State Bar Act—Section 6103, clause 2
In matter charging attorney with filing false declaration and assisting in preparation of fraudulent documents, hearing referee's conclusions that respondent violated statutory duty to uphold the law (Bus. & Prof. Code, § 6068(a)) and statute regarding attorneys' violations of their oath and duties (id., § 6103) were inappropriate. Section 6068(a) charge was duplicative since same misconduct was charged as violation of specific Rule of Professional Conduct. Section 6103 does not define a duty or obligation, but rather provides grounds for discipline for violation of an oath or duty defined elsewhere.

[4] **166 Independent Review of Record**
On its independent review of the record, the review department may reweigh all evidence and adopt findings and a recommendation of discipline at odds with the referee on all issues.

[5] **146 Evidence—Judicial Notice**
147 Evidence—Presumptions
191 Effect/Relationship of Other Proceedings
Although prior civil court actions are not binding in disciplinary matters, they are admissible when they address issues substantially identical to those raised in the disciplinary hearing. Civil court decisions that are supported by substantial evidence are accorded a strong presumption of validity, and individual facts established by such civil court decisions may serve as a conclusive legal determination as to particular facts determined by the civil courts.

[6] **135 Procedure—Rules of Procedure**
148 Evidence—Witnesses
166 Independent Review of Record
The Rules of Procedure of the State Bar require that the review department give great weight to the hearing department's findings of fact resolving issues pertaining to testimony. This rule rests on the sound policy that when evidence turns on the assessment of credibility, the evaluation of such

evidence should be made by a judicial officer who sees and hears the witnesses and can translate the credibility accorded witnesses into the weight to be given their testimony as it relates to other evidence in the case. Before disregarding any such credibility assessments, the review department must have a very good reason for doing so. (Trans. Rules Proc. of State Bar, rule 453.)

[7] **162.11 Proof—State Bar's Burden—Clear and Convincing**
162.90 Quantum of Proof—Miscellaneous
165 Adequacy of Hearing Decision
191 Effect/Relationship of Other Proceedings
Where court in civil action related to disciplinary proceeding had concluded (applying preponderance of evidence standard) that there was substantial evidence that purported transfer of partnership interest to respondent was fraudulent, and it was undisputed that respondent had prepared partnership transfer document, referee's conclusion in disciplinary proceeding that there was no evidence that respondent actively participated in fraud in preparation of document could only be consistent with civil court finding if referee's conclusion was based on difference in applicable standard of proof, in that culpability in disciplinary cases must be proven by clear and convincing evidence.

[8] **148 Evidence—Witnesses**
165 Adequacy of Hearing Decision
Where the record includes extensive documentary as well as testimonial evidence, it is incumbent on the hearing department to weigh all of the evidence and identify for the litigants and further reviewing bodies the way in which credibility assessments led to the court's ultimate conclusions regarding respondent's culpability or innocence.

[9 a, b] **165 Adequacy of Hearing Decision**
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]
Where hearing referee concluded that respondent did not act dishonestly, but failed to exercise due diligence in learning the true facts before filing a declaration in a civil court, this conclusion was inconsistent with the conclusion that respondent's declaration violated the rule against seeking to mislead a judge by a false statement of fact.

[10] **165 Adequacy of Hearing Decision**
204.90 Culpability—General Substantive Issues
320.00 Rule 5-200 [former 7-105(1)]
If respondent's only breach, in relation to a charge of filing a false declaration, was a lack of care in ascertaining the truth of the facts presented in the declaration, then it was incumbent on the hearing referee to determine whether that lack of care or diligence was culpable within the charges and fell below the level of conduct required of members of the State Bar.

[11 a, b] **162.11 Proof—State Bar's Burden—Clear and Convincing**
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]
In order to find a violation of the rule against misleading courts and judicial officers, the State Bar must show clearly and convincingly that the attorney knowingly presented a false statement intending to mislead the court, and such deceit would, in almost every case, be an act of dishonesty in violation of the statute authorizing discipline for acts of moral turpitude, corruption and dishonesty. When an attorney makes a false or misleading statement to a court, that act involves moral turpitude.

[12] **204.90 Culpability—General Substantive Issues**
320.00 Rule 5-200 [former 7-105(1)]
When an attorney presents statements to a judicial tribunal while appearing in pro per as a party to litigation, the rule against misleading courts and judicial officers applies to him as an attorney.

[13] **320.00 Rule 5-200 [former 7-105(1)]**
Culpability of violating the rule against misleading courts and judicial officers may be established even where there is no direct evidence of malice, intent to deceive, or hope of personal gain. Actual deception is not necessary to sustain a violation; wilful deception is established where the attorney knowingly presents a false statement which may tend to mislead the court. Even where the fabrications are the work of another, and the attorney is unaware of the truth, the attorney remains culpable if the attorney learns of their bogus nature and continues to assert their authenticity.

ADDITIONAL ANALYSIS

Culpability
Not Found
213.15 Section 6068(a)
213.25 Section 6068(b)
220.15 Section 6103, clause 2

OPINION

STOVITZ, J.:

A hearing referee of the former, volunteer State Bar Court has recommended that respondent William H. Temkin, Jr., be suspended from the practice of law in California for one year, stayed on conditions, including a 45-day actual suspension. The referee found respondent failed to exercise due diligence in preparing and signing a declaration he filed in 1981 in superior court in support of his objection to the entry of a partnership charging order, in which he claimed that the interest sought to be secured had been transferred to him for consideration in February 1981. The referee concluded that respondent's declaration violated rule 7-105(1) of the Rules of Professional Conduct of the State Bar[1] and Business and Professions Code sections 6103, 6068 and 6068 (b)[2] in that respondent employed conduct and methods that tended to mislead the trial judge in the case. The referee also concluded that the State Bar examiner representing the Office of Trial Counsel had failed to demonstrate by clear and convincing evidence that respondent's conduct involved moral turpitude pursuant to section 6106.

[1a] For the reasons we shall detail below, based upon our independent review of the record, which consisted of many documents, prior court rulings and extensive testimony before the referee, we have concluded that the referee's findings and conclusions of law are incomplete and in some instances irreconcilable with each other. Particularly in light of the extensive testimony which required a credibility assessment to determine whether the particular charged rule or statute was violated, coupled with the referee's failure to make needed findings resolving credibility issues, we have determined that we cannot properly resolve the factual and legal inconsistencies in the referee's decision. Accordingly, we have determined that we have no choice but to remand this matter to the Hearing Department of the State Bar Court for retrial of the charges.

FACTS

We summarize the facts which appear from the record to be undisputed. Respondent was admitted to practice in California on June 5, 1963, and has no prior record of discipline. Prior to February 2, 1981, respondent was a general partner in a limited partnership entitled Normandie Towers, Limited ("Normandie Towers"). His parents, Mr. and Mrs. William Temkin, Sr., his brother, Sheldon, and William Nemour, all were limited partners. Normandie Towers was intended to construct senior citizen housing financed in part by federal housing grants.

On May 20, 1981, judgment was entered in San Diego Superior Court in favor of Richard Eddy for $303,741 against William Nemour and other defendants (none connected to this case), in a civil action unrelated to Normandie Towers. After recording the judgment in Los Angeles County, Eddy filed a petition in Los Angeles County Superior Court on June 16, 1981, seeking a charging order against Normandie Towers and its partners, to reach the partnership interest held by Nemour to satisfy the judgment. (Exh. 2, attach. A.) At the superior court order to show cause hearing, respondent appeared in propria persona to oppose the charging order, alleging in his petition and supporting declaration that Nemour no longer held an interest in the limited partnership. Respondent stated in his declaration dated July 27, 1981, that "ultimately by February 15, 1981," over five months earlier, he had paid Nemour over $300,000 and had been assigned Nemour's partnership interest. (Exh. 2, attach. B.) An amended certificate of limited partnership evidencing the transfer, signed "as of" February 2, 1981, was recorded on June 16, 1981, and was attached to respondent's declaration.

In light of respondent's submission, the trial court judge continued the proceedings to permit discovery. Eddy's attorneys deposed respondent, his brother, Sheldon, his attorney, Robert Leff

1. References to the Rules of Professional Conduct herein are to the rules effective from January 1, 1975, through May 26, 1989.

2. Unless otherwise stated, references to sections are to the sections of the Business and Professions Code.

(respondent's long-time law partner, who signed the agreement on behalf of respondent's parents) and Norman Cohen (respondent's boyhood friend and sometime business partner who notarized the amended partnership agreement and accompanying jurat,[3] and recorded the agreement). Documents were also exchanged by respondent and Eddy's attorneys, including the original partnership agreement, the partnership ledgers and summaries of payments made to Nemour and Nemour's payments to the partnership, and letters; one an unsigned letter from respondent to his parents and brother Sheldon dated December 12, 1980, which sought their consent to the transfer of Nemour's interest in exchange for the "advances" made to Nemour (exh. 22, attach. 20); and another letter, signed by Nemour and dated February 2, 1981, purporting to acknowledge $307,577.53 in advances made by Normandie Towers to Nemour from a partnership account[4] on which Nemour was an authorized signatory. (Exh. 31.) The notarial journal was not produced in discovery and Cohen claimed it had been lost.

Without holding a plenary hearing and based solely on the evidence adduced in discovery, the superior court found that Nemour was still a partner in Normandie Towers. It concluded that respondent had never paid any consideration for Nemour's interest in the partnership, did not sign the amended certificate on February 2, 1981, and did not sign a notary public journal as part of the execution of the amended certificate. Further, the court found that the amended certificate of partnership (drafted by respondent) had been prepared to "fraudulently conceal" Nemour's interest in the partnership. The court issued an order dated February 9, 1982, charging the partnership interest of Nemour in Normandie Towers with the unsatisfied judgment of Eddy. (Exh. 2, attachs. G and H.)

Respondent and the partnership appealed from the charging order, alleging error by the trial court in failing to hold a plenary hearing on the order to show cause and contending that the charging order was not supported by substantial evidence in the record. On April 23, 1985, the Court of Appeal affirmed the superior court's order and rejected both of the arguments raised. (*Eddy* v. *Temkin* (1985) 167 Cal.App.3d 1115 (Arguelles, J.).) The appellate court identified specifically the substantial evidence supporting the finding of fraudulent intent in the form of depositions, declarations and bank records showing: Nemour had received less than $300,000 for the interest and continued as an authorized signatory on the bank account *after* his "withdrawal," formalities were not followed in the purported transfer, and the notarial records could not be produced, making the February 1981 agreement date highly suspect. (*Id.* at p. 1122.)[5]

In the meantime, this dispute spawned other litigation. In February 1982, after the charging order had been entered by the trial court and finding Normandie Towers to be all but insolvent, Eddy brought suit in Los Angeles County Superior Court against respondent, Nemour, Sheldon Temkin, Cohen and Leff, in a fraudulent conveyance action alleging that they had conspired to hide and conceal Nemour's interest in Normandie Towers from his creditors, including Eddy. (Exh. 29.) Eventually,

3. The State Bar Court hearing referee found that the separate jurat was altered by using "white-out" to cover the date "June 9" and typing "Feb. 2" over it. This alteration was not discovered until June 1986, when attorneys for Eddy were able to examine the original document. (R.T. pp. 37-38.)

4. The account was shared with another limited partnership, Sunset-Normandie Towers, Ltd.

5. The Court of Appeal's discussion preceding its description of the specific substantial evidence supporting the charging order is as follows: "II. Substantial Evidence [¶] (3) Appellants contend that there was not substantial evidence that the transfer of Nemour's partnership interest to [respondent] was a fraud upon creditors. In support of this contention, appellants recite only the evidence favorable to their position. For this reason alone, their contention could be rejected. (See *Estate of D'India* (1976) 63 Cal.App.3d 942, 950 [134 Cal.Rptr. 165].) However, we also reject this contention on its merits. [¶] Under the Uniform Fraudulent Conveyance Act (Civ. Code, §§ 3439-3439.12), '[e]very conveyance made . . . with actual intent . . . to hinder, delay, or defraud . . . creditors, is fraudulent as to . . . creditors.' (Civ. Code, § 3439.07.) [¶] Proof of fraudulent intent often consists of '*inferences* from the circumstances surrounding the transaction, such as secrecy or concealment of the debtor, the relationship of the parties . . . .' (5 Witkin, Cal. Procedure (2d ed. 1971) Enforcement of Judgment, § 147, p. 3510, and cases cited therein.)" (*Eddy* v. *Temkin*, *supra*, 167 Cal.App.3d at pp. 1121-1122, emphasis and omissions in original.)

after Nemour's death, Eddy entered into separate settlements with the surviving parties, including respondent.[6]

Also, in September 1983, respondent and his co-defendants in the fraudulent conveyancing suit sued Eddy and his counsel for malicious prosecution, slander of title, abuse of process and conspiracy to interfere with economic advantage, arising from the prosecution of the charging order proceeding. (Los Angeles Superior Court Case No. C469948; exh. 32, attach. L, p. 17.) The complaint was dismissed by the trial court as defective, without leave to amend, and affirmed on appeal. (*Normandie Towers, Ltd.* v. *Eddy* (1987) (Cal.App.) [opinion deleted upon direction of Supreme Court by order dated April 23, 1987].)

The notice to show cause which started this disciplinary proceeding against respondent was filed on March 13, 1989. It charged respondent with violations of sections 6068 (a), 6103 and 6106 and former rule 7-105(1). It alleged that at the July 28, 1981 superior court hearing, respondent filed his declaration stating that Nemour no longer had any interest in Normandie Towers because respondent had previously purchased his interest and that respondent participated in the preparation of documents that were used to fraudulently conceal Nemour's interest in Normandie Towers. On November 27, 1989, after five days of hearing, the referee issued his decision, finding culpability under rule 7-105(1), and sections 6103, 6068(b)[7] **[2a, 3a - see fn. 7]** and 6068. The referee found no clear and convincing evidence of violation of section 6106 (act of moral turpitude, dishonesty or corruption). The referee recommended that respondent be suspended, as we have noted, *ante*.

In his decision, the referee made factual findings distilling the essence of the undisputed facts we have recited above. He found that respondent prepared in 1981 the amended partnership certificate but did not find when in 1981 he prepared it. The referee also found that respondent prepared the July 1981 superior court declaration stating that Nemour had no interest in Normandie Towers but did not find whether or not that statement was falsely made. The referee concluded both that respondent failed to use "due diligence" in learning the true facts before filing his superior court declaration and that respondent misled the court in filing that declaration. However, the referee did not specify how or in what manner respondent misled the court. The referee did conclude that there was "no evidence" that respondent actively participated in fraud on the court in preparing the amended certificate "of February 1981 or [sic] June 1981". The referee also concluded that respondent employed conduct which tended to mislead the superior court by a false statement of fact by filing his July 1981 declaration and violated rule 7-105(1) but the referee did not conclude whether or not respondent's violation was wilful[8] and did not specify in what manner respondent's conduct tended to mislead. Although the referee concluded that respondent violated his oath and duties under sections 6068, 6103 and 6068 (b) by employing methods that tended to mislead the superior court, the referee did not specify any misleading methods; and, as noted, respondent was not charged with a violation of section 6068 (b). Finally, the referee concluded that the State Bar did not establish by clear and convincing evidence that respondent's submission of the declaration to the superior court based on the amended certificate of limited partnership was an act of dishonesty, corruption or moral turpitude defined by section 6106.

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6. Respondent's settlement was entered *after* he (1) had a default judgment entered against him for $200,000 ($100,000 in punitive damages), (2) moved to set aside the default, which was denied, (3) appealed the denial of the default to the Court of Appeal, which remanded the matter to the trial court with orders to vacate the default, (4) declared bankruptcy, which stayed the trial court proceedings and resulted in his severance from the case, and (5) fought Eddy's complaint in bankruptcy court seeking to prevent discharge of any claim arising from the fraudulent discharge proceeding. Respondent was granted partial summary judgment in the latter proceeding, the bankruptcy judge finding that the loss of value of Normandie Towers was not a result of fraud on the part of respondent and dismissing Eddy's complaint on that issue.

7. **[2a]** Section 6068 (b) was not alleged in the notice to show cause and no motion to amend was made at the hearing. **[3a]** Sections 6068 (a) and 6103 would not be appropriate bases for culpability on this record. (See discussion, *post*.)

8. Section 6077; rule 1-100.

Neither the examiner nor respondent requested review of the decision. Nevertheless, the procedural rules governing review of State Bar Court decisions rendered by the former hearing department pursuant to former section 6079 require that we review the referee's decision ex parte. Upon independent review of the record, we issued a notice of intent to adopt with modifications, filed on May 3, 1990, providing for no change in the proposed discipline, but modifying the findings to (1) strike the culpability findings under sections 6068 (a), 6103 and 6068 (b), (2) add two factual findings that establish respondent's knowledge of a misrepresentation in his declaration when it was submitted to the trial judge, and (3) conclude that the respondent's misrepresentation constituted an act involving moral turpitude or dishonesty under section 6106. In the notice, we deferred submission for 30 days to permit the parties to submit any objections to the proposed modifications by means of a request for review. (Rule 450(a), Trans. Rules Proc. of State Bar.) Respondent timely objected to our proposed action and requested our review.

DISCUSSION

On our ex parte review, we noted inadequacies and inconsistencies in the findings and conclusions. We also noted that neither side had initially requested review, including of the recommendation of suspension. Upon respondent's later objection to our proposed modifications on ex parte review and request for review however, as we shall detail below, we have determined that it is necessary to remand this matter for a new hearing.

[4] Our review of the record is independent. (Rule 453, Trans. Rules Proc. of State Bar; see *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928.) We may reweigh all evidence and adopt findings and a recommendation of discipline at odds with the referee on all issues. (See *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.)

[5] Although prior civil court actions are not binding in disciplinary matters (*Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 444), they are admissible when they address issues substantially identical to those raised in the disciplinary hearing. (*Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612, 634; *Caldwell* v. *State Bar* (1975) 13 Cal.3d 488, 496-497.) Civil court decisions that are supported by substantial evidence are accorded a strong presumption of validity. (*In re Wright* (1973) 10 Cal.3d 374, 377.) Indeed, individual facts established by such civil court decisions may serve as a "conclusive legal determination" as to particular facts determined by the civil courts. (*Lee* v. *State Bar* (1970) 2 Cal.3d 927, 941.) **[1b]** Were this case one solely resting on documents and argument of counsel, we would appear to be in an appropriate position to exercise our independent review by correcting the problems in the referee's decision and assessing the appropriate discipline. But at the State Bar Court hearing, the referee also heard five days of testimony. As respondent has argued to us, a significant portion of his testimony consisted of his assertion of his position of good faith and acts, which if believed, show his innocence of wrongdoing.

[6] Our rules of procedure require we give great weight to the findings of fact of the hearing referee resolving issues pertaining to testimony. (Trans. Rules Proc. of State Bar, rule 453; see *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 283; *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055.) That rule rests on a sound policy reason, for when evidence turns on assessment of credibility we should insist that an evaluation be made by a judicial officer who sees and hears the witnesses and can translate the credibility accorded witnesses into the weight to be given their testimony as it relates to other evidence in the case. (See, e.g., *Meiner* v. *Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140.) Before disregarding any such credibility assessments of the referee, we should have very good reason to do so. (See *Connor* v. *State Bar*, *supra*, 50 Cal.3d at p. 1056.)

With the foregoing preface, we identify in greater detail many problems with the hearing referee's decision, which are, in the aggregate, insurmountable. First, the referee simply failed to make necessary findings. The record of State Bar proceedings should have been ample to permit the referee to find whether or not the amended partnership certificate prepared by respondent showing the transfer of Nemour's interest was signed in February of 1981 or June of 1981. This was the single, crucial predicate issue to

the ultimate finding, which should have been made by the referee, as to whether there was clear and convincing evidence that respondent's declaration was the making by him of a false statement. Instead, the referee limited his findings to background facts which were either undisputed since the earliest litigation, or which are not crucial to resolving the issues raised by the notice to show cause.

Second, the referee's conclusion that respondent misled the court in filing the 1981 declaration fails to follow from the referee's findings of fact. As noted, the referee failed to make the essential findings necessary to conclude that respondent did or did not mislead the court. Therefore, we cannot deem this conclusion properly supported by the findings.

[7] Third, the referee adopted a conclusion of law which seems clearly contrary to evidence presented at the hearing. Although the referee concluded that there was no evidence presented that respondent actively participated in fraud in preparation of the amended certificate of partnership, that conclusion could only be consistent with the determination by the Court of Appeal in *Eddy* v. *Temkin, supra*, 167 Cal.App.3d at p. 1122, that there was substantial evidence that the transfer of Nemour's partnership interest to respondent was a fraud upon creditors if it was based on the difference in the applicable standard of proof. The referee had a substantial issue to resolve: did the determination by the Court of Appeal that Nemour's partnership interest transfer was fraudulent, coupled with undisputed evidence that respondent prepared the partnership transfer document, constitute clear and convincing evidence that respondent violated the charged disciplinary statutes and rule? At the time that the appellate court made its determination, proof of fraud in a civil case required only a preponderance of the evidence. (*Liodas* v. *Sahadi* (1977) 19 Cal.3d 278, 291-293.) In contrast, it is well settled that the State Bar must prove the respondent culpable of professional misconduct in a disciplinary case by clear and convincing evidence. (*Arden* v. *State Bar* (1987) 43 Cal.3d 713, 725, and cases cited.) The referee failed to resolve this issue.

Fourth, with regard to the referee's conclusion that no evidence was presented that respondent actively participated in fraud in preparation of the partnership certificate, the referee failed even to determine whether it was prepared in February of 1981 or June of that year, and to that extent his conclusion suffers from the first difficulty we noted above. Further, the referee's conclusion fails to show how it was reached. [8] As we noted, the record includes extensive documentary as well as testimonial evidence. It was therefore incumbent upon the referee to weigh all evidence and identify for the litigants and further reviewing bodies the way in which that credibility assessment led to the referee's ultimate conclusions regarding respondent's culpability or innocence.

[9a] There is some language in the referee's conclusions that suggests, but does not expressly state, that the referee found respondent's testimony credible since the referee concluded that the respondent did not commit an act of dishonesty, but perhaps was culpable of something less serious in failing to exercise due diligence in learning of the true facts before filing his 1981 superior court declaration. (Compare *Connor* v. *State Bar, supra*, 50 Cal.3d at p. 1056.) However, we can only speculate as to the referee's credibility determinations. [1c] Yet in a case as this, where such credibility determinations were critical in view of the seemingly adverse determinations of civil courts on similar issues, we are not content to so speculate. We are especially loathe to do so in view of our determination, as we shall next discuss, that the referee's conclusions are hopelessly in conflict with one another and are thus unreliable.

Fifth, the key conclusions of the referee appear irreconcilably in conflict. While concluding that respondent misled the court in filing his July declaration, the referee next concluded that no evidence showed that respondent actively participated in fraud on the court in preparing the amended partnership certificate. These conclusions seem clearly at odds with each other in view of the record showing that the only material aspect of respondent's July 1981 superior court declaration at issue was his statement therein concerning when he received an assignment of Nemour's interest. [9b] Moreover, this latter conclusion appears inconsistent with the referee's fourth conclusion that respondent's declaration violated rule 7-105(1) by employing conduct tending to mislead the trial judge by a false statement of fact.

Furthermore, the referee's fourth conclusion appears to have been substantially undercut if it is not actually at odds with his third conclusion, to the effect that respondent failed to exercise due diligence in learning of the true facts before filing his declaration. This "due diligence" conclusion suggests that respondent is not culpable of a violation of rule 7-105(1), but may be responsible only for some lack of care. **[10]** If indeed respondent's only breach is lack of care as suggested by the referee's third conclusion of law, it was incumbent upon the referee to conclude whether or not that lack of care or diligence was culpable within the charges and fell below the level of conduct required for members of the State Bar in a disciplinary proceeding. (Compare, e.g., *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 857-858 with *Call* v. *State Bar* (1955) 45 Cal.2d 104, 110-111.)

We simply cannot square the referee's third and fourth conclusions with each other, particularly when we note that his fourth conclusion fails to identify wherein respondent employed conduct which tended to mislead the judge by a false statement of fact.

Assuming that we were to credit, arguendo, the referee's fourth conclusion that respondent did violate rule 7-105, we see another inconsistency, in light of the referee's sixth conclusion that the State Bar failed to prove that respondent committed dishonesty or moral turpitude within the meaning of section 6106. Our analysis of the Supreme Court's decisional law involving cases where attorney misconduct could violate rule 7-105(1) and section 6106 show that the referee's unexplained different conclusions as to whether respondent violated those respective authorities appear not to be warranted. As we shall discuss, we note that in all but one decision in which a respondent was charged with both a rule 7-105(1) violation and a section 6106 offense, the Supreme Court found that the respondent had violated both provisions. **[11a]** In order to find a rule 7-105(1) violation, the State Bar must show clearly and convincingly that the attorney knowingly presented a false statement intending to mislead the court, and such deceit would, in almost every case, be an act of dishonesty proscribed by section 6106.

Rule 7-105(1) reads in pertinent part as follows: "In presenting a matter to a tribunal, a member of the State Bar shall: [¶] (1) Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge . . . by an artifice or false statement of fact or law." **[12]** At the time respondent opposed the charging order and offered his declaration, he was appearing in pro per. Accordingly, the rule applies to him as an attorney. (*Davis* v. *State Bar* (1983) 33 Cal.3d 231, 240.) **[13]** Culpability may be established even where there is "no direct evidence of malice, intent to deceive or hope of personal gain. [Citation.]" (*Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 473.) Actual deception is not necessary; wilful deception is established where the attorney knowingly presents a false statement which may tend to mislead the court. (*Davis* v. *State Bar*, *supra*, 33 Cal.3d at pp. 239-240.) Even when the fabrications are the work of another and the attorney is unaware of the truth at the time he presents the statement or document, he remains culpable once he learns of their bogus nature and continues to assert their authenticity. (*Olguin* v. *State Bar* (1980) 28 Cal.3d 195, 198-200.)

[11b] The Supreme Court has held in a number of cases that when an attorney makes a false or misleading statement to a court, that act involves moral turpitude proscribed by section 6106. (*Bach* v. *State Bar* (1987) 43 Cal.3d 848, 855; *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 124; *Giovanazzi* v. *State Bar*, *supra*, 28 Cal.3d at p. 473.) There are cases where the State Bar chose to charge only a violation of rule 7-105 but not section 6106. (See *Davis* v. *State Bar*, *supra*, 33 Cal.3d at p. 240 [section 6106 not alleged against attorney, rule 7-105 violation found]; *Garlow* v. *State Bar* (1982) 30 Cal.3d 912 [section 6106 not charged, rule 7-105 violation found; however, case often cited for proposition that rule 7-105 violation involves moral turpitude (e.g., *Chefsky* v. *State Bar*, *supra*, 36 Cal.3d at p. 124)].)

Neither the examiner nor respondent's counsel offered any basis for reconciling the referee's finding of a rule 7-105 violation but no section 6106 violation on these facts. Our own research has revealed only one case in recent years where violations of section 6106 and rule 7-105 were charged and the Court did not find the misrepresentations at issue to violate both. (*Arm* v. *State Bar* (1990) 50 Cal.3d

763.) In *Arm*, the State Bar Court had found that by failing to disclose his then upcoming suspension to a trial court judge during a scheduling conference with opposing counsel, the attorney violated rule 7-105(1) and sections 6068 (d) (duty to employ the truth and not mislead judge or judicial officer) and 6106. The Supreme Court adopted the finding that the attorney had misled the trial court, but without any discussion as to whether or not he thereby violated section 6106, affirmatively found violations only of rule 7-105(1) and section 6068 (d). (*Id.* at p. 776.) The three-justice dissent on the degree of discipline noted the majority's omission of a violation of section 6106 in passing. (*Arm* v. *State Bar*, *supra*, 50 Cal.3d at p. 782 (dis. opn.).)

Yet a further inconsistency in the hearing referee's decision is his conclusion five, that respondent violated sections 6068 (b) and 6103 by employing methods that tended to mislead the court. We do not find this conclusion appropriate.

[3b] Section 6103 does not define a duty or obligation, but rather provides grounds for discipline for violation of an oath or duty defined elsewhere. (*Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 617-618; *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815.) **[2b]** Respondent was not charged in the notice to show cause with failure to maintain respect for the courts and their officers, nor was the notice amended at trial, so the conclusion of a section 6068 (b) violation is inappropriate. (*Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1151-1152; *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 420.) **[3c]** Section 6068 (a), which was charged in the notice, appears duplicative since the same misconduct was charged as a violation of a specific Rule of Professional Conduct. (*Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1059-1060.)

[1d] Considering the many problems we have identified with the hearing referee's findings and conclusions and considering especially that their resolution in this case will require reassessment of credibility of witnesses and the weighing of documentary evidence in light of that credibility assessment, we are not in the appropriate position, regrettably, to make the appropriate findings of fact and conclusions of law and assess any appropriate disposition in light of those findings and conclusions. That responsibility must be left to a hearing judge on remand for new trial on the issues raised in the notice to show cause.

We are cognizant of the burden this remand places on respondent and the examiner. If we could have avoided the additional expenditure of resources entailed in another hearing, we certainly would have done so. However, there are pretrial mechanisms available to the parties, such as factual stipulations and other agreements, that could streamline the process and reduce the costs involved. We encourage their use especially in this case.

DISPOSITION

For the reasons stated, we remand this proceeding to the Hearing Department of the State Bar Court, composed of judges and judges pro tempore under section 6079.1, for retrial of the charges in a manner consistent with this opinion.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

FRANK STERLING MITCHELL

A Member of the State Bar

[No. 88-O-14854]

Filed January 30, 1991

SUMMARY

Respondent was found culpable of misrepresenting his educational background on his resume, which was sent to various law firms, one of which granted respondent an interview. Respondent did not correct or attempt to correct his misrepresentations during the interview. Respondent's misconduct was aggravated by two other instances where respondent had sent a false resume to two other law firms and by respondent's having made untruthful statements in response to interrogatories propounded by the State Bar in the disciplinary matter. The hearing judge recommended that respondent be suspended for two years, stayed, with probation for two years and actual suspension for six months. (Hon. Christopher W. Smith, Hearing Judge.)

Respondent requested review of the hearing judge's recommendation, arguing that no actual suspension should be imposed. The review department concluded that, with limited exceptions, the hearing judge's findings of fact and conclusions of law were supported by the record. However, because the review department attached more weight to respondent's mitigating evidence than did the hearing judge, and because of the lighter discipline imposed in factually similar cases, the recommended discipline was found to be excessive. The review department recommended that respondent be suspended for one year, stayed, with probation for one year and sixty days actual suspension. The review department also revised the hearing judge's recommended conditions of probation to delete the requirement of a probation monitor, and eliminated the requirement that respondent comply with rule 955, California Rules of Court.

COUNSEL FOR PARTIES

For Office of Trials: Ronald E. Magnuson

For Respondent: Frank Sterling Mitchell, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
139 Procedure—Miscellaneous
151 Evidence—Stipulations
Where parties stipulated to waive any variance between facts set forth in stipulation and allegations of notice to show cause, stipulated facts which were not charged in original notice could be considered even though notice had not been amended.

[2 a, b] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record
Rule 453 of the Transitional Rules of Procedure provides that in all cases brought before it, the review department, like the Supreme Court, must independently review the record. The review department accords great weight to findings of fact made by the hearing judge which resolve issues pertaining to testimony, but the review department may make findings, conclusions and recommendations that differ from those made by the hearing judge. The issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department.

[3] **802.30 Standards—Purposes of Sanctions**
The review department's overriding concern is the same as that of the Supreme Court: the preservation of public confidence in the profession and the maintenance of high professional standards.

[4] **801.30 Standards—Effect as Guidelines**
1091 Substantive Issues re Discipline—Proportionality
In determining the appropriate degree of discipline to recommend, the review department starts with the Standards for Attorney Sanctions for Professional Misconduct, which serve as guidelines. It also considers whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts.

[5 a-e] **221.00 State Bar Act—Section 6106**
611 Aggravation—Lack of Candor—Bar—Found
760.12 Mitigation—Personal/Financial Problems—Found
833.10 Standards—Moral Turpitude—Suspension
833.40 Standards—Moral Turpitude—Suspension
1091 Substantive Issues re Discipline—Proportionality
Where respondent misrepresented his educational background in his resume, these actions were dishonest, and some period of actual suspension was warranted. Where respondent's misconduct extended over a three-year period, and was aggravated by his misrepresentations in discovery responses in the disciplinary proceeding, and where respondent had personal problems but they did not fully explain his misconduct, a 60-day actual suspension, with one year of probation, was appropriate to recognize the seriousness of the misconduct, the mitigating circumstances, and the sanction imposed in previous cases.

[6] **221.00 State Bar Act—Section 6106**
833.30 Standards—Moral Turpitude—Suspension
Although respondent's acts of dishonesty did not occur during the actual practice of law, but rather while respondent was seeking employment as a lawyer, respondent's willingness to use false and misleading means in the employment process was a matter of serious concern.

[7] **113 Procedure—Discovery**
611 Aggravation—Lack of Candor—Bar—Found
Respondent's deceit in his responses to the State Bar's interrogatories seriously aggravated his misconduct, and might perhaps constitute a greater offense.

[8] **113 Procedure—Discovery**
142 Evidence—Hearsay
145 Evidence—Authentication
Respondent's answers to State Bar's interrogatories could be relied on as party admissions even though not verified, and were adequately authenticated when examiner identified them while introducing them at trial, and respondent did not object.

[9 a, b] **760.12 Mitigation—Personal/Financial Problems—Found**
Hearing judge should not have entirely discounted respondent's testimony regarding family problems, on ground that no causal connection was established by expert testimony between personal problems and misconduct. The Supreme Court has often considered lay testimony of emotional problems as mitigation. It was readily conceivable that respondent's concern for his wife and unborn child and his ability to support them would cloud his judgment as he stated it did, and be directly responsible for some of his misconduct; accordingly, review department gave such evidence more weight than did hearing judge.

[10] **801.30 Standards—Effect as Guidelines**
The Standards for Attorney Sanctions for Professional Misconduct are guidelines, not inflexible mandates.

[11] **172.15 Discipline—Probation Monitor—Not Appointed**
Where the only active steps required by the recommended conditions of probation were the submission of approximately four quarterly reports directly to the probation department, the review department revised the hearing judge's recommended conditions of probation, which included assignment of a probation monitor, because it did not consider a probation monitor necessary.

[12] **175 Discipline—Rule 955**
Compliance with rule 955 of the California Rules of Court (requiring notification of clients and other interested parties of the attorney's suspension) is not usually ordered where the period of actual suspension is less than ninety days.

[13] **204.90 Culpability—General Substantive Issues**
221.00 State Bar Act—Section 6106
An attorney's deliberate use of dishonesty to further attempts to gain employment, particularly as a lawyer, is very serious. An attorney is not just another job-holder or job-seeker. Attorneys in this state are charged with high duties of honesty and professional responsibility. Any act of dishonesty by an attorney is an act of moral turpitude, and ground for serious professional misconduct, whether or not arising in the course of attorney-client relations; an attorney's dishonesty in seeking to further his or her career is simply inexcusable. An attorney's statements in a resume, job interview or research paper should be as trustworthy as that professional's representation to a court or client.

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106—Deliberate Dishonesty/Fraud

Not Found

213.15 Section 6068(a)

220.15 Section 6103, clause 2

Aggravation

Found

521 Multiple Acts

541 Bad Faith, Dishonesty

561 Uncharged Violations

Declined to Find

588.50 Harm—Generally

Mitigation

Found but Discounted

710.33 No Prior Record

740.31 Good Character

Discipline

1013.06 Stayed Suspension—1 Year

1015.02 Actual Suspension—2 Months

1017.06 Probation—1 Year

Probation Conditions

1022.50 Probation Monitor Not Appointed

1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge of the State Bar Court that respondent, Frank Sterling Mitchell, be suspended from the practice of law for a period of two years, with that suspension stayed and respondent placed on probation for two years, subject to certain conditions, including actual suspension for six months. The recommendation is based on the hearing judge's findings that respondent misrepresented his educational background on his resume, which was sent to various law firms, one of which granted him an interview. In the interview respondent did not correct or attempt to correct the misrepresentation. The misconduct was aggravated by two other instances where respondent sent a false resume to two other law firms and a third instance where he made untruthful statements in response to State Bar interrogatories.

Respondent requested review of the hearing judge's recommendation, arguing that no actual suspension should be imposed. The examiner, in reply, asserts that the recommended discipline is appropriate and supported by the record.

Based on our independent review of the record, we have concluded that, with the exceptions discussed *post*, the hearing judge's findings of fact and conclusions of law are supported by the record and we adopt them as our own. However, because we attach more weight to the respondent's mitigating evidence than did the hearing judge and in light of relevant case law, the recommended discipline is excessive and we modify the decision accordingly. With this modification, we recommend that respondent be suspended for a period of one year, with execution of that snspension stayed and respondent placed on probation for a period of one year with conditions, including sixty days actual suspension. We also slightly revise the hearing judge's recommended conditions of probation to reflect our modifications to the recommended discipline.

BACKGROUND

Respondent received a bachelor of arts degree from Pepperdine University and a juris doctor degree from Western State University. He was admitted to the practice of law in California in December of 1982 and has no prior record of discipline. A one-count notice to show cause was filed on July 28, 1989, alleging that in or about August of 1988, respondent authorized the distribution of his resume to potential legal employers knowing that the resume contained a false statement indicating that he had graduated from the University of Southern California School of Law (USC). The notice further alleged that respondent had an interview in August of 1988 with the law firm of Monteleone and McCrory, at which he did not correct or attempt to correct the false statement. These acts were alleged to be in violation of Business and Professions Code sections 6068 (a), 6103 and 6106.[1]

On August 24, 1989, respondent filed an answer denying the allegations. On September 11, 1989, the parties filed a stipulation to facts and culpability (stipulation), reserving their rights to present evidence at trial on the issue of the appropriate degree of discipline to be recommended. Trial was held on November 22, 1989. The hearing judge's decision was filed on February 20, 1990.

FACTS

The stipulated facts reveal that in August of 1988 respondent prepared a resume which falsely indicated that he was enrolled in a masters program at USC.[2] In addition, the resume stated that respondent had a juris doctor degree but the name of the law school was left blank on the resume. The placement

1. All further references to statutes are to the Business and Professions Code, unless otherwise noted. Section 6068 describes the duties of an attorney which include, under subsection (a), the duty to support the Constitution and state and federal laws. Section 6103 provides, in relevant part, that any violation of an attorney's duties constitutes cause for disbarment or suspension. Section 6106 provides, in relevant part, that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes cause for disbarment or suspension.

2. All of the resumes in question are attached to the stipulation.

of the juris doctor degree on the resume was such that it would lead the average reader to believe that respondent had obtained his law degree from USC, instead of from Western State University. Respondent gave the resume to an employment service. The service prepared a new resume explicitly showing respondent to hold a law degree from USC. Respondent was provided a copy of that resume and did not correct the false statement. The new resume was sent to the law firm of Monteleone and McCrory in August of 1988 which resulted in an employment interview. Respondent did not attempt to correct the false statement at the interview.

The stipulation also reveals that in February 1989 respondent was using a resume that indicated he had an undergraduate degree from Pepperdine University and a juris doctor degree. Again, the school from which he obtained the law degree was left blank but the placement of the juris doctor degree on the resume was such as to lead the reader to conclude that respondent had obtained his law degree from Pepperdine University.[3] **[1 - see fn. 3]** Respondent's current resume clearly indicates that he obtained his law degree from Western State University.

The parties stipulated that the above acts were in wilful violation of sections 6068 (a), 6103 and 6106. The hearing judge found respondent culpable, consistent with the stipulated facts above, and concluded he violated sections 6068 (a) and 6106. (Decision, pp. 4-5.)

Both oral and documentary evidence was presented at trial on the issues of aggravation and mitigation. In aggravation (decision, pp. 6-9), the hearing judge found that in 1987, respondent submitted a resume to the law firm of Chase, Rotchford, Drucker and Bogust (Chase, Rotchford). That resume falsely stated that respondent was enrolled in a masters program at USC and listed his law degree in such a manner as to mislead the reader into concluding that he had obtained the degree from USC. Respondent was given an employment interview wherein he represented that he had graduated from USC law school. Respondent was hired by the firm and worked there for approximately a year. Following his employment at Chase, Rotchford, respondent sent his resume and a cover letter to the law firm of Cummins and White. That resume also indicated that he had obtained his law degree from USC.

Another aggravating circumstance found by the hearing judge was that respondent made untrue statements in his response (exh. 2) to State Bar interrogatories (exh. 1). The interrogatories were served on respondent after he had stipulated to culpability and sought information regarding the existence of aggravating and mitigating circumstances, including information of other instances of use of the false resumes that were not charged in the notice to show cause.[4]

Interrogatory number four asked respondent if he had advised Chase, Rotchford, either orally or in writing, that he had obtained his law degree from USC. Respondent denied making such a representation, which the judge found to be untruthful. Interrogatory number 12 asked respondent to provide the names and addresses of all firms and organizations to whom he had stated by resume or otherwise that he obtained his law degree from USC. Respondent denied making any such statements and denied knowledge of the identity of any firm that received his resume. The hearing judge found this to be false. As indicated above, the record shows that at the time respondent answered this interrogatory he had previously stipulated with the examiner that he knew that his resume falsely showed that he had a USC law degree and that one specific firm, Monteleone and McCrory, had received such a resume.

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3. [1] The notice to show cause does not charge respondent with the use of this February 1989 resume. Ordinarily, "If the evidence produced before the hearing panel shows the attorney has committed an ethical violation that was not charged in the original notice, the State Bar must amend the notice to conform to the evidence adduced at the hearing." (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929.) However, the parties specifically waived any variance between the stipulated facts and the allegations contained in the notice to show cause. (Stipulation, p. 2.) Especially in these circumstances, we need not consider any issue of notice amendment.

4. The interrogatories were served on respondent on September 21, 1989. The stipulation was filed on September 11, 1989.

In sum, the hearing judge found the following aggravating circumstances: multiple acts of wrongdoing (standard 1.2(b)(ii), Standards for Attorney Sanctions for Professional Misconduct [Trans. Rules Proc. of State Bar, div. V; "standard(s)"]); misconduct surrounded by dishonesty (standard 1.2(b)(iii)); and lack of candor to the State Bar during the discovery phase (standard 1.2(b)(vi)).

In mitigation (decision, pp. 5-6), respondent was admitted to practice law in California in December of 1982 and has no record of prior discipline. Respondent had been in practice somewhat less than six years prior to the time he sent his resume to Monteleone and McCrory and approximately five years at the time he sent his resume to Chase, Rotchford. The hearing judge accorded little weight to respondent's blemish-free record because of the short duration of respondent's practice of law prior to the misconduct. (See standard 1.2(e)(i); *Smith* v. *State Bar* (1985) 38 Cal.3d 525, 540 [six years of practice at time of misconduct].)

Respondent testified that he had sent approximately 100 to 200 resumes (presumably listing Western State University as his law school) and received no responses, not even a phone call.[5] (R.T. p. 19.) Respondent met a person at a fund-raiser in late 1986 or early 1987 who operated an employment agency and who attributed the lack of response to his law school. (R.T. p. 15.) That person suggested he leave the name of his law school blank on the resume as a means of obtaining an interview and at the interview, respondent could inform the prospective employer of his law school. (*Id.*) In June of 1987, respondent's wife lost a child in the eighth month of pregnancy, which he attributed to worry over finances and he was very concerned about obtaining employment so he could support his family. (R.T. pp. 19-20.) At the time respondent left Chase, Rotchford (1988), his wife was again pregnant and he was concerned that his unemployment would lead to the loss of another child, so he again made use of the false resumes. (*Id.*) The hearing judge did not accord these personal problems much weight as respondent did not present any expert evidence establishing that the problems were directly responsible for the misconduct. (See standard 1.2(e)(iv).)

Respondent also presented a letter from a state senator, attesting to respondent's good character. (Respondent's exh. C.) The hearing judge gave some weight to this evidence but noted that it was not an extraordinary demonstration of good character, attested to by a wide range of references. (Decision, p. 6; see standard 1.2(e)(vi).)

DISCUSSION

[2a] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it, this review department, like the Supreme Court, must independently review the record. Although we accord great weight to findings of fact made by the hearing judge which resolve issues pertaining to testimony, we may make findings, conclusions and recommendations that differ from those made by the hearing judge. (Rule 453(a), Trans. Rules Proc. of State Bar.) Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (*Id.*) **[3]** Our overriding concern is the same as that of the Supreme Court: the preservation of public confidence in the profession and the maintenance of high professional standards. (See standard 1.3; *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117.)

Respondent asserts that no actual suspension is warranted in this case. Other than the recommendation of actual suspension for his misconduct, respondent does not challenge the findings of fact or conclusions of law. Respondent's three-page brief on review cites no authority and offers little argument with regard to his assertions. He sets forth a brief description of the discipline allegedly imposed in other matters, without any indication of the source of this information or any surrounding facts and circumstances. Respondent's basic argument seems to be that any period of actual suspension will cause him severe financial hardship. The examiner's brief cites no case authority but asserts the discipline is appropriate under the standards.[6]

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5. The record does not reveal when these resumes were sent.

6. The examiner argued at trial that one year probation with ninety days actual suspension was appropriate. (R.T. p. 35.)

[4] In determining the appropriate degree of discipline to recommend, we start with the standards which serve as our guidelines. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We must also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts. (See, e.g., *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-11.) **[5a]** In the present case we have concluded that respondent is culpable of misrepresenting his educational background in his resume. These actions are dishonest, as the hearing judge concluded. (See *In re Naney* (1990) 51 Cal.3d 186, 195.)

Standard 2.3 provides for actual suspension or disbarment for acts involving moral turpitude or dishonesty, depending upon the extent to which the victim of the misconduct is harmed or misled and depending on the magnitude of the misconduct and the degree to which it relates to the member's practice of law. **[5b]** Thus, some period of actual suspension is warranted under this standard.

Although not argued by respondent, we note that proof of "harm to the victim" (standard 2.3) was minimal. In fact, it does not appear that Monteleone and McCrory suffered any harm. The firm did not hire respondent and there is no other indication in the record that they were delayed or in any other way prejudiced by his deceit. Respondent was hired by Chase, Rotchford and Cummins and White, but nothing in the record indicates the role, if any, the misrepresentations played in the decisions to hire him. The record is also silent as to whether the misrepresentations caused any harm to clients while respondent worked at the firms, and as to the reasons for his departure from the firms.

[6] Respondent's acts did not occur during the actual practice of law. (See standard 2.3.) Yet they did occur while respondent was seeking employment *as a lawyer*. When we consider the purposes of attorney discipline (see *post*, p. 341), respondent's willingness to repeatedly use false and misleading means to secure a perceived advantage in the employment process is a matter of serious concern, despite the lack of misconduct during the "practice of law." (Cf. *In re Lamb* (1989) 49 Cal.3d 239 [dishonesty occurring during bar admission process].)

Other than its discussion as an aggravating circumstance in *In re Naney*, *supra*, 51 Cal.3d at 195, we are not aware of any published opinions of our Supreme Court with regard to the appropriate discipline for misrepresentations made in a resume. Other states' high courts have imposed discipline ranging from censure to 90 days actual suspension based on similar misconduct.

In *In the Matter of Michael Lavery* (1978) 90 Wn.2d 463 [587 P.2d 157], the attorney falsified his law school transcript to show a grade point average higher than he received and wrote bogus and extremely favorable letters of recommendation over photocopied signatures. The falsified documents were sent to prospective employers, one of which wrote back requesting more information. Lavery's reply enclosed altered letters of recommendation. Mitigation convinced the court that Lavery's actions were not corrupt but "only seriously misguided judgement." In a five-to-four decision, the Washington Supreme Court imposed 90 days actual suspension. The four dissenting justices would have imposed more severe discipline.

In *In the Matter of Ronald Norwood* (1981) 80 A.D.2d 278 [438 N.Y.S.2d 788], the attorney, applying for a job, submitted his resume which stated he had an undergraduate degree from Yale University when he was two credits short. He also stated to the employer under oath that he had filed income tax returns for the previous five years when in fact he had not for one of those years. Finding mitigation, the court ordered that Norwood be censured.

In *In re Theodore Hadzi-Antich* (D.C.App. 1985) 497 A.2d 1062 the attorney was publicly censured for submitting a resume to a prospective employer which falsely indicated that he had received high scholastic honors in law school and undergraduate school.

In *In re Anthony Lamberis* (1982) 93 Ill.2d 222 [443 N.E.2d 549] the attorney was censured for plagiarizing two published works in a thesis submitted to satisfy the requirement for an advanced law degree.

[5c] In contrast to the above cases, respondent's use of false resumes extended over an approximate three-year period, from 1987 to 1989. [7] In addition, respondent's deceit to the State Bar in his answers to the interrogatories is a serious factor in aggravation. (*Franklin* v. *State Bar* (1986) 41 Cal.3d 700, 710.) This deceit may constitute perhaps a greater offense. (See, e.g., *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 128; *Olguin* v. *State Bar* (1980) 28 Cal.3d 195, 200.)

Interrogatory number four asked respondent if he advised Chase, Rotchford, orally or in writing, that he obtained his degree from USC. Respondent answered "No".[7] [8 - see fn. 7] A Mr. Clark from the firm testified at trial. He conducted one of the two interviews. The hearing judge found that Clark testified that respondent told him during the interview that he had his degree from USC. (Decision, p. 8.)[8] The hearing judge found Clark's testimony to be credible and concluded that the interrogatory responses were untruthful. (*Id.*) [2b] This finding of fact, which resolves an issue pertaining to testimony, is entitled to great weight. (Rule 453(a), Trans. Rules Proc. of State Bar.)

Interrogatory number 12 asked respondent to provide the names and addresses of all law firms to whom he may have stated by resume or otherwise that he obtained his degree from USC. Respondent answered that he did not make any such statements and that he did not know the identity of law firms that may have received the resume that was the subject of the action. Exhibit number six is a copy of an undated letter and resume respondent sent to Cummins and White. The resume clearly indicates that he graduated from USC law school with honors (cum laude). Respondent testified that his signature appeared at the bottom of the cover letter attached to the resume. (R.T. pp. 16-17.) Nevertheless, respondent asserted that he answered interrogatory number 12 honestly because that resume was one prepared by the employment service and he did not recall sending it. (R.T. pp. 20-21, 40.) Even if respondent did not remember sending the resume, the blanket denial contained in his answer was untruthful, particularly in light of his admission in the stipulation just a few weeks earlier, that he knew this false resume—which he had approved—had been sent to Monteleone and McCrory.

Respondent's explanation for the underlying misconduct is also disturbing. He testified that he did not intend to deceive anyone. (R.T. p. 20.) He was merely attempting to get an interview at which time he would inform the employer of the true facts. (*Id.*) This explanation is troubling in light of his earlier stipulation, confirmed by his testimony (R.T. p. 21), that in the interview with Monteleone and McCrory, respondent made no attempt to correct the falsity of his resume. But even if, for the sake of argument, respondent's explanation is credited, in our opinion, it evidences a lack of understanding of the inherent dishonesty involved in circulating a knowingly false resume.

[5d] Respondent's misrepresentations in his discovery responses aggravate the misconduct. Taken together with the misrepresentations in the resumes, clearly some period of actual suspension is warranted. We are not convinced, however, that respondent's misconduct warrants six months actual suspension. [9a] Respondent's testimony regarding the loss of one child and his wife's subsequent pregnancy was uncontroverted. The hearing judge discounted this testimony because no causal connection was established by expert testimony between the

7. [8] Respondent's answers to the interrogatories (State Bar exh. 2) are not verified as required by Code of Civil Procedure section 2030, subdivision (g). However, the answers need not be verified to constitute admissions of a party (Evid. Code, § 1220), provided they are respondent's answers. No evidence was proffered establishing the authenticity of the responses. (Evid. Code, §§ 1400-1401.) The examiner did identify the answers as respondent's when he sought their introduction into evidence at trial (R.T. p. 5) and respondent did not object (R.T. p. 6). The identification of the answers as respondent's, coupled with respondent's failure to object and respondent's subsequent statements made at trial regarding the answers (R.T. pp. 38, 40) were sufficient to authenticate the responses by admission. (Evid. Code, § 1414.)

8. Clark had no specific recollection of the interview. (R.T. pp. 8-11.) Clark did, however, identify his handwritten notes on respondent's resume (exh. 5), which he testified represented responses by respondent to specific questions he asked during the interview. (R.T. pp. 8-11.) Those notes show that Clark wrote "USC" on the resume in the blank space next to the juris doctor degree. (See exh. 5.)

personal problems and the misconduct, as required by standard 1.2(e)(iv). **[10]** However, the standards are guidelines, not inflexible mandates. (See, e.g., *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 38.) **[9b]** The Supreme Court has often considered lay testimony of emotional problems as mitigation. (See, e.g., *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1364.) It is readily conceivable that respondent's concern for his wife and unborn child and his ability to support them would cloud his judgment, as he stated it did, and be directly responsible for some of his misconduct.

[5e] Although we accord this mitigation more weight than did the hearing judge, respondent's personal problems do not fully explain his use of false and misleading resumes, his refusal to correct the resume in the interview, or his deceit to the State Bar. The subsequent deceit to the State Bar indicates respondent has not truly recognized the wrongfulness of his actions and raises the specter that the misconduct will recur. Consequently, some period of actual suspension is warranted in order to achieve the purposes of attorney discipline as set forth in standard 1.3 (protection of the public, courts and legal profession; maintenance of high professional standards by attorneys; and preservation of public confidence in legal profession). Guided by these principles and the decisions of other states we have discussed above, 60 days actual suspension with one year probation appears more suited to achieve the purposes set forth in standard 1.3. This sanction recognizes the seriousness of the misconduct, including the misrepresentations in the discovery, the mitigating circumstances and the sanction deemed appropriate by existing case law.

We also modify the decision to delete the conclusion that respondent violated section 6068 (a). We do not find a factual basis for the section 6068 (a) violation on this record. (See *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562.)

[11] As indicated above, we deem it appropriate to revise the hearing judge's recommended conditions of probation to reflect our modifications to the recommended discipline. The hearing judge recommended that a probation monitor referee be assigned to monitor respondent's performance on probation. We do not consider a probation monitor referee necessary in this case as the only active steps the conditions of probation require are the submission of approximately four quarterly reports directly to the probation department. The staff of the probation department can more than adequately monitor respondent's compliance with this condition.

[12] The hearing judge also recommended that respondent be ordered to comply with rule 955 of the California Rules of Court (requiring notification of clients and other interested parties of the attorney's suspension). Compliance with this rule is not usually ordered where the period of actual suspension is less than 90 days. As we have modified the recommended period of actual suspension to 60 days, we do not consider compliance with the rule necessary.

[13] Although we have reduced the recommendation of the hearing judge as noted, largely because of the only published opinions we have found in which similar conduct was the central aspect of the attorney's misconduct, we deem very serious an attorney's deliberate use of dishonesty to further attempts to gain employment, particularly as a lawyer. An attorney is not just another job-holder or job-seeker. For years, our Supreme Court has recognized the high duties of honesty and professional responsibility with which attorneys in this state are charged. (*Cannon* v. *State Bar* (1990) 51 Cal.3d 1103, 1115; *In re Rivas* (1989) 49 Cal.3d 794; *In re Lamb* (1989) 49 Cal.3d 239; *Stuart* v. *State Bar* (1985) 40 Cal.3d 838, 846-847; *Jackson* v. *State Bar* (1979) 23 Cal.3d 509, 514; *McKinney* v. *State Bar* (1964) 64 Cal.2d 194, 196-197; see also *Hulland* v. *State Bar* (1972) 8 Cal.3d 440, 449.) Since any act of dishonesty by an attorney is an act of moral turpitude, and ground for serious professional misconduct, whether or not arising in the course of attorney-client relations (Bus. & Prof. Code, § 6106), an attorney's dishonesty in seeking to further his or her career is simply inexcusable. An attorney's statements in a resume, job interview or research paper should be as trustworthy as that professional's representation to a court or client.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law in this state for one (1) year; that execution of such order be stayed; and that respondent be placed on probation for one (1) year on the following conditions:

(1) That during the first sixty (60) days of said period of probation he shall be suspended from the practice of law in the State of California;

(2) That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

(3) That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

(4) During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for the State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

(5) That, except to the extent prohibited by the attorney client privilege and the privileges against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, or designee, at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge or designee, relating to whether respondent is complying, or has complied, with these terms of probation;

(6) That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective; and

(7) That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of one (1) year shall be satisfied and the suspension shall be terminated.

We further recommend that respondent be required to take and pass the Professional Responsibility Examination within one (1) year of the effective date of the Supreme Court order and furnish satisfactory proof of such to the Probation Department of the State Bar Court.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

EDWARD C. BURCKHARDT

A Member of the State Bar

[No. 88-O-15079]

Filed February 4, 1991; as modified, February 8, 1991

SUMMARY

Respondent was found culpable of failure to communicate with clients, unauthorized practice of law, failure to perform competently, improper withdrawal from representation, acceptance of an illegal fee, and failure to cooperate with the State Bar's investigation of his misconduct. The hearing judge rejected culpability under Business and Professions Code section 6106, but found in aggravation that respondent had committed acts which fell within the scope of section 6106. The hearing judge found no evidence in mitigation. (Hon. Jennifer Gee, Hearing Judge.)

The examiner sought review, contending that the hearing judge erred in reaching what the examiner characterized as a conclusion that respondent did not violate section 6106 of the Business and Professions Code. The issue raised was essentially one of clarification of the interpretation of how section 6106 operates when misconduct within its ambit is found. The review department held that section 6106 is the proper basis for charging and finding culpability for acts of moral turpitude, dishonesty and corruption. It therefore found a violation of section 6106, and deleted, as duplicative, the finding in aggravation based on the same facts. The review department also added a conclusion of prejudicial withdrawal from representation, disagreeing with the hearing judge and holding that such conclusion does not require a finding of intent to withdraw. These changes did not result in any change in the discipline recommendation.

The review department also found that respondent's 13 years of practice without prior discipline was an appropriate factor in mitigation and should be given significant weight. Respondent's prior disciplinary record was discounted, as it stemmed from conduct roughly contemporaneous with that involved in the present matter. The review department adopted the recommendation of two years stayed suspension, three years probation, and one year of actual suspension consecutive to respondent's prior actual suspension. It also recommended that respondent be required to demonstrate rehabilitation and fitness to practice under standard 1.4(c)(ii) before returning to active practice.

COUNSEL FOR PARTIES

For Office of Trials: Hans M. Uthe

For Respondent: No appearance (default)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record
Although party requesting review raised only one issue regarding a legal conclusion drawn by the hearing judge, review department had duty to conduct independent, de novo review of record. (Trans. Rules Proc. of State Bar, rule 453(a).) Review department therefore undertook to determine whether remainder of hearing judge's findings and conclusions were supported by record, and whether recommended discipline was appropriate. In so doing, review department held that hearing judge erred in rejecting culpability on one charge.

[2] **214.30 State Bar Act—Section 6068(m)**
Culpability for violating statutory duty to communicate with clients may only be predicated on failure to communicate after effective date of statute. Where respondent failed to respond to letter sent by client after effective date, respondent's failure to communicate continued after effective date and culpability finding was appropriate.

[3] **230.00 State Bar Act—Section 6125**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Finding that respondent was culpable of prejudicial withdrawal from representation and of failure to perform competently was based only on respondent's failure to render services while not under suspension; during suspension, respondent was precluded from practicing law, and misconduct in that connection is governed by statute precluding unauthorized practice of law.

[4] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Charge of prejudicial withdrawal from representation was established by clear and convincing evidence, even though respondent did continue to communicate with one of two joint clients through a certain date, where there was no evidence that respondent had communicated with either client, or taken any action on clients' behalf, during extended period of time between that date and filing of notice to show cause.

[5] **204.20 Culpability—Intent Requirement**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Rule prohibiting prejudicial withdrawal from representation may reasonably be construed to apply when attorney ceases to provide services, even in absence of intent to withdraw as counsel.

[6] **221.00 State Bar Act—Section 6106**
Conclusion that respondent was not culpable on charge of violating section 6106 would be inconsistent with Supreme Court precedent where hearing judge made factual findings that respondent lied to clients about status of their claim and wrongfully held himself out during suspension as entitled to practice law.

[7 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
106.30 Procedure—Pleadings—Duplicative Charges
220.10 State Bar Act—Section 6103, clause 2
As terms of art, an attorney's "oath and duties" are defined by sections 6067 and 6068. Section 6103 confirms the Supreme Court's inherent authority to impose discipline for violation of oath or duties

defined by other statutes. Accordingly, charge of violating section 6103 or finding that attorney has committed misconduct thereunder is redundant and adds nothing to charges otherwise pending. Charge of violating section 6103 "oath and duties" does not put respondent on notice of any particular misconduct without reference to other statutes defining the particular duty allegedly violated.

[8 a, b] **221.00 State Bar Act—Section 6106**
Charging a violation of section 6106 is the basis for imposing discipline for acts of moral turpitude. An attorney cannot be disciplined under section 6106 except based on an explicit determination that the attorney committed an act within its scope. The source of precise definition of such acts is not any specific statutes and rules, but case law and common understanding. The scope of section 6106 includes any act of moral turpitude, dishonesty, or corruption, whether or not violative of any civil or criminal statute.

[9] **106.20 Procedure—Pleadings—Notice of Charges**
221.00 State Bar Act—Section 6106
Charge of violating section 6106 put respondent on notice, to which respondent was entitled, that misconduct charged involved moral turpitude, dishonesty or corruption as described by statute and case law.

[10] **710.10 Mitigation—No Prior Record—Found**
Thirteen years of practice without discipline, before engaging in first act of misconduct, is appropriate factor in mitigation; such factor was appropriately considered even though respondent had prior disciplinary record, because such record stemmed from conduct roughly contemporaneous with that involved in subsequent disciplinary matter.

[11] **513.10 Aggravation—Prior Record—Found but Discounted**
Aggravating force of prior disciplinary record was diminished by fact that it involved misconduct occurring at same time as that in subsequent matter, and therefore did not constitute prior warning to respondent of the wrongful nature and possible disciplinary consequences of respondent's conduct.

[12] **221.00 State Bar Act—Section 6106**
543.10 Aggravation—Bad Faith, Dishonesty—Found but Discounted
Where hearing judge's finding of aggravation for conduct surrounded by bad faith, dishonesty and concealment reflected same conduct that review department relied on as basis for finding respondent culpable of acts of moral turpitude, finding in aggravation was deleted as duplicative.

[13] **805.59 Standards—Effect of Prior Discipline**
Guideline that discipline for second offense should in most instances be more severe than that imposed for first offense was not appropriate where offenses were contemporaneous.

[14] **107 Procedure—Default/Relief from Default**
176 Discipline—Standard 1.4(c)(ii)
Requirement that respondent comply with standard 1.4(c)(ii) before returning to active practice after suspension was particularly appropriate where respondent defaulted in disciplinary proceeding, indicating a need for an affirmative showing of fitness prior to resuming practice.

[15 a, b] **175 Discipline—Rule 955**
Where respondent was already on actual suspension from prior matter and had been ordered to comply with rule 955 in that connection, review department recommended that Supreme Court again order compliance with rule 955 only if respondent's suspension in second matter was neither concurrent with nor immediately consecutive to suspension in first matter.

[16] **173 Discipline—Ethics Exam/Ethics School**
Where respondent had been ordered to pass Professional Responsibility Examination in connection with recently-imposed prior discipline, review department deemed it unnecessary to require such passage in subsequent disciplinary matter.

ADDITIONAL ANALYSIS

Culpability
Found
213.91 Section 6068(i)
214.31 Section 6068(m)
221.11 Section 6106—Deliberate Dishonesty/Fraud
230.01 Section 6125
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
290.01 Rule 4-200 (former 2-107)
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
Aggravation
Found
521 Multiple Acts
582.10 Harm to Client
586.11 Harm to Administration of Justice
591 Indifference
Discipline
1013.08 Stayed Suspension—2 Years
1015.06 Actual Suspension—1 Year
1017.09 Probation—3 Years
Probation Conditions
1022.50 Probation Monitor Not Appointed
1030 Standard 1.4(c)(ii)

OPINION

PEARLMAN, P.J.:

In this matter, in which respondent is in default, the State Bar examiner has requested review of a decision by Hearing Judge Gee (hereafter "decision") recommending that respondent be suspended for two years, stayed, with three years of probation and one year of actual suspension consecutive to that imposed in an earlier matter. [1a] The sole issue which the examiner has requested us to address is whether the hearing judge erred in reaching what the examiner characterizes as a conclusion that respondent did not violate section 6106 of the Business and Professions Code.[1] However, in light of our duty to conduct an independent, de novo review of the record (rule 453(a), Trans. Rules Proc. of State Bar), we have also undertaken to satisfy ourselves that the remainder of the hearing judge's findings and conclusions are supported by the record, and that the recommended discipline is appropriate.

We hereby adopt the hearing judge's decision, with a number of modifications not affecting the degree of discipline recommended. These modifications include our conclusion that section 6106 was violated.

STATEMENT OF FACTS

Respondent was admitted to practice in California in 1972. (Exh. 2.) The three-count notice to show cause in this matter was filed on December 18, 1989. Respondent was properly served with the notice to show cause, and his default was duly entered following his failure to file an answer. The hearing judge held a hearing at which documentary evidence and declarations were admitted to supplement the admissions deemed to have been made by virtue of respondent's default. (Rule 552.1(d)(iii), Trans. Rules Proc. of State Bar.) The hearing judge's factual findings are supported by the evidence and deemed admissions, and we hereby adopt them. A brief summary of respondent's misconduct follows.

Count One (White).

Frank and Charylann White hired respondent in June 1987 to represent Frank White in a criminal matter and to represent both of them in a government tort claim. (Decision, findings of fact ¶ 2; exhs. 7, 8.) From August 31, 1987, to May 18, 1988, respondent was suspended from the practice of law for nonpayment of his State Bar membership fees. (Decision, findings of fact ¶ 3; exh. 4.) Respondent was notified of his suspension by certified mail. (Decision, findings of fact ¶ 4; exh. 4.) Notwithstanding his suspension, respondent continued to hold himself out as an attorney, and continued to represent Frank White in the criminal matter until White's sentencing on March 24, 1988. (Decision, findings of fact ¶ 5; exhs. 7, 8.)

In addition, respondent failed to file a government tort claim on behalf of the Whites, and falsely told the Whites on more than one occasion that he had done so. (Decision, findings of fact ¶¶ 6, 8; exhs. 7-10.) After March 1988, respondent failed to respond to Charylann White's repeated efforts to communicate with him. (Decision, findings of fact ¶ 7; exh. 7.) However, respondent continued to communicate with Frank White at least through the summer of 1988. (Decision, findings of fact ¶ 8; exh. 8.)

In count one, respondent was charged with violating sections 6068 (a), 6068 (m), 6103, 6106, and 6125, and former rules 2-111(A)(2) and 6-101(A)(2) of the Rules of Professional Conduct.[2] The hearing judge found respondent culpable of violating sections 6068 (m) (failure to communicate with client) and 6125 (unauthorized practice of law) and rule 6-101(A)(2) (failure to perform competently). Her ruling as to section 6106 is discussed *post*. She rejected culpability on the remaining charges.

Count Two (Barr).

David Barr hired respondent in July 1985 to assist him in probating the will of Barr's deceased father. (Decision, findings of fact ¶ 9; exh. 11.) Barr sent respondent an advance fee of $170 and the

1. All further statutory references herein are to the Business and Professions Code unless otherwise noted.

2. All further references to rules herein are to the former Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989.

original of Barr's father's will. (Decision, findings of fact ¶ 10; exh. 11.) Thereafter, respondent failed to respond to Barr's repeated efforts to communicate with him, and failed to probate the will as he had promised to do. (Decision, findings of fact ¶¶ 11, 12; exhs. 11, 12.)

In count two, respondent was charged with violating sections 6068 (a), 6068 (m), and 6103, and rules 2-111(A)(2), 6-101(A)(2), and 2-107(A). The hearing judge found respondent culpable of violating section 6068 (m) and rules 2-111(A)(2) (improper withdrawal from representation), 6-101(A)(2), and 2-107(A) (acceptance of illegal fee), but rejected culpability on the remaining charges.

Count Three (Failure to Cooperate).

An investigator for the State Bar, and subsequently the examiner, made several efforts to contact respondent in connection with the investigation of the charges in counts one and two. Respondent did not respond to any of these efforts and did not cooperate in any way with the State Bar's investigation in this matter. (Decision, findings of fact ¶¶ 13-15; exhs. 5, 6.)

In count three, respondent was charged with violating sections 6068 (a), 6068 (i), and 6103. The hearing judge found culpability only as to section 6068 (i) (failure to cooperate with State Bar disciplinary investigation).

DISCUSSION

The hearing judge rejected culpability under sections 6068 (a) and 6103, on all counts, on the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804 and *Sands* v. *State Bar* (1989) 49 Cal.3d 919. The relevant holdings of *Baker* and *Sands* have been reiterated by the Supreme Court in several subsequent opinions. (See, e.g., *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562; *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 617-618; *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1059-1060; *Porter* v. *State Bar* (1990) 52 Cal.3d 518, 523, fn. 2.) We concur in the hearing judge's conclusions as to these charges.

We also concur in the hearing judge's conclusions that respondent violated sections 6068 (m) (as to counts one and two),[3] **[2 - see fn. 3]** 6068 (i) (as to count three), and 6125 (as to count one), and rules 2-111(A)(2) (as to count two), 6-101(A)(2) (as to counts one and two), and 2-107(A). These charges are supported by clear and convincing evidence in the record which fully justifies the hearing judge's legal conclusions. **[3]** In finding respondent culpable of violating rules 2-111(A)(2) and 6-101(A)(2), we rely only on his failure to render services while *not* under suspension. During his suspension he was precluded from practicing law and his misconduct in connection therewith is governed by section 6125.

[1b, 4] The examiner has not requested that we revisit the hearing judge's rejection of culpability as to the rule 2-111(A)(2) charge in count one. Nonetheless, we have examined the record, and have concluded that the hearing judge was incorrect in holding, on the basis of respondent's continued communications with Frank White through the summer of 1988, that the rule 2-111(A)(2) charge was not established by clear and convincing evidence as to this count. There was no evidence that respondent had communicated with either Frank or Charylann White, or taken any action on their behalf, after the summer of 1988. His inaction and failure to communicate between mid-1988 and the date of filing of the notice to show cause (December 18, 1989) are clear and convincing evidence of a violation of rule 2-111(A)(2).

[5] In so concluding, we disagree with the hearing judge's statement that "A conclusion that rule 2-111(A)(2) was willfully violated requires evidence of the [r]espondent's intent to withdraw from the

3. **[2]** Respondent's culpability for violating section 6068 (m) may only be predicated on his failure to communicate with clients after the effective date of the statute, i.e., January 1, 1987. (*Baker v. State Bar*, *supra*, 49 Cal.3d at p. 815.) As to count one, respondent's attorney-client relationship with the Whites commenced in 1987. As to count two, respondent failed to answer a letter Barr wrote to him in March 1987. (Decision, ¶ 11; exh. 11.) Thus, respondent's failure to communicate with Barr did continue into 1987.

client's employment. [Citations.]" (Decision, conclusions of law ¶ 8 [citing *Baker* v. *State Bar*, *supra*, 49 Cal.3d at pp. 816-817, fn. 5, and *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979].) *Baker* held that rule 2-111(A)(2) "may reasonably be construed to apply when an attorney ceases to provide services, even *absent* formation of an intent to withdraw as counsel for the client." (*Baker*, *supra*, 49 Cal.3d at pp. 816-817, fn. 5, emphasis supplied.)

Guzzetta held that where, after the alleged withdrawal, the attorney "continued to advise [his client]," recommended action for his client to take, and reviewed papers for his client, the attorney did not violate rule 2-111(A)(2). The reason for this holding, however, was that the attorney had not in fact ceased to provide services, not a requirement of a showing that the attorney intended to withdraw. (*Guzzetta*, *supra*, 43 Cal.3d at p. 979.) Under *Guzzetta*, the hearing judge was correct in holding that the evidence of respondent's continued communications with his client demonstrated that he had not in fact withdrawn as of the summer of 1988; however, as already noted, the record demonstrates that he did effectively withdraw thereafter.

With respect to the section 6106 charge in count one—the issue as to which the examiner requested review—the hearing judge noted the similarity in construction of sections 6103 and 6106 of the Business and Professions Code and held that "As with [s]ection 6103, [s]ection 6106 also does not prescribe attorney conduct. It is a statement of the sanction appropriate for conduct found to involve moral turpitude, dishonesty or corruption. Thus, it, too, is not a section [r]espondent can violate. However, [r]espondent's conduct in [c]ount 1 involved dishonesty. . . . Thus, I conclude that [r]espondent's conduct in [c]ount 1 falls within the scope of conduct described by section 6106." (Decision, conclusions of law ¶ 5.)

[6] As already noted, in seeking review, the examiner characterizes this conclusion as a holding that respondent was not culpable on the section 6106 charge. Such a conclusion would be inconsistent with controlling Supreme Court precedent based on the hearing judge's factual findings, amply supported by the record, that respondent lied to the Whites about the status of their tort claim, and wrongfully held himself out during his suspension as entitled to practice law.

However, due consideration was given by the hearing judge to the acts of moral turpitude which she found to have occurred, and we view the issue raised here as essentially one of clarification of the interpretation of how section 6106 operates when misconduct within its ambit is found. As the hearing judge's decision notes, there is a structural similarity between sections 6103 and 6106. Section 6103 provides that an attorney may be disciplined for a violation of the attorney's oath and duties, but does not define such oath and duties. Similarly, section 6106 provides that an attorney may be disciplined for acts of moral turpitude, dishonesty, or corruption, but does not specifically define such acts.

There, the similarity ends. While we understand the temptation to construe both statutes similarly based on a careful reading of their wording, neither statute can be read out of context. **[7a]** As terms of art, an attorney's "oath and duties," referred to in section 6103, are specifically defined by sections 6067 and 6068 of the Business and Professions Code. When the Supreme Court finds that an attorney has violated the attorney's professional oath or has breached one of these statutes that define an attorney's duties, its inherent authority to impose discipline up to and including disbarment for such violations is confirmed in section 6103. (See also Bus. & Prof. Code, § 6100.)[4] There is thus never any reason to charge a section 6103 violation for breach of an attorney's duties because the duties breached are elsewhere defined and subject to discipline; a section 6103 charge adds nothing to the charges otherwise pending. (*Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1060.)

4. Section 6077, on the other hand, makes an attorney subject to discipline for violations of the Rules of Professional Conduct, and gives the State Bar the authority to impose reprovals or recommend suspensions of up to three years for such violations.

[8a] In the case of section 6106 (unlike section 6103), charging violation of the statute is the basis for imposing discipline for acts of moral turpitude. While the statute is general in language, the source of precise definition is not any specific statutes and rules, but case law and common understanding. (Cf. *In re Kelley* (1990) 52 Cal.3d 487, 493-495 [discussing standards for imposition of discipline after conviction of crime involving moral turpitude or "other misconduct warranting discipline"]; *In re Fahey* (1973) 8 Cal.3d 842, 849-850; *In re Higbie* (1972) 6 Cal.3d 562, 569-570.) Thus, there is at least one major difference between sections 6103 and 6106. **[7b]** Because an attorney's "oath and duties" are defined elsewhere in the State Bar Act, it is redundant for the State Bar Court or the Supreme Court to determine in a disciplinary decision or opinion whether an attorney has committed misconduct within the scope of section 6103. (See *Bates* v. *State Bar, supra,* 51 Cal.3d at p. 1060.) A finding that the attorney violated specified sections of the State Bar Act will suffice as a basis for the recommendation or imposition of discipline. **[8b]** In contrast, because the scope of section 6106 includes any act of moral turpitude, dishonesty, or corruption, whether or not violative of any civil or criminal statute, an attorney cannot be disciplined under that section except on the basis of an explicit determination that he or she has committed an act within its scope.

The Supreme Court has therefore repeatedly drawn a distinction between section 6103 which "defines no duties" and section 6106, violation of which may be charged in the notice to show cause and proved. (See *Baker* v. *State Bar, supra,* 49 Cal.3d at p. 815; *Sands* v. *State Bar, supra,* 49 Cal.3d at p. 931; *Sugarman* v. *State Bar, supra,* 51 Cal.3d at p. 618.) **[9]** Respondent was entitled to be put on notice of the charges against him (*Van Sloten* v. *State Bar* (1989) 49 Cal.3d 921, 929) and the charge of violating section 6106 served to put him on notice that the misconduct with which he was charged involved moral turpitude, dishonesty or corruption as described by the statute and the case law. **[7c]** In contrast, a charge of violating an attorney's "oath and duties" as set forth in section 6103 does not put a respondent on notice of any particular misconduct without reference to the other statutes defining the particular duty he allegedly violated.

In this matter, the hearing judge correctly found that respondent committed the acts of dishonesty charged against him. However, rather than concluding that he was "culpable of violating section 6106," she held that he had committed an act which "falls within the scope of conduct described by [s]ection 6106," and, accordingly, constitutes ground for discipline. (Decision, conclusions of law ¶ 5.)

While the examiner is correct that Supreme Court precedent clearly holds that a section 6106 violation did occur, it results in no difference in the outcome of this case. In effect, the determination that an attorney "violated section 6106" is merely a convenient shorthand for the statement that the attorney "committed an act of moral turpitude, dishonesty, or corruption in violation of section 6106." The hearing judge reached an equivalent result by a different route. She included such findings as part of her findings in aggravation. It is readily apparent from her decision, and from her order denying reconsideration, that she took respondent's acts of dishonesty into consideration in determining the appropriate discipline. Thus, while we rephrase the conclusion that respondent "committed acts within the scope of [i.e., made disciplinable by]" section 6106 to a conclusion that respondent "violated section 6106," as the examiner correctly urges, as discussed more fully below, we do not consider such change to have any effect on the judge's disciplinary recommendation.

RECOMMENDED DISCIPLINE

The hearing judge found no evidence in mitigation (decision, p. 10), although she did note that respondent was a member of the bar for some 13 years before engaging in the first act of misconduct that is at issue in this matter. (Decision, p. 15.) **[10]** Thirteen years of practice without prior discipline is an appropriate factor in mitigation. (See *Schneider* v. *State Bar* (1987) 43 Cal.3d 784, 798-799; *Hawes* v. *State Bar* (1990) 51 Cal.3d 587, 596 [significant weight given to more than ten years of practice prior to first act of misconduct].) We deem it to have been appropriate for the hearing judge to consider this factor in mitigation, because although respondent does have a prior disciplinary record, it stems from conduct roughly contemporaneous with that involved

in the present matter. (*Shapiro* v. *State Bar* (1990) 51 Cal.3d 251, 259.)

In aggravation, the hearing judge noted the existence of a prior disciplinary record for misconduct which was very similar to that involved in the present matter (failure to perform services, practice while suspended, and failure to cooperate with the State Bar), and which was committed during the same time period.

At the time of the hearing judge's decision, the record in the prior matter consisted of our recommendation, which the Supreme Court had not yet adopted, that respondent be suspended for two years, with the suspension stayed on condition of one year's actual suspension and two years probation on specified conditions. (Exh. 13.) We take judicial notice that on November 29, 1990, the Supreme Court issued an order adopting this recommended discipline. **[11]** We also concur with the hearing jndge that the aggravating force of this prior discipline is diminished by the fact that it involved misconduct occurring at the same time as that in the present matter, and therefore did not constitute a prior warning to respondent of the wrongful nature and possible disciplinary consequences of his conduct.[5]

The hearing judge also found other aggravating factors consisting of multiple acts of misconduct; conduct surrounded by bad faith, dishonesty and concealment; harm to his clients and the administration of justice; and indifference toward rectification of the misconduct. (Standard 1.2(b)(ii), (iii), (iv), & (v), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V (hereafter "standards").) **[12]** As indicated above, we interpret the finding of aggravation for conduct surrounded by bad faith, dishonesty and concealment to reflect the same conduct in count one that is properly the basis for the finding of a section 6106 violation. There is no basis for such a finding in aggravation on count two. In adopting a section 6106 violation in count one as requested by the examiner, we at the same time delete this finding in aggravation as duplicative. (See *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11.)

Balancing the mitigating and aggravating factors, the hearing judge's recommended discipline appears well within the appropriate range under the standards and Supreme Court precedent. (See, e.g., *Hawes* v. *State Bar*, *supra*, 51 Cal.3d 587; *Middleton* v. *State Bar*, *supra*, 51 Cal.3d 548; *Stevens* v. *State Bar* (1990) 51 Cal.3d 283; *Shapiro* v. *State Bar*, *supra*, 51 Cal.3d 251; *Young* v. *State Bar* (1990) 50 Cal.3d 1204.) Indeed, the examiner has not argued otherwise.

[13] Standard 1.7(a) indicates that discipline for a second offense should in most instances be more severe than that imposed for the first offense. We do not treat this guideline as appropriate here because the offenses were in fact contemporaneous. In any event, we are recommending more severe discipline by including an additional year of probation, and (if the Supreme Court imposes at least a total of two years actual suspension in the combined matters), by recommending that respondent be required to demonstrate rehabilitation under standard 1.4(c)(ii) before returning to active practice. **[14]** The requirement of a standard 1.4(c)(ii) hearing appears particularly appropriate in light of respondent's default in this matter, which indicates, under the circumstances, a need for an affirmative showing of fitness prior to resuming practice. (See *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 299-300.)

We therefore adopt the hearing judge's decision and recommendation as to discipline, as set forth in our formal recommendation, *post*, with the modifications indicated above and with one further modification. **[15a]** In the event that actual suspension is ordered by the Supreme Court in this case and that it either is concurrent with or (as we recommend) is consecutive to and commences immediately after the actual suspension imposed in the prior case, we

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5. Because of many varying factors, including that complaining witnesses vary widely in the degree of timeliness with which they contact the State Bar to allege attorney misconduct, it is not always possible for the Bar to charge all of an attorney's contemporaneous misconduct in a single notice to show cause.

recommend that respondent not be required to comply again with rule 955 of the California Rules of Court. [16] We also deem it unnecessary to require that respondent pass the Professional Responsibility Examination. He has already been ordered by the Supreme Court to fulfill both of these conditions in connection with his prior discipline.

FORMAL RECOMMENDATION

It is hereby recommended that respondent be suspended for two (2) years; that this suspension be consecutive to the suspension previously imposed by the Supreme Court (No. S015724, order filed Nov. 29, 1990); that execution of the order for such suspension be stayed, and that respondent be placed on probation for a period of three (3) years (concurrent with his previously imposed probation [*id.*]) on the following conditions:

1. That during the first full year of said period of probation, respondent shall be suspended from the practice of law in the State of California and that said full year of suspension shall be consecutive to the actual suspension previously imposed by the Supreme Court (No. S015724, order filed Nov. 29, 1990). In the event that the combined actual suspension in these two matters is two years or longer, it is recommended that the suspension continue until respondent has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct;

2. That during the period of probation, respondent shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

4. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar;

5. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

6. That, except to the extent prohibited by the attorney/client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, her designee or to any probation monitor

referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

7. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective;

8. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of two years shall be satisfied and the suspension shall be terminated.

[15b] If (and only if) respondent serves an actual suspension in this matter which is not concurrent with or immediately consecutive to an actual suspension previously imposed by the Supreme Court, we further recommend that respondent be required to comply with the provisions of rule 955, subdivisions (a) and (c), California Rules of Court within thirty (30) and forty (40) days, respectively, of the effective date of the Supreme Court order in this matter.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

FRANK H. WHITEHEAD, JR.

A Member of the State Bar

[No. 86-O-14767]

Filed February 22, 1991; as modified, March 12, 1991.

SUMMARY

An attorney was found culpable of commingling trust funds with personal funds; failing to supervise his associates; failing to respond to letters from his clients' subsequent attorney; and failing to respond to investigative letters from the State Bar. Numerous other charges were dismissed for lack of evidence. In light of extensive mitigating evidence, the hearing department recommended three months suspension, stayed, with five years probation, and no actual suspension. (Elliot R. Smith, Hearing Referee.)

The State Bar examiner sought review, seeking additional culpability findings and a minimum of one year actual suspension. With minor modifications, the review department adopted all of the essential findings of culpability and non-culpability, but added a finding that the attorney had failed to act competently. In assessing the appropriate degree of discipline, the review department also took into account the extensive mitigation. However, in view of the attorney's culpability on three client matters and his record of prior discipline, the review department held that some actual suspension was warranted. Accordingly, the review department recommended that the attorney be suspended for one year, stayed, with 45 days actual suspension and five years probation on the strict probation conditions recommended by the referee.

COUNSEL FOR PARTIES

For Office of Trials: Teri Katz

For Respondent: Frank H. Whitehead, in pro. per.

HEADNOTES

[1 a, b] 130 **Procedure—Procedure on Review**
135 **Procedure—Rules of Procedure**
166 **Independent Review of Record**
In all cases brought before it, the review department must independently review the trial record just as the Supreme Court does upon review of the review department recommendation. (Rule 453(a), Trans. Rules Proc. of State Bar.) In doing so, the review department accords great weight to

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

findings of fact made by the hearing department which resolve testimonial issues. However, the review department also has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department; despite a party's initial failure to request review on one count which was addressed in the party's brief, the review department would address the propriety of the findings on that count.

[2] **199 General Issues—Miscellaneous**
802.30 Standards—Purposes of Sanctions
The review department's overriding concern is the same as that of the Supreme Court: the protection of the public, preservation of public confidence in the profession and the maintenance of high professional standards.

[3] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
The rules of ethics regarding the duties of an attorney upon withdrawal apply to attorneys who are discharged as well as those who withdraw.

[4] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Where an attorney had performed some work on a client's case and believed he was entitled to retain the entire advance fee, it was reasonable for him to postpone refunding the fee until a small claims court had determined that a refund was required.

[5] **582.50 Aggravation—Harm to Client—Declined to Find**
Where attorney delayed in pursuing client's appeal, but client ultimately dropped appeal after discharging attorney, there was no basis for determining that client was harmed by attorney's conduct, and in any event, a delay of a few months in prosecuting an appeal does not, standing alone, warrant a finding of significant harm to the client.

[6] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Attorney's failure to apply the diligence necessary to discharge the duties arising from his employment, by failing to pursue his client's appeal in a timely fashion, did not establish reckless disregard or repeated failure to perform legal services competently.

[7 a, b] **148 Evidence—Witnesses**
166 Independent Review of Record
Where hearing referee found respondent's testimony credible and candid; and client's testimony confusing and inconsistent, argument that review department should disbelieve attorney and believe client was unavailing in light of deference review department must give to referee's findings based on credibility of witnesses.

[8 a, b] **165 Adequacy of Hearing Decision**
490.00 Miscellaneous Misconduct
Although hearing referee did not specifically find that client had expressly authorized attorney to endorse settlement check on client's behalf, review department interpreted decision to have resolved this issue on the basis of express rather than implied authorization.

[9 a-c] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.00 Misappropriation
Possession of client funds in the form of a cashier's check is no defense to a charge of commingling. However, an attorney who held client funds outside his trust account in the form of cashier's checks, notified his client promptly of the receipt of the funds, forwarded them to the client promptly upon demand, and had adequate funds at all times to pay what he owed the client, did not commit misappropriation, violate obligation to deliver client funds promptly upon demand, or commit any act of moral turpitude or dishonesty.

[10] **213.20 State Bar Act—Section 6068(b)**
An attorney's filing a lawsuit in the wrong court, and not paying sanctions awarded against the attorney in the change of venue order, did not support the contention that the attorney failed to maintain the respect due to the courts, when the attorney had no personal knowledge of the sanctions or the failure to pay them.

[11] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
An attorney's obligation to perform services competently must be construed to have covered the entire period that the attorney represented the clients, even after the clients' case was dismissed.

[12] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where clients hired an attorney to represent them, and were not informed that the attorney had delegated responsibility for the case to an associate, the clients rightly looked to the attorney to pursue their claims diligently. Accordingly, the attorney's failure to supervise the associate's handling of the case amounted to a failure to perform services competently.

[13] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where an attorney acted in good faith, and was kept in the dark by his associate either by design or negligence, his good faith did not relieve the attorney from culpability for failure to perform services competently, based on the attorney's prolonged failure to monitor his associates' handling of the case, after the ethics rule regarding competence was amended to delete the good faith exception.

[14 a, b] **213.10 State Bar Act—Section 6068(a)**
214.30 State Bar Act—Section 6068(m)
410.00 Failure to Communicate
Where respondent's failure to respond to letters sent by another attorney whom clients had contacted occurred before enactment of specific statute requiring response to clients' reasonable status inquires, respondent could not be found culpable of violating that statute. Nevertheless, a longstanding common-law duty to communicate with clients was recognized by the Supreme Court prior to the adoption of the specific statute. Thus, for failures to communicate with clients occurring prior to the addition of the new statute, it is not duplicative nor otherwise inappropriate to charge an attorney with violating his general duties as an attorney.

[15 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
213.10 State Bar Act—Section 6068(a)
Little, if any, purpose is served by duplicative allegations of misconduct; if misconduct violates a specific Rule of Professional Conduct or statute, there is no need for the State Bar to allege the same misconduct as a violation of an attorney's duty to obey the law.

[16] **106.30 Procedure—Pleadings—Duplicative Charges**
204.90 Culpability—General Substantive Issues
213.10 State Bar Act—Section 6068(a)
1099 Substantive Issues re Discipline—Miscellaneous
If violations of the Rules of Professional Conduct were automatically also violations of the statute governing an attorney's duty to obey the law, the statute limiting the discipline for rule violations to a maximum of three years' suspension would be rendered meaningless; such a construction of the statutory scheme would be illogical.

[17] **511 Aggravation—Prior Record—Found**
710.55 Mitigation—No Prior Record—Declined to Find
An attorney's prior private reproval which originated only four years before his current misconduct was not so remote in time to the current proceeding that the imposition of greater discipline in the present case based on the prior discipline would be manifestly unjust, even though the prior private reproval involved misconduct which did not bear any substantive relationship to the subsequent misconduct.

[18] **801.41 Standards—Deviation From—Justified**
824.54 Standards—Commingling/Trust Account—Declined to Apply
The Standards for Attorney Sanctions for Professional Misconduct are not to be rigidly applied, and an actual suspension of less than three months for commingling may be appropriate in the circumstances of a particular case.

[19] **173 Discipline—Ethics Exam/Ethics School**
Ordinarily, a requirement that a disciplined attorney take and pass the Professional Responsibility Examination is set forth as a separate requirement and not as a condition of probation.

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a)
213.91 Section 6068(i)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.01 Rule 4-100(A) [former 8-101(A)]
410.01 Failure to Communicate
Not Found
213.15 Section 6068(a)
213.25 Section 6068(b)
214.35 Section 6068(m)
220.15 Section 6103, clause 2
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.25 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.54 Misappropriation—Not Proven

Aggravation
Found
521 Multiple Acts
535.10 Pattern
Mitigation
Found
715.10 Good Faith
720.10 Lack of Harm
735.10 Candor—Bar
740.10 Good Character
745.10 Remorse/Restitution
760.11 Personal/Financial Problems
Standards
805.10 Effect of Prior Discipline
844.13 Failure to Communicate/Perform
863.10 Standard 2.6—Suspension
863.30 Standard 2.6—Suspension
Discipline
1013.06 Stayed Suspension—1 Year
1015.02 Actual Suspension—2 Months
1017.11 Probation—5 Years
Probation Conditions
1023.10 Testing/Treatment—Alcohol
1023.40 Testing/Treatment—Psychological
1024 Ethics Exam/School
1026 Trust Account Auditing

OPINION

PEARLMAN, P.J.:

This case involves seven contested counts. The referee found the respondent culpable of charges in three counts involving two sets of client matters and one count of failing to cooperate with the State Bar. Respondent was found to have commingled trust funds with personal funds in one of the two client matters, and, in the other, was found culpable of failing to supervise his associates in a civil case and failing to respond to letters from the client's subsequent attorney. In the light of extensive mitigating evidence, the referee recommended three months suspension, stayed, with five years probation, on various conditions including trust account reporting, psychiatric counseling and conditions for monitoring potential substance abuse. The examiner requested review challenging the hearing referee's decision regarding culpability on three counts as unsupported by the evidence and seeking the imposition of a minimum of one year actual suspension.

With minor modifications, we adopt the referee's essential findings of culpability as to all counts, except that we add a finding that respondent was culpable of violating former rule 6-101(A)(2) as charged in count five.[1] In assessing the appropriate discipline, we also take into account the extensive mitigation. However, in view of respondent's culpability on three client matters and a prior private reproval, we conclude that some actual suspension is warranted here. We recommend one year stayed suspension conditioned on 45 days actual suspension together with the strict probation conditions recommended by the referee.

PROCEDURAL HISTORY

This proceeding was initiated by a notice to show cause filed on February 27, 1989. As was then customary, all of the counts charged respondent with violating his oath and duties as set forth in Business and Professions Code sections 6068 (a) and 6103. More specifically, count one charged respondent with causing the dismissal of an appeal he was hired to prosecute and alleged failure to perform, failure to return $1,500 in unearned advanced fees and withdrawal from representation of the client (Lillian Collins) without taking reasonable steps to avoid prejudice in violation of rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) of the Rules of Professional Conduct. Count two charged respondent with misappropriating settlement funds deposited in his personal account without the authorization or knowledge of his client (Octavio Gomez), allegedly in violation of Business and Professions Code section 6106[2] and rules 8-101(A), 8-101(B)(1) and 8-101(B)(4). Counts three and four charged respondent with mishandling two matters for Salvadore Ramirez. In count three respondent was charged with failure to perform services in defense of a lawsuit against Ramirez resulting in a default judgment, and alleged failure to communicate, misrepresentation of activity in the lawsuit and failure to return advanced fees in violation of rules 2-111(A)(2), 2-111(A)(3), 6-101(A)(2) and former rule 6-101(2).[3] Count four charged respondent with violating sections 6068 (m) and rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2) by his alleged failure to set aside the default, to respond to client inquiries or to release Ramirez's file on request.

Count five charged respondent with violating section 6068 (b) and rules 2-111(A)(2), 6-101(A)(2) and former rule 6-101 (2)[4] by filing a lawsuit in the wrong court on behalf of three clients (Leon Gonzales, Candelarra Berrios and Michael Giordani), failure to pay costs ordered upon the defendants' motion for change of venue resulting in the dismissal of the action, and failure to communicate with the clients. Count six charged respondent with further related misconduct harming two of the three clients in count

1. All references to rules herein, unless otherwise stated, are to the former Rules of Professional Conduct of the State Bar of California, in effect from January 1, 1975, to May 26, 1989.

2. All references to sections are to sections of the Business and Professions Code unless otherwise noted.

3. The reference here is to former rule 6-101, which was in effect from January 1, 1975, to October 23, 1983.

4. See footnote 3, *ante*.

five. Respondent was charged with violating section 6106 by allegedly misrepresenting to the clients that he had taken care of a notice of foreclosure on their properties, later failing to communicate and respond to their inquiries, and misrepresenting to their new counsel that he had obtained injunctions blocking the foreclosure when the properties had, in fact, been sold at a trustee's sale two and one-half years earlier. Count seven charged respondent with violating section 6068 (i) by allegedly failing to respond to nine letters of inquiry from a State Bar investigator sent to his record address between January of 1987 and August of 1988.

Respondent's answer to the notice to show cause was filed on March 22, 1989, in pro per. Respondent denied all of the charges in counts one through six and affirmatively alleged facts controverting the allegations against him in each count. As to count seven, he admitted his failure to respond to inquiries except for a letter dated November 29, 1988, which he responded to on December 7, 1988, requesting a conference with the examiner prior to the institution of formal charges. He also included in his answer, in mitigation of his failure to respond to earlier inquiries of the State Bar investigator, that he was under severe emotional and financial stress during the period of time in question (1987-1988) due to his then pending contested marital dissolution proceeding.

A three-day evidentiary hearing was held on August 7-9, 1989. By that time, respondent was represented by counsel. He stipulated to the charging allegations of count seven. Oral and documentary evidence was presented with respect to counts one through six. The decision on culpability was issued on September 11, 1989, finding culpability on three of the six contested counts and on count seven. The hearing to consider aggravating and mitigating factors and to determine discipline was held on September 25, 1989. Respondent presented in mitigation psychiatric testimony, several character witnesses, his own testimony and documentary evidence. The referee also received as evidence in aggravation the record of respondent's prior private reproval for failure to obtain informed, written consent to a potential conflict between two clients he was representing.[5]

The referee issued a lengthy, carefully considered decision on December 12, 1989. He found no clear and convincing evidence of the charges in counts one, three and four. On count two he found respondent culpable of commingling in violation of rule 8-101(A) and of violating sections 6068 (a) and 6103, based thereon. He found no willful misappropriation in violation of section 6106, or misconduct in violation of rule 8-101(B)(1) or 8-101(B)(4).

On count five the referee found respondent culpable of violating sections 6068 (a) and 6103, but found insufficient evidence of a violation of section 6068 (b) or rules 2-111(A)(2), 6-101(A)(2) or former rule 6-101(2). On count six the referee found no intentional misrepresentation but only a negligent error of fact in a letter sent by respondent. He determined that respondent was culpable of violating sections 6068 (a) and 6103, but not section 6106. On count seven, pursuant to respondent's stipulation, the referee found that the nine inquiries were properly sent to respondent at his record address and that he failed to respond or otherwise cooperate in violation of sections 6068 (a), 6068 (i) and 6103.

In aggravation, the referee considered the prior private reproval of respondent for failure to obtain informed, written consent of a potential conflict between two clients, but noted that the event occurred 12 years prior to the proceeding before the referee and was so remote in time and minimal in nature that imposition of greater discipline based thereon would be manifestly unjust. (Decision p. 22.) He also found in aggravation that respondent committed multiple acts of wrongdoing (Trans. Rules Proc. of State Bar, div. V, Standards For Attorney Sanctions For Professional Misconduct ["standard(s)"], standard 1.2(b)(ii)), but no demon-

5. Part of the record of the prior reproval was produced on September 25, 1989, and the full record was presented shortly thereafter, as permitted by the referee.

strated "pattern of misconduct." (Decision p. 23.) The referee further found that there was no significant harm to the client proved by clear and convincing evidence and no other aggravating circumstances were found. (Decision p. 23.)

In mitigation, the referee found that respondent acted in good faith; that there was no harm to the client in counts two and six; that respondent had previously suffered from severe depression as a result of problems in his prior marriage; and that respondent had previously been dependent on alcohol, and had since brought his alcohol use under control. The referee further found that respondent demonstrated spontaneous candor and cooperation at the hearing and that the witnesses produced on respondent's behalf permitted the referee to make the finding of an extraordinary demonstration of good character from a wide range of members of the public. Lastly, the referee found respondent to have exhibited extreme remorse. (Decision pp. 25-28.)

FACTS

We adopt the findings of fact of the referee as set forth in his decision except for a few minor modifications set forth below.

A. Count One (Collins).

The client in this matter, Lillian Collins, was involved in an automobile accident sometime prior to July 19, 1984. Collins had been sitting in her parked car with the driver door slightly ajar and a passing car collided with the door causing injuries to the driver of the passing car and Collins. A lawsuit resulted in which Collins was a defendant. The trial resulted in a judgment against Collins. She immediately contacted respondent in July 1984 regarding an appeal of the judgment.[6] Collins was to pay a retainer of $1,500, plus costs. She made an initial payment of $200 and then made payments over the next several months until the $1,500 retainer had been paid in full. Respondent filed a notice of appeal in September 1984. In addition, respondent filed a motion to tax costs in the trial court in which he prevailed on behalf of Collins, saving her approximately $900 in trial costs assessed against her. Respondent ordered the trial transcript and received a request for payment for $1,216. There apparently was some misunderstanding regarding the payment of costs, but eventually Collins forwarded the transcript fee to respondent in April 1985. Respondent did not send the transcript fee to the reporter until November 1985, due partly to respondent's vacation, his own delay in forwarding fees, and the loss of the first check sent to the reporter.

Respondent received the transcript in April 1986 and met with Collins and explained the problems with the case. Respondent did some research and reviewed the transcript but did not file a brief in time and the appeal was dismissed in late August 1986. Respondent then filed a request for reinstatement of the appeal which was granted on October 2, 1986.

Shortly after the August 29 dismissal of the appeal, Collins, who was unable to reach respondent, called the Court of Appeal and was told that the appeal had been dismissed. She immediately sent a mailgram to respondent on September 10, 1986, inquiring about the status of her case. Respondent promptly replied to that inquiry and informed her of his attempts to reinstate the appeal. On October 7, 1986, Collins sent another mailgram to respondent requesting a fee refund, her case file, and the transcript. Respondent immediately replied to that mailgram. The referee found that as of October 7, 1986, Collins had ended the attorney-client relationship with respondent. Collins picked up her file and the transcript from respondent some time prior to December 28, 1986.

In late December 1986, respondent received a letter from the Court of Appeal advising that the appeal would be dismissed unless an opening brief

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6. The referee made a finding that respondent discussed with Collins at that time that her opening of the door may have caused a presumption of liability; that she failed to provide medical testimony to support her injury claims; and that she might have a malpractice claim against her prior attorney. (Decision p. 3.) The examiner points out that these matters were actually discussed in a conversation between respondent and Collins in 1986. (R.T. pp. 382-384, 392.) The respondent agrees that this correction should be made and we hereby modify the findings in this regard.

was filed by January 23, 1987. Respondent advised Collins of this fact by letter dated January 5, 1987. Collins did not or could not get another attorney to represent her and no opening brief was filed. The Court of Appeal dismissed the appeal on February 5, 1987.

Collins eventually filed for fee arbitration and was awarded $1,500. The case then went to small claims court where respondent defaulted and Collins was awarded a judgment for $1,500. Respondent paid her the $1,500 when she went to his office a few weeks later.

B. Count Two (Gomez).

Octavio Gomez hired respondent in 1984 to represent him in a civil action as a plaintiff. Respondent was paid $800 in advanced attorneys fees. At trial of the matter in 1986 the defendant offered Gomez $1,000 to settle the case. Gomez rejected that offer, telling the respondent he wanted $2,000. The defendant then made a final offer of $1,750. Respondent discussed the final offer with Gomez and agreed to reimburse $250 of his attorneys fees to Gomez so that Gomez would receive the $2,000 total recovery he sought. Gomez gave respondent authority to settle on those terms and authorized respondent to deposit the $1,750 check when received. When respondent received the settlement check he did not deposit it into his attorney trust account because his wife, in their contested marital dissolution, had secured a levy on respondent's trust account. Instead, respondent deposited the check into his personal checking account at a different bank, which was not subject to the levy.

Respondent dictated a letter to Gomez, dated January 5, 1985, enclosing a check for $2,000. Prior to sending the letter respondent had his secretary call Gomez about its contents. The secretary did so and was informed by Gomez that he did not want to accept the settlement. Therefore, the January 5, 1987 letter was not sent to Gomez. Several weeks later respondent received a call from an attorney from the Los Angeles County Bar Association inquiring as to why the $2,000 check had not been sent to Gomez. Respondent explained that he thought Gomez had changed his mind. Soon thereafter respondent received a letter from the attorney confirming Gomez's acceptance of the $2,000 and respondent promptly had a cashiers check for $2,000 prepared and sent to Gomez.

Between the date of deposit of the $1,750 check on December 11, 1986, and respondent's payment to Gomez on February 25, 1987, the balance in the account fell below $1,750. Respondent was not aware of this. Respondent had sufficient funds on his person in the form of cashiers checks to cover the $1,750. He was retaining the checks in his personal possession to avoid attachment by his wife.

C. Count Three (Ramirez I).

Respondent was hired by Salvador Ramirez to defend him in a civil suit. Ramirez essentially disappeared from late 1977 to October 1980. He did not keep in contact with respondent and did not respond to communications from respondent. All letters by respondent to Ramirez were sent to the address given to respondent at the beginning of the matter and respondent was not directed to send the letters to any other address. None of the letters respondent sent to Ramirez ever came back as undeliverable.

After Ramirez failed to appear at a deposition and failed to attend several mandatory settlement conferences, despite written notices from respondent, the plaintiff filed a motion to strike his answer, which was granted on July 15, 1982. A default judgment was entered against Ramirez on February 7, 1984, in the amount of $10,500 plus costs.

D. Count Four (Ramirez II).

The plaintiff in the above lawsuit recorded an abstract of judgment in August 1985. Sometime thereafter Ramirez attempted to refinance real property and learned of the lien. Ramirez then contacted respondent and met with him on December 10, 1986. Respondent was eventually paid $500 as a retainer to investigate the matter.

Respondent performed work on the case including research at the recorder's office and setting the date for a motion to challenge the lien. Respondent

was then informed by Ramirez's son that the case was concluded and he demanded the return of the $500. Despite the fact that respondent had earned at least some of the retainer, he returned the entire $500 along with the file in the case. The actual date of the return of the file and the fee was unclear, however there was no credible evidence that there was any delay in either the return of the file or the fee.

E. Count Five (Gonzalez I).

Some time prior to June 1980, respondent was hired by Leon Gonzalez, Candelarra Berrios and Michael Giordani to prosecute a civil suit against a contractor for construction defects in five rental houses they had purchased in Riverside County, California. Respondent was paid $1,500 in advanced attorneys fees. It was agreed that Giordani would be the main contact person with respondent.

A lawsuit and related lis pendens were prepared by an associate of respondent's and filed in the Los Angeles Superior Court in May 1981.

The three clients apparently ceased making payments on the note held on the houses and foreclosure proceedings were initiated against the properties. Respondent prepared an application for a temporary restraining order (TRO) to stay the foreclosures. A hearing was scheduled for December 4, 1981. Upon arriving at the courthouse prior to the hearing, respondent learned that the defendants had filed a motion for change of venue to Riverside County, which deprived the Los Angeles Superior Court of jurisdiction to rule on the TRO. The motion for change of venue was granted on December 23, 1981. Costs of $319 were assessed against respondent's clients and $750 in sanctions were assessed against respondent. The court order further provided that before the plaintiffs could transfer the case they had to pay both the costs and sanctions. The costs were paid, but the sanctions were not. The defendants subsequently moved for dismissal of the case, which was granted on May 6, 1982, without prejudice. Gonzalez and respondent met in October 1982. Respondent reviewed the file, but the papers relating to the dismissal of the case were not in the file. Respondent did not learn of the failure to pay the sanctions or the dismissal of the case until March 1985.

Respondent had assigned responsibility for the case to an associate in his office who later left respondent's employ. A new associate was hired and the case was assigned to the new associate. The new associate left respondent's employ in February 1984 apparently having done nothing on the matter since the 1982 dismissal without prejudice. Respondent moved his law office to Pasadena in 1984, notifying the courts and his clients in his active files.

Gonzalez called respondent in early 1985 to inquire about the case and indicated he had not been given notice of respondent's change of address. Respondent looked for the file in his active section without success. He finally located the file in the inactive section of his files. The dismissals and related papers had been put back in the file and respondent became aware of what transpired.

Respondent refiled the case in Riverside County in March 1985. However, the statutes of limitation had run on most of the causes of action. A malpractice suit was subsequently filed against respondent by Gonzalez and Barrios, which was settled in 1989.

F. Count Six (Gonzalez II).

In January 1985, Gonzalez authorized attorney George Hecker to contact respondent on Gonzalez's behalf. Hecker wrote to respondent on January 18, 1985, and again on February 4, 1985. Respondent did not reply to these letters.

Gonzalez himself called respondent in late February 1985 and had another attorney, Murray Sturner, also call respondent. Respondent replied by letter indicating that "a copy of the temporary restraining order stopping the foreclosure sale, which was issued by the Los Angeles Superior Court" was enclosed. Respondent testified he meant to say that a lis pendens had been filed in Los Angeles Superior Court and he had attached a copy to the letter. Gonzalez was aware that no TRO had been obtained since the properties had been by that time foreclosed. The referee found that respondent did not intentionally misrepresent the status of the case to Gonzalez.

G. Count Seven (Failure to Cooperate).

The parties stipulated that respondent failed to respond to numerous inquiries from the State Bar investigator between January 1987 and August 1988 and thereby failed to respond or cooperate with the State Bar in the investigation of the matters.

ISSUES ON REVIEW

The examiner has requested review of the referee's decision only with regard to counts one, two, and five. **[1a]** While the examiner's request for review does not request review of count six, her brief indicates she is, in fact, seeking review of count six. Since the review department conducts de novo review of the entire record, we will address the propriety of the findings in count six as well.

The examiner does not contest the referee's conclusion of no culpability in counts three and four. Upon our independent review of the record we agree with the referee's findings on these counts and adopt the conclusion of no culpability.

With respect to count one, the examiner argues that the referee's conclusion that the delays in pursuing the appeal were not all attributable to respondent was in error; that respondent failed to perform the services for which he was hired in that he did not ever prepare an appeal brief in the two years he represented Collins, which resulted in the appeal being dismissed, and the decision should be amended to include violations of rules 2-111(A)(2) and 6-101(A)(2).

With respect to count two, the examiner argues that the referee erred in finding that respondent had authority to endorse and deposit the $1,750 settlement check; respondent misappropriated the settlement funds when the account balance of his personal checking account fell below $1,750 and therefore is culpable of violating rule 8-101(B)(4).

With respect to counts five and six, the examiner argues that respondent undertook representation of the three clients (Gonzales, Berrios and Giordani), assigned the case to an associate who could not communicate with the Spanish-speaking clients, failed to supervise the associate and failed to communicate with the clients. As a result respondent abandoned his ethical responsibilities to his clients and the decision should be modified to include violations of section 6068 (b) and rules 2-111(A)(2), 6-101(A)(2) and former rule 6-101(2).

With respect to discipline, the examiner assumes that if all of her requested findings are made in counts one, two, five and six the discipline should be increased to a minimum of one year actual suspension and five years probation primarily because respondent engaged in serious misconduct in count two when he misappropriated and commingled funds and endorsed his client's name to the settlement check.

DISCUSSION

[1b] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it this review department must independently review the trial record just as the Supreme Court does upon review of the review department recommendation. (See *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928.) In doing so, we accord great weight to findings of fact made by the hearing department which resolve testimonial issues. (*In Re Bloom* (1987) 44 Cal.3d 128, 134; rule 453(a), Trans. Rules Proc. of State Bar.) However, the review department also has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar.) Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (*Ibid.*) **[2]** Our overriding concern is the same as that of the Supreme Court: the protection of the public, preservation of public confidence in the profession and the maintenance of high professional standards. (See standard 1.3; *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117.)

A. Count One.

The essence of this count as charged in the notice was respondent's delay in pursuing the appeal. The examiner has not asserted that the referee's findings with regard to respondent's compliance

with rule 2-111(A)(2) after he was discharged by the client in October 1986, are not supported by the record. Rather, she argues that there was a "de facto withdrawal" prior to his discharge in October. Not only did the referee find that the requirements of rule 2-111(A)(2) were complied with, but that the client discharged respondent. He did not withdraw. [3] Nonetheless, rule 2-111 applies to attorneys who are discharged as well as those who withdraw. (See *Academy of California Optometrists, Inc.* v. *Superior Court* (1975) 51 Cal.App.3d 999, 1005-1006.) We therefore address the question of respondent's compliance with rule 2-111 upon his discharge.

The referee's findings that respondent complied with rule 2-111(A)(2) are supported by the record. Upon being discharged, respondent immediately advised Collins that she could pick up the file. (State Bar exh. 11.) By letter dated December 24, 1986, the Court of Appeal advised respondent that the appeal would be dismissed unless a brief was filed within 30 days. Respondent copied Collins with this letter on January 5, 1987. Thus, Collins had from early October 1986 to retain new counsel and was advised of the deadline she was facing. Although respondent could have notified Collins of the December 24, 1986 Court of Appeal letter earlier, considering the fact that she was aware of her need to retain new counsel well before December, his two-week delay in doing so did not prejudice his client, as the referee apparently concluded.

[4] The examiner does not challenge the referee's conclusion that respondent returned the disputed fee promptly and therefore did not violate rule 2-111(A)(3). Respondent testified he did some work on the case and felt he was entitled to the entire $1,500 fee. (R.T. p. 370.) The referee concluded that it was therefore reasonable for respondent to postpone the fee refund until the small claims court determined it was required. We see no basis for disturbing that finding.

With respect to rule 6-101(A)(2), the referee concluded that although there were delays in pursuing the appeal, some were not respondent's fault and that although respondent could have been more timely in his research, there was no clear and convincing evidence of misconduct.

The appeal was filed in September 1984. Respondent received the transcript fee from Collins in April 1985. He forwarded that fee to the reporter in November 1985. Respondent received the transcript in April 1986 and was discharged by Collins in October 1986. The referee found that the delay in receiving the transcript was based on a combination of factors not amounting to clear and convincing proof of misconduct. That finding is understandable with regard to respondent's receipt of the transcript fee from Collins for he had no control over that. The referee also found that respondent's seven-month delay in sending the fee to the reporter was due to respondent's vacation, delay in forwarding the check and the loss of the first check respondent sent. These clearly were factors within respondent's control.

Respondent received the transcript in April 1986 and was not discharged until October 1986. His subsequent failure to file appears unjustified since respondent filed a motion to extend time to file the brief in July 1986 (respondent exh. AJ), which was apparently granted. The appeal was not dismissed until August 29, 1986. Thus, respondent had been made aware of the need to file the brief on more than one occasion with ample time to comply and he failed to do so. Nonetheless, respondent was able to get the appeal reinstated prior to his discharge. The client's failure to pursue the appeal thereafter is not attributable to respondent and may have been due to concerns regarding its merit, which respondent had raised.[7] [5 - see fn. 7] [6] While it appears that respondent may have failed to apply "diligence necessary to discharge the member's duties arising from the employment or representation" as specified in

7. [5] Since the client dropped the appeal there is no basis for determining that she was harmed by respondent's conduct. Even if the client had thereafter pursued the appeal, the delay caused by respondent would probably not be construed as causing significant harm. (*Young* v. *State Bar* (1990) 50 Cal.3d 1204, 1217 [holding that "[a] delay of a few months in prosecuting an appeal, while it may be harmful to a client, is not unusual, and does not, standing alone, warrant the conclusion that the client was 'significantly' harmed thereby"].)

rule 6-101(A)(1), the evidence does not rise to the level of proof of "reckless disregard" or "repeated failure" to perform legal services competently and respondent was therefore not culpable of violating rule 6-101(A)(2).

We thus adopt the referee's finding of no culpability in count one.

B. Count Two.

As indicated above, the examiner's assertions with regard to this count are twofold: First, that respondent did not have authority to endorse and deposit the settlement check, and second, that respondent wilfully misappropriated the funds in violation of rule 8-101(B)(4).

Neither side in this matter disputes the fact that Gomez agreed to the settlement. The dispute arises in the context of whether respondent had authority to endorse and deposit the check. Gomez testified that he did not give respondent permission to sign his name to the settlement check nor was he notified by respondent that respondent had received the check. (R.T. p. 99.) The respondent on the other hand testified that he spoke with Gomez at the courthouse (apparently shortly after or at the time of the settlement) and informed Gomez that it would take approximately 30 days for him to receive the draft. Respondent further testified that he informed Gomez that when the check came in he would deposit the money and as soon as it cleared he would send it to Gomez. Gomez seemed agreeable to that. **[7a]** The referee found respondent's testimony credible and candid, while Gomez's testimony was confusing and inconsistent on certain issues. Thus the referee resolved the testimonial conflict in favor of the respondent.

The examiner makes two arguments: (1) that we should disbelieve respondent's testimony and believe that of Gomez and (2) that respondent's version is in any event insufficient to support a finding that the respondent was authorized to endorse the settlement check. **[7b]** Both arguments are unavailing in light of the deference we must give to the referee's findings based on the credibility of witnesses. (*Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055; cf. *Silver* v. *State Bar* (1974) 13 Cal.3d 134, 144 [deferring to the local committee's finding of no client authority to endorse a settlement check].) **[8a]** While the referee's decision does not specifically mention the endorsement issue, it does expressly find that Gomez authorized respondent to deposit the $1,750 check when received. (Decision p. 9.) Since the examiner raised the identical issue of respondent's lack of express authority in trial briefs below, the referee's finding that the deposit was authorized can only be read as a determination that respondent was authorized by his client to endorse the client's name to the check if necessary in order to deposit it.[8] **[8b]** While the record below appears somewhat equivocal as to whether the authorization was express as required by *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 793-794, the referee was in the best position to evaluate the testimony. We interpret the referee's decision in the face of the examiner's arguments to have resolved this issue on the basis of express rather than implied authorization. (See generally 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 268, pp. 276-277.)

[9a] The referee properly found that possession of the funds in a cashier's check is no defense to commingling. (*Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 854.) "'Prior to 1956, [the] practice of holding . . . clients' funds in the form of cashier's checks, or even in cash [citation], was permissible. In 1956, however, rule 9 of the Rules of Professional Conduct was amended to require that all clients' funds be deposited in a designated account, separate from the attorney's personal accounts, . . . unless the client otherwise directs in writing.'" (*Id.* at pp. 854-855, quoting *Black* v. *State Bar* (1962) 57 Cal.2d 219, 227

8. It is clear from the record that respondent deposited the settlement check into his personal bank account at Imperial Savings. A copy of the front of the draft (State Bar exh. 20) and the bank's records (State Bar exh. 21) were introduced. However, a copy of the back of the draft was not. Although the draft was made payable only to Gomez, no testimony was introduced from respondent or any other source that the client's name was actually endorsed on the check. Without the back of the draft, it is only by inference that the record would allow us to determine that respondent in fact endorsed the client's name as opposed to signing his own name as an authorized nonidentical endorsement. (See, e.g., *Campbell* v. *Bank of America* (1987) 190 Cal.App.3d 1420.)

[public reproval of attorney with no prior disciplinary record for violations of former rule 9 by retention of client's funds in the form of cashier's check without client's written permission].) However, a different issue is presented with respect to whether merely holding the funds outside the trust account in the form of cashier's checks constitutes misappropriation in violation of rule 8-101(B)(4).

The examiner relies principally on *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962 in asserting that a misappropriation in violation of rule 8-101(B)(4) occurred based on the referee's finding that on some occasions between the deposit of the check on December 11, 1986, into respondent's personal account and respondent's payment to Gomez in February 1987, the account balance fell below the amount of the settlement check. The examiner contends that it is of no consequence that the referee found that the client had not made a demand for the funds at that time and that the referee further found that respondent had "sufficient funds on his person in the form of cashiers checks to cover the $1,750." (Decision p. 10.)

Rule 8-101(B)(4) states that a member of the State Bar shall: "(4) Promptly pay or deliver to the client as requested by a client, the funds . . . in the possession of the member . . . which the client is entitled to receive." In her brief, the examiner notes that "arguably . . . a client must first make a request for payment or delivery of the funds or property before a violation of the rule can be claimed." She further notes that in every recent California case she reviewed a demand had in fact been made. (*Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962; *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357; *Kelly* v. *State Bar* (1988) 45 Cal.3d 649; *Chang* v. *State Bar* (1989) 49 Cal.3d 114; *Rhodes* v. *State Bar* (1989) 49 Cal.3d 50.)

[9b] In the instant case, there was never any finding of delay in payment after client demand as required for an 8-101(B)(4) violation. To the contrary, the referee found that respondent drafted a transmittal letter by which he would have immediately sent Gomez his check, but refrained from sending it solely because Gomez informed his secretary that he did not want to accept the settlement. (Decision p. 9.) When Gomez reaffirmed his desire to accept the settlement, respondent promptly sent him a cashier's check in the appropriate amount. These facts amply support the referee's finding that respondent did not violate rule 8-101(B)(1) because the client was promptly notified of the receipt of funds, or 8-101(B)(4) because the client's funds remained in his possession and were promptly paid on request.

[9c] The examiner does not argue that respondent's misconduct involves moral turpitude. No dishonesty was involved. We therefore also adopt the referee's finding of no section 6106 violation. (See *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 321; see also *Silver* v. *State Bar*, *supra*, 13 Cal.3d at p. 144 ["Moral turpitude is not necessarily involved in the commingling of a client's money with an attorney's own money if the client's money is not endangered by such procedure and is always available to him"].)

C. Counts Five and Six.

The examiner argues that the referee ignored the weight of the testimony and documentary evidence on counts five and six and that the legal conclusions the referee reached from his factual findings were also in error. In both counts five and six the referee found respondent's testimony credible and the testimony of the examiner's witnesses not credible, thus believing the respondent on all contested issues.

In count five, the findings of no culpability under section 6068 (b) and rule 2-111(A)(2) appear proper. **[10]** Other than filing the lawsuit in the wrong court and not paying the sanctions, there is no evidence which might be pointed to in support of the argument that respondent failed to maintain the respect due to the courts (section 6068 (b)). The referee specifically found that respondent had no personal knowledge of the sanctions or the failure to pay those sanctions. In addition, there is no evidence respondent withdrew from employment or was discharged by the clients. In fact, respondent refiled the case in Riverside County in March 1985. Neither of the letters that were sent to respondent by the new attorney contacted by the clients indicated that the clients were discharging respondent. Rather, both letters were mere status inquiries. Although respondent did not reply to either of the two letters, he did

respond to the letter of the second attorney contacted by the clients.

The findings of no culpability with regard to the rule 6-101(A)(2) and former rule 6-101 violations are more problematic. The referee concluded that rule 6-101(A)(2) did not apply because that rule did not take effect until October 23, 1983, well after the dismissal of the case. That conclusion is in error. Regardless of when the case was dismissed, the attorney-client relationship extended beyond October 1983 and in fact, respondent filed a new lawsuit on the client's behalf in 1985. The dismissal without prejudice thus did not end the case or respondent's representation of the clients. Had respondent supervised his employees and monitored the case properly he would have learned of the dismissal in a timely fashion (indeed the dismissal might well not have occurred had respondent previously been properly supervising the file and his employee) and could have taken steps to seek earlier reinstatement of the lawsuit.

[11] We conclude that respondent's obligation to perform services competently must be construed to cover the entire period that he represented these clients, which would include a significant period of time after October 1983. [12] Given this conclusion, we next address the issue whether respondent's failure to supervise his associates' handling of the case on and after October 23, 1983, amounts to a failure to perform services competently in violation of rule 6-101(A)(2). We conclude that it did. The clients hired respondent to represent them in this legal matter. They were not informed that respondent had delegated the responsibilities to an associate. Thus, the clients rightly looked to respondent to pursue their legal claims diligently. *Moore* v. *State Bar* (1964) 62 Cal.2d 74, 81 is similar. There an attorney was disciplined for delegation of responsibility for handling a case to an associate without the client's knowledge and his subsequent failure to supervise the associate in the handling of the case. The associate abandoned the case which went to a default judgment against the client. The associate later disappeared. Unbeknownst to Moore, the associate turned out to have been under suspension by the Supreme Court throughout the entire period of time in question. The Supreme Court held Moore culpably negligent in failing to supervise the handling of the case more closely, stating, "An attorney who accepts employment necessarily accepts the responsibilities of his trust." (*Ibid.*)

Respondent herein had earlier failed to accept the responsibility for the trust placed in him by the clients when he failed to supervise his first associate who misfiled the case in the wrong venue, resulting in both a wasted effort to obtain a restraining order in the wrong court and sanctions. Thereafter, in 1982 he met with one of the clients to discuss the case without obtaining accurate information as to its current status. The clients were Spanish-speaking and neither associate was able to communicate with the clients in Spanish. (III R.T. p. 548.) Respondent testified that he expected that if it were necessary to talk to the clients, the associate would talk to him and he would communicate with the clients. (*Id.*)

[13] The referee noted that former rule 6-101, in effect from 1975 to October 1983, made an exception for good faith behavior and concluded that respondent had the requisite good faith. He therefore found that no violation of former rule 6-101 occurred in respondent's conduct during the time period covered by former rule 6-101. The referee's conclusion that respondent acted in good faith is based on his finding that respondent was kept in the dark by the associates either by design or negligence. (Decision p. 18.) We have insufficient basis for disturbing the referee's finding which rests on respondent's credibility as found by the referee. (*Connor* v. *State Bar*, *supra*, 50 Cal.3d at p. 1055.) However, the finding of good faith conduct prior to October 1983 does not relieve respondent from culpability under rule 6-101(A)(2) for his conduct after October 1983. During this period respondent again delegated the case without his client's knowledge to a new associate and again failed to monitor the case while the associate was assigned to it and after the associate left his employ in February of 1984. Respondent did not become aware of its 1982 dismissal without prejudice and subsequent inactive status until the client called him in 1985. This new period of prolonged neglect was simply inexcusable. We conclude based thereon that respondent is culpable of violating rule 6-101(A)(2) by repeatedly failing to perform services competently. (Cf. *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 857-859; *Sanchez* v. *State Bar* (1976)

18 Cal.3d 280, 285 [interpreting gross carelessness and negligence in supervision as violation of the attorney's oath].)

In count six, respondent was found culpable of violating section 6068 (a) and 6103 for failing to respond to two letters sent to him by another attorney the clients contacted. **[14a]** The facts of this count preceded the enactment of Business and Professions Code section 6068 (m) and therefore could not have been charged as a violation thereof. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815.)

Prior to 1989, the broad duty of section 6068 (a) to support the Constitution and laws of the State of California and the oath and duty provisions of section 6103 were routinely charged as statutes violated by respondents for alleged acts of misconduct, including failure to communicate. In 1989, the Supreme Court held that section 6103 defines no duties. (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815.) We therefore reject culpability under section 6103 on all counts in which respondent was found culpable of statutory or rule violations (count two, five, six and seven).

The Supreme Court in *Baker* also disapproved of the blanket routine charge of a section 6068 (a) violation without specification of the basis therefor and refused to consider it applicable to the rule violations charged in that case. (See also *Sands* v. *State Bar*, *supra*, 49 Cal.3d at p. 931.) Since *Baker* was decided, the Court has sometimes permitted similar charges to stand in cases where the issue of the continued viability of section 6068 (a) and 6103 charges in matters covered by other statutes or rules was apparently not contested and where the outcome remained unaffected by the additional charges. (See, e.g., *Phillips* v. *State Bar* (1989) 49 Cal.3d 944; *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071.) **[15a]** However, more recently, in *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, the Court noted that "little, if any, purpose is served by duplicative allegations of misconduct" and explained that if "misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of sections 6068, subdivision (a), and 6103." (*Id.* at p. 1060.)

[15b] The same analysis applies to statutory violations. Thus, there is no independent basis for finding respondent culpable of violating section 6068 (a) in count seven. Culpability of a section 6068 (i) violation for failure to cooperate is the basis for imposing discipline. For the same reason, we also reject section 6068 (a) as a separate basis for culpability in counts two and five. The proved charges of rule 8-101(A) and 6-101(A)(2) violations are the bases for imposing discipline. **[16]** We also note that if rule violations were automatically also violations of section 6068(a), the result would be that the limitation on the State Bar Board of Governors' authority to impose a maximum three-year suspension for any rule violations (Bus. & Prof. Code, § 6077) would be rendered meaningless. In such event, all rule violations could result in disbarment by virtue of constituting section 6068 (a) violations as well. We decline to place such illogical construction on the statutory scheme.

This leaves the issue of respondent's culpability of a section 6068 (a) violation in count six for failure to communicate. **[14b]** Since *Baker*, the Supreme Court has reaffirmed that "[f]ailure to communicate with, and inattention to the needs of, a client may, standing alone, constitute grounds for discipline. [Citations.]" (*Layton* v. *State Bar* (1990) 50 Cal.3d 889, 903-904; see also *Lister* v. *State Bar* (1990) 51 Cal.3d 1117, 1125; *Harris* v. *State Bar* (1990) 51 Cal.3d. 1082, 1088.) This reflects a longstanding common law duty recognized by Supreme Court cases prior to the adoption of Business and Professions Code section 6068 (m). (See, e.g., *Mepham* v. *State Bar* (1986) 42 Cal.3d 943, 949-950 [failure to communicate with clients periodically, standing alone, warrants discipline].) The Supreme Court has very recently affirmed the propriety of predicating findings of culpability for pre-1987 failure to communicate on a charge of a section 6068 (a) violation. (See *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 287-288.) For conduct occurring prior to the addition of section 6068 (m) it clearly is not duplicative nor otherwise inappropriate to charge a section 6068 (a) violation for failure to communicate. We therefore adopt the referee's conclusion that respondent violated section 6068 (a) by the misconduct charged in count six.

DISCIPLINE

The referee, based on his culpability findings and based on findings of extensive mitigating circumstances, recommended that respondent be suspended for three months, stayed, and placed on probation for five years. The examiner argues that the recommended level of discipline is insufficient and should be increased to a minimum of one year actual suspension and five years probation on the ground that respondent should be found to have engaged in serious misconduct, i.e., misappropriation of commingled funds and unauthorized endorsement of his client's name to a check. As indicated above, we have found no basis for disturbing the referee's findings in this regard.

The referee's findings with regard to mitigation are also supported by the record. Substantial mitigation exists in this case including respondent's emotional difficulties because of problems with his marriage and a suicidal wife. (Decision pp. 23-28.) The referee did take the standards into account and concluded that no actual suspension was warranted under the facts of the case because of the extensive mitigating circumstances.

[17] Respondent has a prior private reproval which originated in 1977. The referee concluded that the prior discipline was so remote in time to the current proceeding and involved an offense so minimal in severity that the imposition of greater discipline would be manifestly unjust. However, the prior discipline was only four years before the misconduct in count five (December 1981). While the private reproval involved a conflict of interest problem which the referee correctly found does not bear any substantive relationship to the misconduct which occurred in the present case, nevertheless, the fact that the misconduct in the present case arose only four years after the misconduct in the prior is of concern to us. Respondent, by the prior discipline, should have been more attentive to his ethical responsibilities.

Nevertheless, the referee specifically found that respondent posed no present threat to the public and a period of actual suspension would merely serve as unnecessary punishment. (Decision p. 29.) He further found that "a period of actual suspension would, however, harm respondent's current clients, many of whom are Spanish-speaking and have limited access to legal representation." (Decision p. 30.)

We must undertake our own independent assessment of appropriate discipline based on our own findings regarding culpability. As indicated above, we modify the referee's conclusions of law to include additional culpability in count five for failure to perform services competently. With due regard for the potential impact on respondent's current clients, we nonetheless conclude that respondent's misconduct warrants some period of actual suspension.

Respondent has been found culpable of commingling in violation of rule 8-101(A) pursuant to count two, repeated failure to perform services competently in violation of rule 6-101(A)(2) in count five, failure to communicate in violation of section 6068 (a) in count six and failure to cooperate in violation of section 6068 (i) in count seven. With respect to count two, the standards provide that commingling not resulting in willful misappropriation "shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances." (Standard 2.2(b).) With respect to counts five and six, standard 2.4(b) provides that culpability of willful failure to perform services or communication "shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client."

The standards thus permit a broad range of discipline for the offenses committed by respondent in counts five and six depending on the circumstances. In *Moore* v. *State Bar, supra*, 62 Cal.2d at p. 81, the Supreme Court adopted a recommendation of three months actual suspension of an attorney who turned a case over to an associate to handle without notifying the client, failed to supervise the associate and failed to make restitution to the client. In *Sanchez* v. *State Bar, supra*, 18 Cal.3d at p. 285, the Supreme Court also ordered three months suspension of an attorney for two counts in which he was charged and found culpable of gross negligence in failing to supervise employees and to establish an internal calendaring system resulting in the dismissal of two clients' cases. On the other hand, in *Vaughn* v. *State*

Bar, supra, 6 Cal.3d at pp. 858-859, the Supreme Court ordered public reproval of an attorney with no prior discipline for commingling[9] in violation of former rule 9 and negligent failure to supervise his office which wrongfully garnished the wages of a defendant to pay attorneys' fees already paid to his office. The discipline called for by standard 2.4(b) is thus in accord with the case law providing for a range of discipline for offenses of the type committed in counts five and six.

Violation of section 6068 (i) is covered by standard 2.6 which provides that violations governed thereby "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3." Respondent's initial failure to cooperate followed by full cooperation at the hearing does not constitute a grave offense and does not appear to have materially impeded the proceeding below. The referee's recommendation of stayed suspension on this count in light of its lack of gravity and the extensive mitigation is consistent with the standards. His recommendation is also consistent with standard 1.7(a) which provides that greater discipline shall be imposed when the respondent has a prior record of discipline, here, a private reproval.

The referee's recommendation of no actual suspension is, of course, inconsistent with the three months minimum suspension for commingling called for by standard 2.2(a). **[18]** However, the standards are not to be rigidly applied (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221-222), and the Supreme Court has recently ordered a one-month actual suspension for an attorney who violated rule 8-101(A) who likewise produced extensive evidence in mitigation and demonstrated that she was no current threat to the public. (*Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d at p. 333.) We conclude that in light of the circumstances presented on this record the referee appropriately exercised his judgment in declining to recommend a three-month suspension here. The question remains as to the propriety of no actual suspension in light of the misconduct of which respondent was found culpable and in light of his prior reproval.

The reason the standards call for the general imposition of a three-month minimum for commingling stems from the inherent danger posed by such violation. As the Supreme Court explained in *Silver* v. *State Bar*, *supra*, 13 Cal.3d at p. 144, in similarly increasing the recommended discipline from public reproval to actual suspension for commingling and other misconduct: "Rule 9 [the predecessor of rule 8-101] . . . was "adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money.'" (*Id.*, quoting *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916-917; *Peck* v. *State Bar* (1932) 217 Cal. 47, 51.) Here, the actual danger proved minimal and occurred under extenuating circumstances. Nonetheless, as in *Silver*, commingling was not respondent's only violation of his professional responsibilities. Most troublesome from the standpoint of protection of the public and the integrity of the bar is respondent's prolonged abnegation of responsibility and inattention to the matters which are the subject of counts five and six which resulted in substantial harm to his clients. The referee's recommendation is lighter than in *Moore* and *Sanchez* which involved similar prolonged inattention to client matters with similarly drastic consequences to the clients' lawsuits.

We appreciate the referee's finding that respondent poses no current threat to the public and that he serves current clients with limited access to other counsel, but "maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession" are of equal concern. (Standard 1.3; see *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111.)

Weighing all of these factors, we modify the recommendation of the referee below to provide for one year suspension, stayed on condition of 45 days

9. The Supreme Court also held that the record supported the board's finding that Vaughn appropriated client funds for his own use, but for purposes of discipline it determined that even if no misappropriation occurred, the recommended discipline was fully justified by the undisputed commingling. (*Vaughn* v. *State Bar*, *supra*, 6 Cal.3d at pp. 858-859.)

actual suspension. We retain the referee's recommendation of five years probation with the stringent conditions set forth in the referee's decision and make one minor modification. [19] The referee included a requirement that respondent take and pass the Professional Responsibility Examination as a condition of probation. (See *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891.) Ordinarily, that requirement is set forth as a separate requirement and not as a condition of probation and we make it so in this case.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

OTIS G. MCCRAY

Petitioner for Reinstatement

[No. 88-R-13801]

Filed March 1, 1991

SUMMARY

Petitioner's third petition for reinstatement was denied by the hearing department of the former, volunteer State Bar Court, based on findings that petitioner omitted many significant items from his petition for reinstatement; gave false testimony regarding his arrangements with his creditors, and held himself out as an attorney at law after his disbarment. (C. Thorne Corse, Hearing Referee.)

Petitioner sought review, contending that the referee improperly excluded evidence of his good character, and that he had met the requirements for reinstatement. The review department held that petitions supporting petitioner's reinstatement were properly excluded as hearsay. While modifying the referee's findings in minor respects, the review department found that the referee had not erred in his overall conclusions and that petitioner had failed to demonstrate clearly and convincingly his present moral fitness and learning and ability in the law. The referee's denial of the petition for reinstatement was affirmed.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle, Teresa J. Schmid

For Petitioner: Otis G. McCray, in pro. per.

HEADNOTES

[1] **146 Evidence—Judicial Notice**
191 Effect/Relationship of Other Proceedings
2509 Reinstatement—Procedural Issues
In proceedings on petition for reinstatement, the review department, with the concurrence of the parties, could take judicial notice of State Bar Court decisions on earlier unsuccessful reinstatement petition.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
The review department's review of hearing decisions is independent; it may make findings of fact or adopt conclusions at variance with those of the hearing department. Nevertheless, the review department accords great weight to the hearing department's findings resolving issues pertaining to testimony. (Trans. Rules Proc. of State Bar, rule 453(a).)

[3] **161 Duty to Present Evidence**
2504 Reinstatement—Burden of Proof
While the law does look with favor upon the regeneration of erring attorneys, the petitioner seeking reinstatement bears the burden to show by clear and convincing evidence that the petitioner meets the requirements, and that burden is a heavy one. The person seeking reinstatement after disbarment should be required to present stronger proof of present honesty and integrity than one seeking admission for the first time whose character has never been called into question. A disbarred attorney may be able to show by sustained exemplary conduct over an extended period of time that the attorney has reattained the standard of fitness to practice law.

[4] **135 Procedure—Rules of Procedure**
194 Statutes Outside State Bar Act
2504 Reinstatement—Burden of Proof
In a reinstatement proceeding, the petitioner bears the burden of establishing rehabilitation, present moral qualifications for readmission and present ability and learning in the general law. (Rule 952(d), Cal. Rules of Court; rule 667, Trans. Rules Proc. of State Bar.)

[5] **141 Evidence—Relevance**
145 Evidence—Authentication
2590 Reinstatement—Miscellaneous
Form petitions signed by lawyers and judicial officers in support of petitioner's reinstatement, which contained sketchy text and were undated, were properly excluded from evidence for lack of adequate foundation, as they fell far short of offering any probative value of the assessment of petitioner's character for meeting the rigorous burden of a reinstatement petition.

[6] **142 Evidence—Hearsay**
2590 Reinstatement—Miscellaneous
Form petitions in support of petitioner's reinstatement, and other letters and testimonials, were excludable from evidence as hearsay, absent stipulation of the State Bar examiner.

[7] **2504 Reinstatement—Burden of Proof**
Reinstatement proceedings are adversarial in nature, with the heavy burden resting on petitioner to prove rehabilitation, present moral fitness to practice and learning and ability in the general law.

[8] **166 Independent Review of Record**
2590 Reinstatement—Miscellaneous
Review department gave deference to hearing referee's findings and conclusions regarding reinstatement petitioner's showing of rehabilitation, since they rested largely on referee's superior position to evaluate testimony of witnesses. However, petitioner's two post-disbarment criminal convictions, and failure to establish that restitution had been made in disciplinary proceeding pending at time of disbarment, raised serious questions regarding rehabilitation.

[9] **139 Procedure—Miscellaneous**
2509 Reinstatement—Procedural Issues
In reinstatement cases, where the record on its face indicates a pending disciplinary matter dismissed without prejudice should the petitioner seek reinstatement, or indicates matters as serious as criminal convictions arising after disbarment or resignation, the parties should make clear on the record their respective positions on these factors, which could raise a serious question as to whether a person petitioning for reinstatement had been rehabilitated or was presently fit to practice law.

[10] **2552 Reinstatement Not Granted—Fitness to Practice**
For an applicant for reinstatement, whose moral character was found wanting in earlier disbarment proceedings, the verified petition for reinstatement serves as the important, formal written presentation by which the petitioner placed himself before the State Bar, the legal profession, the judiciary and the public for decision whether he or she should again be allowed to discharge the high responsibilities required of an attorney at lain in this state. A court evaluating a petition for reinstatement should be able to rely on it as candid and complete in the same manner as a court would rely on an attorney's affidavit or declaration made under penalty of perjury. Where petition contained inaccuracy about marital status and omissions about financial obligations, lawsuits, and legal learning activities, and petitioner's explanations for these defects were not credited by hearing referee, petitioner's failure to bring before the State Bar Court a correct and complete petition for reinstatement fell below the standard of sustained exemplary conduct petitioner must meet for reinstatement.

[11] **230.00 State Bar Act—Section 6125**
2590 Reinstatement—Miscellaneous
Where reinstatement petitioner described himself as an attorney at law in public advertisement, but same document referred clearly to petitioner's disbarment, review department declined to find that petitioner had held himself out to the public as authorized to practice law. However, petitioner's use of term "attorney at law" when not an active member of State Bar was inappropriate, and its use in papers filed with State Bar Court in reinstatement proceeding did not aid petitioner in demonstrating sustained exemplary conduct.

[12] **135 Procedure—Rules of Procedure**
230.00 State Bar Act—Section 6125
2502 Reinstatement—Waiting Period
2590 Reinstatement—Miscellaneous
To be accurate, petitioner should have stated that the minimum waiting period to apply for reinstatement is five years (Trans. Rules Proc. of State Bar, rule 662), rather than stating that he had been disbarred for five years. Nonetheless, petitioner's statement as a whole clearly indicated that petitioner was not then licensed to practice law, so misstatement was not serious.

[13] **148 Evidence—Witnesses**
2552 Reinstatement Not Granted—Fitness to Practice
Where witnesses' abilities to observe petitioner's character in light of any changes since disbarment were limited, or witnesses were not fully aware of nature of offenses leading to disbarment, such character evidence failed to show a clear case for reinstatement, or to overcome effect of State Bar's negative evidence.

[14] **148 Evidence—Witnesses**
2590 Reinstatement—Miscellaneous
Favorable character evidence is neither conclusive or necessarily determinative on reinstatement.

[15] **2553 Reinstatement Not Granted—Learning in Law**
Where reinstatement petitioner did not provide documentary evidence to support his claim that he had written legal memoranda, and also did not provide convincing testimonial evidence, petitioner did not show sufficient proof of learning and ability in the general law.

[16] **2509 Reinstatement—Procedural Issues**
2553 Reinstatement Not Granted—Learning in Law
Where reinstatement petitioner had shown rehabilitation, but had not presented sufficient proof of learning and ability in the general law, then if review department had concluded that petitioner was presently fit to practice, it would have conditioned its recommendation of reinstatement on passage of the bar examination to assure the public of petitioner's legal learning. However, review department's adverse determination on petitioner's fitness to practice made bar exam recommendation unnecessary.

ADDITIONAL ANALYSIS

[None.]

OPINION

STOVITZ, J.:

This is the third petition for reinstatement filed by Otis G. McCray (petitioner) following his disbarment by the Supreme Court in 1981. (*In re Petty and McCray* (1981) 29 Cal.3d 356.) After five days of hearing evidence, a referee of the former, volunteer State Bar Court concluded that although petitioner sustained his burden to show that he was rehabilitated, he failed to prove that he was presently morally fit or that he was learned in the general law. (Cal. Rules of Court, rule 952(d); Trans. Rules Proc. of State Bar, rule 667.) The referee's conclusions rest, in part, on his findings that petitioner omitted many significant items from his petition for reinstatement, that he gave false testimony as to arrangements he had made with creditors for payment of debts, and that he held himself out as an attorney at law after his disbarment.

Petitioner seeks our review and contends that the referee improperly excluded evidence of his good character. He cites to evidence he presented showing that he has met reinstatement requirements and urges us to recommend his reinstatement to the Supreme Court. The State Bar examiner (examiner) argues that the referee did not err, that the referee weighed the evidence correctly and made the appropriate findings and recommendation.

As we shall discuss further, we have reached the independent decision that the referee did not err in his overall conclusions and recommendations and that petitioner has failed to meet the high burden he had in this proceeding to show his entitlement to reinstatement.

I. BACKGROUND

Petitioner was admitted to practice law in California in January 1971. Seven years later, in 1978, he was convicted, on his plea of nolo contendere, of two counts of grand theft (Pen. Code, § 487, subd. 1) and one count of forgery (Pen. Code, § 470). That same year, he was placed on interim suspension by the Supreme Court because of his criminal conviction. In 1981, the Supreme Court disbarred him. (*In re Petty and McCray, supra*, 29 Cal.3d 356.) In that case the Supreme Court found that McCray and his law partner, Petty, individually, knowingly and wilfully employed and paid others to produce personal injury and property damage claims, staged false auto accidents, falsified medical reports and damage reports, presented false claims to insurers and forged names of individuals to releases to get proceeds in order to defraud the insurers. The conduct caused losses of $15,000-$17,000. The Supreme Court deemed McCray's claim of youth and inexperience and his lack of prior discipline to be insufficiently mitigating. (*Id.* at pp. 360-362.)

While the Supreme Court disbarred petitioner in 1981, it dismissed without prejudice to the State Bar should petitioner later seek reinstatement, a separate original disciplinary proceeding based on a stipulated disposition recommending petitioner's three-year stayed suspension, three-year probation and 60-day actual suspension. This recommendation arose from stipulated facts showing petitioner's failure to pay sums totalling about $900 in two matters to medical providers who were holding liens in cases of petitioner's clients. Mitigating circumstances showed poor office management and petitioner's good faith in doing the best he could with no intentional misappropriation of funds. (See attachment to September 30, 1988 petition for reinstatement.)

Because petitioner was suspended interimly on December 6, 1978, which suspension was in effect continuously until he was disbarred, he could petition for reinstatement as early as December 6, 1983. (Rule 662, Rules Proc. of State Bar.)

On December 28, 1983, petitioner applied directly to the Supreme Court for "immediate reinstatement," urging that "many members of his family are in . . . peril" resulting from his not practicing law for the past five years. The Supreme Court denied this petition by minute order.

In 1985, petitioner filed with the State Bar Court his second petition for reinstatement. In May of 1986, the former, volunteer review department denied that petition and in October of 1986, the

Supreme Court denied review. (L.A. No. 31350.)[1] **[1 - see fn. 1]**

On September 30, 1988, petitioner filed the reinstatement petition we now review.

II. THE PRESENT RECORD

A. Omissions From the Petition for Reinstatement.

Petitioner omitted several items from his petition for reinstatement and made one incorrect statement therein. Petitioner stated his marital status as single although almost one year before he filed his 1988 petition he became married. His excuse for this was that he prepared several drafts of the petition earlier than the date he filed them, but he did not explain satisfactorily why he allowed this final version of the petition to be filed showing him single.

In the financial obligations section of his petition, petitioner listed only a debt of $13,000 incurred in May 1988, to a "Brookland Financial." In his testimony, however, he admitted that as of the time of the petition he had four other obligations: Daniel's Jewelers for about $400, the West Publishing Company for about $3,500, the Mitsui Manufacturer's Bank for at least $8,000 and one Kenneth Bell who held an unlawful detainer judgment against him for about $1,300. (R.T. 6/14/89 pp. 7-12, 16-33.) At the hearing below, petitioner testified that he disclosed these obligations previously to the State Bar and he thought that his application for reinstatement was designed to bring forth current information or information later than what he had earlier given the State Bar. (R.T. 6/15/89 pp. 28-29.) As to the foregoing debts, petitioner's 1985 petition identified only the Bell obligation. However, it listed two others not mentioned by him in 1989: an obligation to the State Bar Client Security Fund for $850 incurred in "approximately 1980" and a debt due "H.F.C." of Bell, California in the amount of $2,100 incurred in 1974 and reaffirmed in 1979. Petitioner could point to no language in the current petition that limited his answers to debts occurred since the filing of any previous petition.

In completing the section of the petition asking for information as to every civil case or bankruptcy proceeding to which petitioner had been a party, he left that area blank, although he was or had been involved as a party in at least 11 civil cases. While an addendum to his 1985 petition shows that these cases started prior to his disbarment, it appears some of them were pending after the effective date of his disbarment. Again, he could point to nothing in the text of the current petition which would allow him to limit his answer regarding lawsuits and in his attached 1985 petition, he stated that he could not recall any of the details of four of the suits to which he was a party.

Finally, although the petition form asked him to attach specific information regarding his learning and ability in the law, he furnished no specific information.

B. Petitioner's Testimony Regarding Arrangements to Pay Off Debts.

On December 19, 1988, the State Bar took petitioner's deposition in this reinstatement proceeding. During that deposition, petitioner testified that he had made arrangements to pay the outstanding obligations that he had with Daniel's Jewelers, West Publishing Company, and Mitsui Manufacturer's Bank. (R.T. 6/14/89 pp. 17-18.)[2] At trial, petitioner maintained that it was a true statement at the time of

1. **[1]** Petitioner's 1985 application is before us as an attachment to his 1988 petition. Neither petitioner nor the examiner introduced in evidence the State Bar Court file on the 1985 petition. At oral argument in this proceeding, the parties stated that they had no objection to our taking judicial notice of the hearing and review department decisions on the petition. Despite extended efforts, the State Bar Court clerk's office has been unable to locate the State Bar Court file in the 1985 proceeding and we, like the hearing referee, are thus unable to consider the State Bar Court rulings on the earlier petition.

2. In attempting to impeach petitioner's deposition testimony, the State Bar never quoted verbatim from the deposition, nor did it introduce the specific passage, although the referee at one point suggested that this should be done. Nevertheless, petitioner never disputed that he made that statement and at the trial he reaffirmed the truth of that statement. (R.T. 6/14/89 pp. 18-19.)

his deposition and was true today. However, the State Bar produced witnesses whose testimony, together with the vague statements of petitioner's later testimony, show that petitioner's "arrangements" were not that, but, at most, were his unilateral offers to pay followed by no payment to the bank and only two $50 payments to West Publishing Company ("West").

Robert Leff, attorney for West, testified that he was hired in 1987 to collect the $3,500 owed by petitioner to West. In 1987, Leff had one call from petitioner in which he told Leff he was in dire straits. Leff then had no contact with petitioner between June of 1987 and May of 1988, but had several in just the last month before the State Bar Court reinstatement hearing. In those calls, petitioner offered to pay the full amount, but he had not paid anything directly to Leff. The two $50 payments were paid directly to West in St. Paul, Minnesota. Earlier, Leff had filed suit against petitioner on behalf of West; he was willing to work with petitioner but there had been no arrangement. (R.T. 6/14/89 pp. 43-60.)

Ms. Margaret Langer, a Vice President of Mitsui Manufacturer's Bank ("bank") testified that in 1976 or 1977 the bank obtained a judgment against petitioner for its debt of around $10,000-$11,000. She believed that the current value of that judgment (in 1980) was about $13,000 and it was ultimately charged off to loan losses since petitioner made no payment on it. Langer recalled that petitioner telephoned her in the fall of 1988 to try to "retire" the debt to the bank. She did not have any current records available to her since this obligation was so old. By talking to her legal department she was able to reconstruct enough information about it. She invited petitioner to send to the bank information about his financial condition and what arrangements he wanted to make. She got no further information from petitioner at that time. (R.T. 6/14/89 pp. 71-80.) In his cross-examination of Langer, petitioner was obviously confused about the difference between paying off this obligation, which had been reduced to a judgment, and trying to "renew" or create a new loan arrangement with the bank for future credit. In any event, the evidence is clear that petitioner had not made any sufficient "arrangement" with the bank as he had testified at deposition and adopted at hearing.

As mentioned *ante*, another obligation which petitioner had was to one Kenneth M. Bell, who had rented a residence to petitioner and who had obtained an unlawful detainer judgment against petitioner when he had failed to pay rent for two to three months continuously. (R.T. 6/14/89 pp. 116-118; exh. 1 (judgment for $1,351).) While testifying at his reinstatement hearing about his obligations, petitioner testified that he continually stayed in touch with the jewelry store, West and the bank, but did lose touch with Bell. However, petitioner testified that he always indicated to Bell that he (petitioner) would take care of "the bill" once he was in a financial position to do so. He further testified that Bell's unlawful detainer action against petitioner was "filed at my instruction to Mr. Bell to help protect him." (R.T. 6/14/89 p. 19.)[3] Bell testified that he has lived in the same address in Granada Hills for 19 to 20 years, he lived there while petitioner was a tenant of Bell's, and petitioner visited him there more than once when he was a tenant, either to talk or to pay the rent. (*Id.* at p. 122.) Bell testified that petitioner never denied that he owed the rent obligation, but that he never recalled discussing any arrangements to pay the debt and petitioner never talked about how Bell might be protected as far as back rent was concerned. (*Id.* at p. 129.) When petitioner asked Bell how the State Bar located him for these proceedings, Bell replied simply that it sent him a letter. (*Id.* at p. 132.) Petitioner sought to explain his statement that he couldn't locate Bell by stating that his records of Bell's address had been lost. (*Id.* at pp. 29-30.)

C. The Evidence Introduced to Show Petitioner's Holding Himself Out as an Attorney At Law.

The State Bar presented evidence to show that petitioner held himself out as an attorney at law after

3. Although petitioner's December 1988 deposition was not specifically read into the record nor introduced into evidence, it does appear that petitioner testified at his deposition that he would have paid Bell's judgment but he could not locate Bell. (R.T. 6/14/89 p. 122.)

he was disbarred. Petitioner placed an ad, which ran about December 8, 1988, in the *Los Angeles Sentinel*, a weekly newspaper of general circulation oriented primarily toward the black community. (Exh. B.) This announcement was entitled "A PUBLIC APOLOGY". In that announcement, petitioner incorrectly stated that the Supreme Court of California had disbarred him "for a period of five years"; that "the five years are up" and he had filed for reinstatement. He expressed regret to his family, friends, clients and the legal profession for his involvement in the insurance fraud which led to his disbarment. He promised that after reinstatement he would again provide quality legal services to the poor. He stated that his deposition was being taken at the State Bar in Los Angeles on December 19, 1988, and invited persons interested in "financial involvements" (which he did not define) to write to him at "Otis G. McCray, Attorney at Law [address and telephone number given]." In addition, petitioner placed the title "Attorney at Law" immediately below his name on three of the legal documents he filed in this reinstatement proceeding: a Notice of Pre-Hearing Conference filed April 17, 1989; a Notice of Motion and Motion to Transfer Hearing to the City of Compton filed May 3, 1989; and a Stipulation Re: Petitioner's Testimony filed June 14, 1989.

Petitioner explained his use of the term attorney at law by stating that he did not mean to mislead anyone and particularly he could not mislead the State Bar since everyone at the State Bar knew of his true status.[4]

D. Other Evidence Bearing on Rehabilitation, Character and Fitness to Practice.

Petitioner did appear to show regret and remorse over the criminal convictions leading to disbarment. (See R.T. 6/15/89 p. 45; R.T. 6/20/89 p. 117.) He made full restitution for the losses he caused. However, one of his two main character witnesses, his own brother-in-law, testified that respondent told him that he was not involved in any of the wrongdoing which led to his disbarment. (R.T. 6/13/89 p. 76.) Moreover, the record of this matter includes not only the Supreme Court opinion and underlying record concerning petitioner's disbarment, it includes another disciplinary proceeding which had gone completely through the State Bar Court with the recommendation of a three-year stayed suspension, 60-day actual suspension and until petitioner made specified restitution to the two doctors involved or the client security fund. The only mention of this by the referee was that he could not ascertain the precise legal basis of the culpability found by the State Bar. While the referee did make a good point, there can be little doubt that the State Bar Court had earlier found petitioner culpable of failing to handle properly and account for funds owed two doctors, and ultimately failing to pay them over. When the Supreme Court dismissed that proceeding before entering an order of discipline on the matter because petitioner had just been disbarred in the grand theft and forgery matter, it specifically reserved the State Bar's right to inquire into that matter should petitioner seek reinstatement. We find no examination of petitioner on that prior proceeding and we see no evidence of restitution to the two doctors involved in that matter or the client security fund.

In his 1988 reinstatement petition, petitioner did disclose two criminal convictions in 1983 and 1987, respectively. Petitioner's earlier conviction was for a 1983 arrest on a charge of violation of Labor Code section 212 (paying wages due by form of payment which is not negotiable). Petitioner gave no details of this conviction other than that the criminal court was in Van Nuys, California, and disposition was a $50 fine. The second conviction he revealed was for Vehicle Code section 23152 and Penal Code section 12025 (driving while under the influence of alcohol or drugs and unlawful carrying of a concealed firearm without a license). Petitioner gave a few more details about this arrest: It occurred on January 26, 1987; he gave the case number and it resulted in a plea of guilty to "reckless" with a $350 fine. We see nothing else in the record concerning these offenses,

4. The pleadings petitioner filed in this proceeding after this evidence was called to his attention, described his title as either "Petitioner In Pro Per", without reference to the phrase "attorney at law"; or after the phrase "Attorney at Law" he placed within parentheses the word "Disbarred".

except for a brief statement in the 1985 petition as to the Labor Code conviction.[5]

Petitioner's main attempt to show his present moral fitness rested on his unsuccessful attempt to have introduced into evidence petitions which he caused to circulate around the criminal courts in Compton and which were signed by about 60 members of the bench and bar. The hearing referee declined to admit the petitions over objection from the State Bar that they lacked an adequate foundation for admission because they bore no dates when the individuals signed them and showed no recognition of any detail of the signatories' understanding of petitioner's moral character or rehabilitation. (R.T. 6/13/89 pp. 28-32, 35-36.)

When a few of the public defender attorneys who signed the petition were called to testify (mainly on petitioner's learning of the law) it was clear that most did not understand the reason petitioner was disbarred (most understood it had something to do with commingling—not insurance fraud, as petitioner's own public apology admitted) or had no knowledge of petitioner's omissions or false statements in this reinstatement proceeding. One witness, Deputy Public Defender Kenneth Green, testified that before the trial he asked the examiner if he had a choice as to being called as a witness or removing his name from the petition, and that he would prefer to remove his name from the petition. He felt he would need to know more about why petitioner was disbarred, but like all other witnesses, he did say that he would like to see petitioner reinstated. (R.T. 6/14/89 pp. 83-90.)

Petitioner's main witnesses as to his rehabilitation and moral character were his brother-in-law and a legal secretary who had worked for petitioner between 1975 and 1978. This secretary testified that petitioner's morals were good in that he always respected clients and that he was a decent and honest person. (R.T. 6/13/89 pp. 55-68.) She saw petitioner several times a year socially since 1978 but her views relating to petitioner in a professional setting were limited to the period of her employment by petitioner, over 10 years ago. (*Id.* at pp. 58, 65.)

One impressive witness for petitioner was attorney Jess Willitte, president of the South-Central Los Angeles Bar Association. Willitte had known petitioner for about five years, was familiar with his current employment, had the chance to observe his conduct and testified that his character has been impeccable. (R.T. 6/15/89 pp. 66-80.)

E. Evidence Bearing on Petitioner's Learning in the Law.

This showing rested mainly on petitioner's own testimony which was generalized as to his activities in keeping up with the law. He testified that he attended seminars and bar associations, read the *Daily Journal* advance sheet cases in which he had an interest, discussed legal issues with attorneys and others on a regular basis in the Los Angeles County Public Defender's office where he worked as a law clerk, wrote briefs and memoranda and interviewed clients. However, he produced no briefs and memoranda he had drafted, claiming a privilege that the briefs or memoranda were not filed in any public action. (R.T. 6/15/89 pp. 70-71; 6/20/89 pp. 88-97.) Several of those who worked with petitioner in the public defender's office testified as to his discussion of legal issues and topics with them, and expressed in generally conclusory terms that petitioner either knew the law or was highly competent in it; but it was clear that this impression was limited to criminal law and little detail was provided about specific issues. (R.T. 6/20/89 pp. 22-52.)

F. The Referee's Findings and Conclusions.

After making findings concerning petitioner's disbarment, the referee found that petitioner had made full restitution of the losses caused to victims

5. In his 1985 petition (at p. 3), petitioner stated that this conviction resulted from a bank's failure to honor paychecks issued by him as secretary-treasurer of a business he was selling. According to petitioner, the business bank account was closed, all funds were transferred before the checks could clear, the new owners were to make the checks good but did not and petitioner pled nolo contendere to the statute imparting criminal liability to anyone issuing such a check for wages.

in the matter which led to his disbarment, that there was no evidence of any misconduct in connection with petitioner's employment from 1978 until 1985, that after 1985 petitioner started work for the public defender's office as a law clerk and that the evidence showed that he was doing a very good job. From these findings, the referee concluded that petitioner showed that since the events for which he was disbarred, he had been adequately rehabilitated. (Decision ¶¶ 1-9, conclusion 1.)

The referee also concluded that petitioner failed to sustain his burden to show that he was morally fit to practice law. (Decision, conclusion 2.) He based his conclusion on findings that petitioner omitted material facts from his petition, including information regarding past petitions, the number of past disciplinary proceedings, his financial obligations, litigation to which he was a party and specific information concerning activities undertaken in respect to legal learning. He also found that petitioner described himself in his reinstatement application as single, although at the time of filing it he was married.

Also contributing to the referee's adverse conclusion on petitioner's moral fitness were his findings that, in documents filed in this proceeding, petitioner described himself as an attorney at law and also so described himself in a published apology in which he also misrepresented to the public the effect of his disbarment. The referee also found that petitioner gave "inaccurate testimony" as to financial arrangements he had made with creditors. (Decision, ¶ 16-19, conclusion of law 2.)

Finally, the referee concluded that petitioner failed to show required learning and ability in the general law. This conclusion rested on findings by the referee as to petitioner's limited reading of legal developments, lack of specific proof to support his testimony as to other activities he engaged in which were law related and the testimony of witnesses that their awareness of petitioner's knowledge of the law was limited to criminal law and certain related matters. (Decision ¶¶ 22-23.) The referee also found that petitioner showed an almost complete lack of familiarity with the rules of evidence and methods of proper case presentation. He gave examples of this in his decision. (Decision ¶ 24.) The referee recommended that petitioner's application for reinstatement be denied.

Four days after the date by which petitioner was afforded the opportunity to file a closing brief, the referee received such a brief from petitioner. Although untimely, the referee considered the brief but found no reason to modify his decision. Treating petitioner's brief as a motion for reconsideration, the referee denied the motion.

III. DISCUSSION

[2] Our review of the hearing referee's decision and recommendation is independent. We may make findings of fact or adopt conclusions at variance with those of the referee. (Trans. Rules Proc. of State Bar, rule 453(a); *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.) Nevertheless, we give great weight to the referee's findings resolving issues pertaining to testimony. (*Feinstein* v. *State Bar* (1952) 39 Cal.2d 541, 547; Trans. Rules Proc. of State Bar, rule 453(a).)

[3] While the law does look with favor upon the regeneration of erring attorneys (*Resner* v. *State Bar* (1967) 67 Cal.2d 799, 811), as we stated in *In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, review den. Aug. 15, 1990 (S015226), the petitioner seeking reinstatement bears the burden to show by clear and convincing evidence that he meets the requirements and that burden is a heavy one. In *Giddens*, we quoted the Supreme Court's opinion in *Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 403 that the person seeking reinstatement after disbarment should be required to present stronger proof of present honesty and integrity than one seeking admission for the first time whose character has never been called into question. Petitioner was disbarred for grand theft and forgery and in disbarring petitioner, the Supreme Court stated that he may be able to show "by sustained exemplary conduct over an extended period of time" that he has reattained the standard of fitness to practice law. (*In re Petty and McCray, supra*, 29 Cal.3d at p. 362.) [4] Petitioner bears the burden of establishing these issues: rehabilitation, present moral qualifications for readmission and present ability and learning in the general law. (Rule 952(d), Cal. Rules of Court; rule 667, Trans. Rules Proc. of State Bar.)

[5] At the outset, we discuss petitioner's contentions that the hearing referee improperly excluded evidence. We find petitioner's contentions to be without merit. With respect to the circulated petitions containing signatures of lawyers and judicial officers in support of petitioner's reinstatement, the hearing referee correctly ruled that petitioner presented an inadequate foundation for their admission. These petitions were undated and, from the sketchiest nature of the text preceding the signatures, would fall far short of offering any probative value of the assessment of petitioner's character for meeting the rigorous burden of a reinstatement petition. [6] Even if petitioner had been able to overcome the hurdle of the lack of a sufficient foundation, these form-petition testimonials would have been excludable as hearsay, absent stipulation of the State Bar examiner. (Evid. Code, § 1200; *In re Ford* (1988) 44 Cal.3d 810, 818.) The same can be said of other letters and testimonials which the referee declined to admit into evidence. We agree with the observation of the examiner in his brief to us that in each case where the referee excluded evidence, the referee's careful consideration of the proffered evidence was apparent on the record. Petitioner was allowed wide latitude to argue his position to the referee, the referee gave petitioner the specific reason for his rulings on the evidence proffered and the hearings were even reopened at petitioner's request to allow him a further opportunity to present favorable evidence. Petitioner was afforded an eminently fair hearing presided over by a fair and impartial referee. [7] Petitioner's complaint that the State Bar had "erroneously construed reinstatement proceedings as being adversarial in nature" shows that petitioner has failed to understand that the governing rules and decisional law do, indeed, make these proceedings adversarial in nature, with the heavy burden resting on petitioner to prove rehabilitation, present moral fitness to practice and learning and ability in the general law. (See *ante*.) Finally, petitioner's claim that his July 1989 brief was not considered by the referee is completely refuted by the referee's supplemental decision filed July 27, 1989.

[8] Giving deference to the referee's findings and conclusion of petitioner's showing of rehabilitation, since they rest largely on the referee's superior position to evaluate the testimony of witnesses (decision ¶¶ 1-9; conclusion I.A.), we adopt those findings and conclusion but not without some doubts. In that regard, we note that after his disbarment, petitioner suffered two different criminal convictions, one involving a violation of the Labor Code and another involving the unlawful carrying of a concealed firearm without a license. We also note that the record raises questions as to whether petitioner has made amends for losses which occurred in an original disciplinary proceeding pending at the time of his disbarment which was dismissed by the Supreme Court without prejudice to this reinstatement application. Finally, we note that testimony on petitioner's behalf was not always favorable to him concerning his involvement in the activities which led to his disbarment. Although we do have some serious questions concerning petitioner's evidence in rehabilitation, we do not find sufficient evidence to set aside the referee's findings and conclusion favorable to petitioner on this subject.[6] **[9 - see fn. 6]**

Concerning the referee's findings on petitioner's fitness to practice, we adopt the referee's conclusion and most of his supporting findings. We shall analyze those findings individually and adopt the appropriate findings.

The hearing referee found (decision ¶ 13) that the petition for reinstatement was defective in many respects because petitioner omitted the date of his interim suspension, failed to attach his 1985 petition, omitted information as to the numbers of the disciplinary proceedings leading to his disbarment, incorrectly stated that he was single although he was married at the time of filing his petition, omitted most

6. [9] In future reinstatement cases where the record on its face indicates a pending disciplinary matter dismissed without prejudice should the petitioner seek reinstatement or indicates matters as serious as criminal convictions arising after disbarment or resignation of the type on which the Supreme Court would authorize the State Bar Court to hold hearings, we would hope that the parties would make clear on the record their respective positions on these factors, which could raise a serious question as to whether a person petitioning for reinstatement has been rehabilitated or is presently fit to practice law.

of his financial obligations, omitted any litigation in which he had been involved and failed to detail his learning and ability in the law. Our review of the record has led us to conclude that it does not support several of the referee's determinations. We cannot agree with the referee that petitioner failed to attach all previous petitions that he filed. Our review of the record shows that petitioner attached to his 1988 petition both his 1983 and 1985 petitions and several supplements he filed to his 1985 petition. It is possible that the referee may have been confused in this regard since the 1985 petition and supplements do not bear the State Bar Court's case number for that earlier proceeding, 85-R-4 LA. However, from the State Bar Court file stamps on those 1985 documents, we are satisfied that petitioner did comply with the requirement in his 1988 petition to cite to any previous reinstatement petition filed. Moreover, we find that the 1985 petition includes sufficient information concerning petitioner's interim suspension and the number of disciplinary proceedings which led to his disbarment. (See also *Calaway* v. *State Bar* (1986) 41 Cal.3d 743, 748.) Thus, we delete subparagraphs (a), (b) and (c) from the referee's paragraph 13 as not supported by the record.

We do find, however, that in the four remaining areas identified by the referee, petitioner's incorrectly stated marital status, his lack of complete disclosure of his financial obligations and pending litigation and his lack of required information as to activities taken in support of learning and ability in the general law, that petitioner's 1988 application for reinstatement was materially incomplete; and, as to his marital status, incorrect. Without dispute, petitioner omitted from his reinstatement petition most of his financial obligations which were sizable. Although he did refer to other obligations in his 1985 attached petition, he did not update those in his 1988 petition; and, in any event, all of the disclosures did not form a complete list of his obligations. The same can be said about lawsuits to which he was a party. He disclosed none on his 1988 petition; and, although he disclosed a number on an addendum to his 1985 petition, he furnished only the court case number, date of filing and title for many of them, claiming that he did not remember the incidents which gave rise to the lawsuits.

[10] As we said in our earlier reinstatement opinion of *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 34: "The petition for reinstatement is not merely a paperwork exercise to hurdle on the way to readmission. For an applicant such as this petitioner, whose moral character was found wanting earlier in disbarment proceedings, the *verified* petition for reinstatement serves as the important, formal written presentation by which the petitioner now places himself before the State Bar, the legal profession, the judiciary and the public for decision whether he or she should again be allowed to discharge the high responsibilities required of an attorney at law in this state. A court evaluating a petition for reinstatement should be able to rely on it as candid and complete in the same manner as a court would rely on an attorney's affidavit or declaration made under penalty of perjury." We need not decide whether petitioner's inaccuracy about his marital status or omissions about his financial obligations, lawsuits or legal learning activities were intentional or careless. The hearing referee who observed all of the witnesses, including petitioner, did not credit him for the various theories he gave for why his marital status was inaccurately stated or why his other information was omitted. We see no reason to disturb that resolution of evidence. We conclude that petitioner's failure to bring before the State Bar Court a correct and complete petition for reinstatement in the four areas we have noted falls below the standard of sustained exemplary conduct petitioner must meet for reinstatement. (See *In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 37-38.)

With respect to the referee's findings that petitioner described himself as an attorney at law in documents filed in these proceedings and in an apology published in a community newspaper, thereby suggesting in that apology that he was eligible to practice law (decision ¶¶16-17), we would modify the findings in two respects: in finding 16, we would find that petitioner referred to himself as an attorney at law in three, rather than "numerous" documents filed in this proceeding. **[11]** In finding 17, as to petitioner's public apology, we do not find that he suggested that he was entitled to practice law by his placement of the term "attorney at law" near his address, for in the same document, he referred

clearly to his disbarment. Given these facts, we decline to adopt that portion of the referee's conclusion 2 on page 11 of his decision that petitioner held himself out to the public as authorized to practice law. On the other hand, petitioner's use of the term "attorney at law" when not an active member of the State Bar in good standing was inappropriate (see Bus. & Prof. Code, §§ 6002, 6064) and its use in papers petitioner filed with the State Bar Court manifestly did not aid him in demonstrating to the court sustained exemplary conduct required to sustain his burden.

[12] Similarly, we do not assign the degree of seriousness shown by the referee to petitioner's reference in his public apology to his disbarment as being for a period of five years. (Decision, conclusion 2, page 11.) To be accurate, petitioner should have stated that the period of five years was the minimum waiting period to apply for reinstatement. (See Rules Proc. of State Bar, rule 662.) Nonetheless, the apology taken as a whole clearly indicated that he was not then licensed to practice law.

We adopt paragraphs 18 and 19 of the referee's decision and the referee's conclusions that those findings showed petitioner's inaccurate testimony as to arrangements he had made with creditors, including Bell. Here, the referee was in a particularly good position to judge conflicting testimony. The State Bar presented testimony of petitioner's creditors and our independent review of the record supports fully the referee's findings and conclusions that petitioner had not given accurate testimony as to arrangements he had made with creditors; nor did he offer any reasonable explanation why he was unable to discharge his longstanding debt to Bell.

[13] Finally, we adopt paragraphs 20-22 of the referee's decision relative to the shortcomings of petitioner's character witnesses. Of those findings, we conclude further that petitioner's character evidence failed either to show a clear case for reinstatement or to overcome the effect of the negative evidence presented by the State Bar. The witnesses' knowledge of petitioner's character for the most part demonstrated either that their abilities to observe him in light of any changes since his disbarment were limited or that they were not fully aware of the nature of the offenses leading to his disbarment. Most testified that they might reconsider their favorable opinions or at least would want to know more when presented with the negative evidence introduced by the State Bar concerning the incompleteness of the petition for reinstatement or misrepresentations made by petitioner about financial obligation arrangements. **[14]** The Supreme Court has held that favorable character evidence is neither conclusive nor necessarily determinative on reinstatement. (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1095; *Tardiff* v. *State Bar*, *supra*, 27 Cal.3d at p. 404.) While we have considered fully petitioner's character evidence, as did the hearing referee, we cannot consider it sufficient on this record to find petitioner fit to practice.

[15] We construe the referee's findings and conclusion that petitioner did not show sufficient proof of learning and ability in the general law to rest not only on the lack of convincing testimonial evidence, but also on the lack of documentary evidence to support his claim that he had written legal memoranda or had engaged in other activities to maintain knowledge of the law. We also find that conclusion grounded on the referee's finding that petitioner failed to demonstrate any but the most rudimentary knowledge of case presentation. Accordingly, we adopt paragraphs 22-24 of the referee's decision and conclusion 3 as our findings and conclusion that petitioner failed to demonstrate adequate evidence of present learning and ability in the general law. **[16]** If we had concluded that petitioner was presently fit to practice, we likely would have exercised the authority of rule 952(d), California Rules of Court, by conditioning the recommendation of his reinstatement on him passing the California State Bar Examination, thus assuring the public that he is sufficiently learned in the law. However, we need not make that examination recommendation in this case because of our decision adverse to petitioner on the question of fitness to practice.[7]

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7. Also a requirement for reinstatement is passage of the Professional Responsibility Examination. (Rule 952(d), Cal. Rules of Court.) The record is silent as to whether petitioner took or passed that examination, but we need not determine that fact in view of our decision.

IV. CONCLUSION AND DISPOSITION

It was petitioner's burden to present competent evidence showing clearly and convincingly his rehabilitation, present moral fitness and learning and ability in the law. As we have discussed, his showing of rehabilitation was barely sufficient, and his evidence concerning his fitness to practice and learning and ability in the law were each inadequate to sustain his burden. We adopt the findings and conclusions of the hearing referee as we have modified them as set forth above. We also adopt the referee's conclusions. Petitioner's application for reinstatement is denied.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ALBERT S. LAZARUS

A Member of the State Bar

[No. 86-O-14113]

Filed March 11, 1991

SUMMARY

Respondent was charged with numerous statutory and rule violations based on his handling of a single check issued in partial settlement of a personal injury case. He properly deposited the check into his trust account, but failed to notify his client of its receipt. A year later, after withdrawing from the case, he unilaterally determined to apply the funds to attorney's fees and costs which were the subject of a lien agreement with the client. The hearing referee found respondent culpable only of failing to notify his client promptly of the receipt of the funds, and recommended a public reproval. (Diane L. Karpman, Hearing Referee.)

The State Bar requested review, arguing for at least three months actual suspension primarily on the basis that the record supported additional culpability findings. The review department found no act of moral turpitude, but modified the referee's findings to include culpability for failure to render an appropriate accounting to the client. It increased the recommended discipline to two months suspension, stayed, and one year of probation with periodic auditing of respondent's client trust account.

COUNSEL FOR PARTIES

For Office of Trials: Loren J. McQueen

For Respondent: David A. Clare

HEADNOTES

[1] **166 Independent Review of Record**
In analyzing disputed facts in a matter on review, the review department defers to the hearing department's explicit credibility findings premised on personal observation of the demeanor of the witnesses.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2 a-c] **280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]**
Where attorney's reluctance to inform client of arrival of partial settlement check was prompted by concern that client would demand payment rather than allowing funds to be held to satisfy medical and attorney's fee liens, this explanation did not excuse attorney's delay in informing client of receipt of funds and was not a defense to culpability for violating rule requiring prompt notice to clients of receipt of client funds.

[3] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record
Even though party requesting review did not challenge certain of hearing department's conclusions as to culpability, review department reviewed these determinations as part of its independent de novo review of the record. (Rule 453(a), Trans. Rules Proc. of State Bar.)

[4] **213.10 State Bar Act—Section 6068(a)**
It would not have been proper to find an attorney culpable of violating his duty to uphold the law, where there was no such violation separate and distinct from other charged statutory violations or violations of the Rules of Professional Conduct.

[5] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
An attorney's accounting regarding the funds belonging to his client that he had received, which was transmitted solely to the client's new counsel, did not satisfy the attorney's duty to render appropriate accounts to his client, since the attorney was not directed by the client to render the account to her new counsel and since the obligation ran directly to the client. Nevertheless, the possibility that the attorney was relying on the new counsel to transmit the accounting to the client precluded clear and convincing proof of a violation.

[6] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
An attorney's belated accounting of client funds was deficient in that it did not explain why it had not been made at the time the attorney originally forwarded the client's file to the client's new attorney.

[7] **280.00 Rule 4-100(A) [former 8-101(A)]**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.00 Misappropriation
Any objection that a client raised to attorney's fees and costs, upon client's receipt of accounting of settlement funds, would have to be resolved prior to attorney's withdrawal of funds from trust account to pay fees and reimburse advanced costs.

[8] **220.30 State Bar Act—Section 6104**
An attorney who receives a medical payment draft made payable to the client, simulates the client's signature on the draft, and deposits it in the attorney's trust account does not thereby corruptly or wilfully and without authority appear as attorney for a party to an action or proceeding. Merely signing the back of a check does not constitute an appearance.

[9] **130 Procedure—Procedure on Review**
165 Adequacy of Hearing Decision
Given the deference to be accorded to the referee's findings on issues of fact and credibility, the party requesting review does not advance his or her cause very effectively by ignoring those

findings, especially when no contention is advanced that the findings are not supported by the evidence.

[10] **199 General Issues—Miscellaneous**
204.90 Culpability—General Substantive Issues
273.00 Rule 3-300 [former 5-101]
Absent unconscionable circumstances in its creation, an agreement granting an attorney express authority to sign a client's name on documents is clearly not contrary to public policy. Indeed, it is essential that express authority be obtained by an attorney seeking the power to sign the client's name to documents on the client's behalf.

[11 a, b] **273.00 Rule 3-300 [former 5-101]**
The inclusion in a fee agreement of a special power of attorney, authorizing the attorney to sign the client's name on settlement drafts and other documents, does not create a conflict of interest in and of itself such that it requires compliance with the ethical rules governing attorneys' business transactions with clients. The attorney does not acquire any adverse interest by virtue of the special power of attorney, and the rules governing attorney-client business transactions have never been interpreted to apply in such circumstances.

[12] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
273.00 Rule 3-300 [former 5-101]
Where an attorney was not charged in the notice to show cause with violating the ethical rules governing attorneys' business transactions with clients, then even if compliance with those rules were required under the facts, the attorney could not be found culpable of violating those rules. It is a fundamental constitutional and statutory requirement that an attorney must be given notice of all charges and a reasonable opportunity to prepare his defense thereto.

[13 a, b] **194 Statutes Outside State Bar Act**
490.00 Miscellaneous Misconduct
Sections 2450, et seq., of the Civil Code did not mandate a different format for special powers of attorney than the one which the respondent used, where those statutes were not enacted until two years after the power of attorney was executed by the client and one year after it was acted upon by the respondent, and where section 2456 of the Civil Code, enacted simultaneously with section 2450, expressly provides that any form that complies with the requirements of any other law may be used in lieu of the form set forth in section 2450.

[14] **193 Constitutional Issues**
Statutes affecting a substantive right are generally construed prospectively to avoid a declaration of unconstitutionality.

[15 a, b] **221.00 State Bar Act—Section 6106**
490.00 Miscellaneous Misconduct
An attorney's simulation of a client's endorsement on a check, pursuant to an express power of attorney, without expressly indicating the representational capacity of the signature, does not constitute an attempt to deceive the bank and is not an act of moral turpitude. An attorney may not endorse a client's name to a check without express authority to do so, but the representative capacity of the signature need not be indicated on the check.

[16 a, b] **194 Statutes Outside State Bar Act**
Under Commercial Code section 3403, a properly authorized agent may simply sign the principal's name on a check endorsement rather than indicating that the agent is signing as agent. Absent evidence to the contrary, the expectations of the bank must be presumed to be in accord with this statute.

[17] **221.00 State Bar Act—Section 6106**
280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]
Moral turpitude is not demonstrated simply by an attorney's failure to notify a client that a medical payment draft has arrived and that the attorney has endorsed it for the client. Although this conduct clearly violates the rule requiring attorneys to notify clients promptly upon receipt of client funds, it does not amount to dishonesty or other misconduct in any way characterizable as moral turpitude.

[18] **106.20 Procedure—Pleadings—Notice of Charges**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
Where a notice to show cause alleged that the respondent attorney had misappropriated funds to his own use and purposes, and charged the attorney with acts of moral turpitude in violation of section 6106, but did not charge the attorney with a breach of the ethical rule concerning the proper handling of client trust funds, and the notice to show cause did not clearly put the attorney on notice of a charge that he had violated the trust funds rule, the attorney therefore could not be found culpable of violating that rule in light of the mandate that the attorney be given adequate notice of all charges and a reasonable opportunity to respond thereto.

[19 a-c] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
561 Aggravation—Uncharged Violations—Found
Attorney could not be found culpable of misconduct where not given adequate notice of charges, but this did not preclude consideration of such misconduct for other purposes, including aggravation. Evidence of uncharged misconduct may not be used as an independent ground of discipline, but may be considered for other relevant purposes. Right to notice of charges is not violated by use of uncharged misconduct in aggravation where evidence of such misconduct was necessarily elicited in cause of proving other charges; evidence was used in aggravation only; and facts were based on respondent's own testimony.

[20] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Where a client was never entitled to receive certain funds which were the subject of two liens, and where, by the time demand for the funds was made, the client's attorney had clearly become entitled to receive the funds to satisfy his lien, there was no basis for finding a violation of the ethical rule requiring that funds to which a client is entitled must be paid to the client promptly as requested by the client.

[21] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
545 Aggravation—Bad Faith, Dishonesty—Declined to Find
555 Aggravation—Overreaching—Declined to Find
561 Aggravation—Uncharged Violations—Found
575.90 Aggravation—Refusal/Inability to Account—Declined to Find
Under the Standards for Attorney Sanctions for Professional Misconduct, greater discipline may be imposed for a violation of an attorney's duty to render appropriate accounts than might otherwise

be appropriate if the attorney's misconduct was surrounded by bad faith, dishonesty, concealment, or overreaching, as well as for other violations of the State Bar Act or Rules of Professional Conduct or refusal or inability to account for improper conduct toward trust funds.

[22 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**
Under California law, absent an enforceable contractual lien, an attorney commits a trust account violation by unilaterally determining his or her fee and withdrawing trust funds to satisfy the fee, even though the attorney may be entitled to a fee in the withdrawn amount. Fact that small claims court eventually found in favor of attorney on fee dispute was not a defense to such violation; client should not have had to sue attorney after fees were taken.

[23 a, b] **277.40 Rule 3-700(C) [former 2-111(C)]**
280.00 Rule 4-100(A) [former 8-101(A)]
Where an attorney in a contingent fee case has a contractual lien for the attorney's fees, but withdraws before completion of the case, this renders uncertain both the amount, if any, which the attorney is entitled to be paid, and the attorney's entitlement to enforce the lien; they depend on whether the attorney had justifiable cause for withdrawing. Thus, in the event of such a withdrawal, the attorney's right to enforce the lien and the extent of the attorney's recovery cannot be determined unilaterally by the attorney. If the attorney and client cannot reach a new agreement, then the attorney's sole recourse is to an independent tribunal with the funds remaining in trust in the interim.

[24] **221.00 State Bar Act—Section 6106**
545 Aggravation—Bad Faith, Dishonesty—Declined to Find
An attorney's trust account violation, which consisted of unilaterally determining his fee and withdrawing trust funds to satisfy the fee, did not amount to an act of moral turpitude, because there was no evidence the attorney acted dishonestly in his payment to himself of a reduced fee taken in the good faith belief of a claim of right.

[25] **277.40 Rule 3-700(C) [former 2-111(C)]**
Where an attorney began to doubt his client's credibility and therefore believed he could not give the client effective representation, the attorney's difficulty in working with the client justified his consensual withdrawal.

[26] **801.30 Standards—Effect as Guidelines**
The Standards for Attorney Sanctions for Professional Misconduct are not to be applied in talismanic fashion and do not mandate a particular result.

[27] **801.49 Standards—Deviation From—Generally**
824.59 Standards—Commingling/Trust Account—Declined to Apply
1091 Substantive Issues re Discipline—Proportionality
Violations of the ethical rule governing placement of client funds in a trust account have not always resulted in actual or even stayed suspensions.

[28] **174 Discipline—Office Management/Trust Account Auditing**
824.54 Standards—Commingling/Trust Account—Declined to Apply
1093 Substantive Issues re Discipline—Inadequacy
An attorney's lengthy delay in notifying his client of receipt of a check in partial settlement of her case, and his failure to render a timely and appropriate accounting upon his withdrawal, which was aggravated by unilateral payment to himself of his fees, merited more than a public reproval. The

attorney's handling of trust account records was required to be reviewed by an accountant for some period of time to ensure protection of other clients. However, in view of mitigating circumstances, subsequent corrective measures, and lack of harm to the client or her doctor, no actual suspension was necessary to protect the public. The Review Department recommended two months' stayed suspension, with one year's probation, periodic auditing of the attorney's trust account, and a professional responsibility examination.

ADDITIONAL ANALYSIS

Culpability

Found

280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2
220.35 Section 6104
221.50 Section 6106
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.55 Misappropriation—Valid Claim to Funds

Aggravation

Declined to Find

582.50 Harm to Client

Mitigation

Found

710.10 No Prior Record
715.10 Good Faith
720.10 Lack of Harm
730.10 Candor—Victim
735.10 Candor—Bar
750.10 Rehabilitation
791 Other

Discipline

1013.02 Stayed Suspension—2 Months
1017.06 Probation—1 Year

Probation Conditions

1022.50 Probation Monitor Not Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing

OPINION

PEARLMAN, P.J.:

Respondent was admitted to practice in 1979 and has no prior record of discipline. The one-count notice to show cause charged respondent with numerous statutory and rule violations based on his conduct in connection with the handling of a single check issued in 1983 for $839.39 in partial settlement of a personal injury case. He properly deposited the check into his trust account, but failed to notify his client of its receipt. A year later, after withdrawal from the case, he unilaterally determined to apply the funds to attorney's fees and costs which were the subject of a lien agreement with the client.

The referee found respondent culpable only of violating the notice provision of former rule 8-101(B)(1)[1] and recommended a public reproval. The examiner argues for a period of at least three months actual suspension primarily on the basis that the record supports a finding, not made by the referee, that the respondent committed an act involving moral turpitude. We find no act of moral turpitude. However, we do modify the findings to include a violation of former rule 8-101(B)(3) as charged; and to increase the discipline by recommending two months suspension, stayed, on condition of one year of probation, including periodic auditing of his client trust account, coupled with a requirement that respondent take and pass, within one year of the effective date of the Supreme Court's order in this matter, the California Professional Responsibility Examination.

STATEMENT OF FACTS

With very few exceptions, the facts in this matter are not in dispute. The few disputed points of fact were addressed specifically in the referee's decision ("decision"). [1] She resolved them on the basis of explicit credibility determinations, which were premised on her personal observation of the demeanor of the witnesses. (See, e.g., decision, ¶¶ 4-7, 15, 40-41.) Accordingly, in analyzing the disputed facts in this matter, we defer to the referee's findings. (See, e.g., *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055; *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 968 fn. 2; *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 121.)

Respondent was admitted to the State Bar in June 1979. (Decision, ¶ 1; I R.T. pp. 77-78; exh. 4.) The complaining witness, Filomena Vinzon, hired respondent to represent her in connection with a traffic accident that took place in May 1982. (Decision, ¶ 2; I R.T. pp. 17, 79.) She signed a one-page retainer agreement prepared by respondent's office and presented to her in her home by a representative of respondent. (I R.T. pp. 18-19, 96-97; exh. 1.) The retainer agreement contained a special power of attorney authorizing respondent to sign Vinzon's name on drafts and other documents. Vinzon, who is a schoolteacher and graduated from college in the Philippines, testified that she had read the retainer agreement before signing it, though at the time of the hearing she could not recall all of the contents. (I R.T. pp. 32-33, 40-42, 48.) The referee disbelieved Vinzon's testimony that she was unaware, when she signed the retainer, of the special power of attorney it contained. (Decision, ¶¶ 4-7, 40-41.)

In January 1983, Vinzon's insurance company issued a draft in the amount of $839.39 for her medical expenses, which respondent deposited into his trust account, having simulated Vinzon's endorsement signature. (I R.T. pp. 79-82; exh. 2.) Respondent kept the funds in his trust account throughout his representation of Vinzon, but did not notify Vinzon that he had received the draft until over a year later. (Decision, ¶ 8.)

In the fall of 1983, respondent informed Vinzon that he no longer wished to handle her case, and she should hire a new lawyer. She subsequently retained attorney Gil Siegel to take over her case from respondent, and respondent forwarded the file to Siegel in November 1983 with a cover letter. (Decision, ¶¶ 9-11; I R.T. pp. 22-23, 51-53, 102; exh. 3.)

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1. Unless noted otherwise, all references herein to Rules of Professional Conduct are to the former rules which were in effect at the time respondent committed the acts at issue in this matter.

In February 1984, respondent sent Siegel a letter notifying Siegel about the receipt of the medical payment draft, and explaining respondent's intended handling of it to cover $621.70 in costs and to apply the balance to his attorney's fees which he calculated as $335.75 based on 40 percent of the recovery. He determined that the effect was to leave a negative balance of $118.08.[2] (Exh. 6, D.) When Siegel spoke by telephone with respondent about the draft,[3] respondent informed Siegel (and testified at the hearing in this matter) that respondent had received the draft, signed Vinzon's name to the back of the draft, and deposited it in his trust account, and that when their relationship terminated, respondent applied the proceeds of the draft to costs and fees owed him by Vinzon. (I R.T. pp. 57, 62-63, 88-89.) Respondent took this action based on rights which respondent believed were given to him by the terms of his retainer agreement with Vinzon. (I R.T. pp. 56-57, 62-63, 79-82, 94-95, 100, 118-119, 121-124.) [2a] Respondent admitted he had not told Vinzon that the draft had arrived. He explained that he was concerned that if Vinzon knew this fact, she would demand that the money be paid to her rather than held for satisfaction of the liens by application to her medical bills or respondent's fees and costs.[4] (I R.T. pp. 91-93.)

Respondent offered as an alternative to his payment of fees and costs to himself out of the trust funds in his possession to return the money to Siegel in exchange for a separate payment for his costs and fees. (I R.T. p. 89.) Siegel did not respond to the alternative suggestion, but told respondent that he did not think respondent should remove the money from the trust account (I R.T. pp. 63, 88) and that he thought Vinzon would cause respondent a lot of trouble (I R.T. p. 89). The referee nonetheless found that with respect to respondent's proposed withdrawal, "Siegel concurred that respondent had the right to do so." The record does not support this finding. Rather, both Siegel and respondent testified that respondent claimed that he was entitled to do so and Siegel did not address the issue. (I R.T. pp. 63, 88-89.) We therefore modify finding 17 in this regard. Respondent proceeded to apply the funds in his trust account to the fees and costs covered by his contractual lien.

The State Bar does not dispute that Vinzon owed respondent attorney's fees and costs, and, at one point toward the end of the hearing, conceded that no evidence had thus far been introduced that the matter involved misappropriation. (II R.T. p. 158.) Respondent testified that he had waived all of his fees in connection with the matter except for his share of the funds he had actually collected in the form of the medical payment draft. (I R.T. pp. 127-128.) The referee credited respondent's testimony that he applied the medical payment funds to his legitimate costs and fees. (Decision, ¶ 18.)

When Vinzon's case finally settled in 1986, she discovered that the January 1983 medical payment draft had been issued and that respondent had received and negotiated it. (I R.T. pp. 23-24, 54-56; exh. 2.) Sometime before September of 1986 Vinzon called respondent to discuss the matter. (I R.T. pp. 25-26, 135.) On September 8, 1986, respondent sent Vinzon a copy of the February 1984 letter from respondent to Siegel, which explained respondent's treatment of the January 1983 insurance payment. (I

2. Siegel denied receiving this letter until a copy of it was sent to him as an enclosure to a subsequent letter in October 1986. However, Siegel admitted that the 1984 letter was correctly addressed, except that the city was erroneously given as Los Angeles rather than Beverly Hills. (I R.T. pp. 59-60, 71-72.) The same address error was made on an earlier letter which Siegel admitted he had received despite the incorrect address. (I R.T. pp. 72-73; exh. 3.) Respondent testified that the February 1984 letter was mailed on or about the date on the letter, that it was not returned by the Post Office, and that he was never informed that it had not been received. (I R.T. pp. 83-85, 124-125; exh. D.) The referee found that the letter was sent in February 1984 as indicated by its date. (See decision, ¶¶ 8, 12-15.)

3. The date of this telephone conversation is one of the disputed facts. Respondent testified that the conversation occurred in 1984, around the time he sent the February 1984 letter; Siegel testified that it occurred in 1986, after he and Vinzon found out about the 1983 insurance company draft. (I R.T. pp. 55-56, 87, 125-126.) The referee found that the conversation occurred in 1984. (Decision, ¶ 16.) In any event, there is no dispute about the substance of the conversation. (Decision, ¶ 17; I R.T. pp. 88-89, 127.)

4. The referee found that the doctor's fees were not payable either at that time or directly out of those particular proceeds, but only out of trust funds disbursed upon final settlement of the case. (Decision, ¶ 23.)

R.T. pp. 26-30, 58-61, 124-125, 135; exh. 5, 6.)[5] Vinzon then complained to the State Bar. (I R.T. pp. 47-48.)[6] Siegel withheld from the settlement proceeds sufficient funds to pay the doctor, but at Vinzon's insistence, pending resolution of the matter, he retained the funds in his trust account rather than paying the money to the doctor. (I R.T. pp. 61-62.)

DISCUSSION

A. Culpability.

The notice to show cause charged respondent with having violated Business and Professions Code sections 6068 (a), 6103, 6104 and 6106, and former Rules of Professional Conduct 8-101(B)(1), 8-101(B)(3), and 8-101(B)(4). **[2b]** The referee found respondent culpable of only one of these charges, concluding that respondent violated former rule 8-101(B)(1) by failing to notify Vinzon in a timely manner of the receipt of the medical payment draft. (Decision, ¶ 21.) The referee properly did not consider respondent's explanation for this conduct to be a defense to the violation. (*Id.*; see, e.g., *Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 976.)

Respondent did not request review and acknowledges the correctness of the referee's finding that he violated rule 8-101(B)(1). Respondent admittedly failed to inform his client for over a year that the medical payment draft had been received and then did so only indirectly through her new counsel. Apparently, the client herself remained unaware of respondent's prior receipt of the medical payment draft until mid-1986 when the entire case settled. **[2c]** We adopt the referee's conclusion that respondent violated rule 8-101(B)(1) by his inexcusable delay in informing the client of the receipt of the medical payment draft.

On review, the examiner requests that we find respondent culpable of several additional violations not found by the referee, to wit, violations of sections 6104 and 6106 of the Business and Professions Code, and rule 8-101(B)(4). **[3]** The examiner has not challenged the referee's conclusions that respondent was not culpable of violating sections 6068 (a) and 6103 of the Business and Professions Code, or rule 8-101(B)(3). Nonetheless, we review those determinations as part of our independent de novo review of the record. (Rule 453(a), Trans. Rules Proc. of State Bar.)

We agree with the referee's rejection of the section 6103 violation. (See *Baker* v. *State Bar* (1989) 49 Cal.3d 803, 815; *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 617.) **[4]** As to section 6068 (a), however, the referee's decision appears to contemplate that it would have been proper to find a section 6068 (a) violation if any of the other charged Business and Professions Code sections had been violated. (See decision, ¶ 35.) On this point, we modify the referee's decision, and hold that no section 6068 (a) violation occurred in this matter that is separate and distinct from the charged statutory violations or charges of violation of the Rules of Professional Conduct. (*Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1059-1060; *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 903; *Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 804.)

With respect to the charged rule 8-101(B)(3) violation of the duty to render appropriate accounts, the referee found that the accounting occurred in February of 1984 and no improprieties were proved by clear and convincing evidence. (Decision, ¶ 22.) We disagree. The referee impliedly found that respondent's accounting solely to the client's new counsel satisfied his duty to "render appropriate accounts *to his client*." (Rule 8-101(B)(3), emphasis added.) **[5a]** Since respondent was not directed by the client to render the account to her new counsel and since the obligation ran directly to the client we question the sufficiency of his indirect method of

5. Respondent sent Siegel a copy of his September 8, 1986, letter to Vinzon, with the enclosure; Siegel testified that he did not receive the February 28, 1984, letter until respondent sent him the copy in 1986, but the referee found otherwise. (Decision, ¶¶ 12-15.)

6. Vinzon ultimately sued respondent in a small claims court action challenging his fees, which action respondent defended and won. The referee permitted this testimony for the limited purpose of establishing the fact that the litigation occurred as part of the ongoing dispute between the attorney and client. (I R.T. pp. 103-105.) Independent of the small claims court judge, the referee also found that no clear and convincing evidence established that the client raised a legitimate challenge to respondent's fees and costs.

accounting to the client under circumstances which indicate that he wished to avoid notifying his client directly because she might disagree about the appropriate disposition of the funds. (See respondent's testimony, I R.T. pp. 88-89.) As a result, it appears from the record that the client herself, as opposed to her new counsel, did not receive actual notice of the accounting until more than two years after it was made to her new counsel. When Vinzon was notified, she objected, but by then respondent had long since already paid himself.

[5b] Nonetheless, we do not base our finding that respondent violated rule 8-101(B)(3) on his failure to transmit his February 1984 accounting directly to his client. The possibility that he was relying on Siegel to transmit the accounting to Vinzon precludes clear and convincing proof of a violation on that basis. [6] Rather, we find a rule 8-101(B)(3) violation based on the fact that even the accounting respondent made in February 1984 was deficient. The record reveals no explanation by respondent for failing to mention in his transmittal letter to the new counsel in November of 1983, the funds he had long since received from the insurance company and placed in trust and his intended disposition thereof to cover costs and attorneys fees upon his withdrawal. Had respondent accounted to the client then as he should have done, the client would have had an opportunity to object prior to disbursement of the funds. [7] Any objection Vinzon then raised to the fees or costs would have had to be resolved prior to respondent's withdrawal of funds from the trust account to pay his fees and reimburse costs advanced. (See former rule 8-101(A)(2), now rule 4-100(A)(2).)

We therefore reject the finding of no culpability of a rule 8-101(B)(3) violation, but for the reasons set forth below, we adopt the referee's challenged findings of no culpability with regard to the charges of violating sections 6104 and 6106 of the Business and Professions Code and rule 8-101(B)(4).

1. Section 6104.

[8] The examiner's argument that respondent's simulation of Vinzon's signature on the draft constituted an unauthorized appearance in violation of section 6104 tortures both the facts and the law. Respondent's conduct manifestly did not constitute "corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding." (Bus. & Prof. Code, § 6104.)[7] Merely signing the back of a check does not constitute an appearance within the meaning of Business and Professions Code section 6104; and in any event, the State Bar's own evidence showed that respondent was fully authorized, by a signed retainer agreement, to represent Vinzon and to appear on her behalf in connection with the accident that gave rise to the insurance payment. (Exh. 2.)

The examiner argues that the provision of the retainer agreement expressly giving respondent a special power of attorney to sign Vinzon's name on drafts and other documents related to her case was void as against public policy. As respondent points out, the examiner's unconscionability argument relies heavily on a view of the facts expressly contrary to that taken by the referee.[8] [9 - see fn. 8] The referee expressly found that the client's testimony that she

7. In *Hizar* v. *State Bar* (1942) 20 Cal.2d 223, an attorney was disbarred for, among other things, forging signatures on grant deeds and other documents that the attorney had notarized. However, the attorney was charged with and found culpable of committing acts of moral turpitude and violating his oath as an attorney, not making unauthorized appearances. (See *id.* at p. 224.) Thus, contrary to the examiner's contention, *Hizar* does *not* stand for the proposition that signature forging constitutes an unauthorized appearance. Moreover, in *Hizar*, unlike this case, there was no indication in the record that the signatures were authorized by a power of attorney. (See *Hizar*, *supra*, 20 Cal.2d at p. 227 [declining to address contention, raised for first time in reply brief on appeal, that State Bar's case was flawed by failure to prove absence of power of attorney].)

8. [9] Given the deference which the Supreme Court has directed us to accord to the referee's findings on issues of fact and credibility, the party requesting review does not advance his or her cause very effectively by ignoring those findings, especially when no contention is advanced that the findings are not supported by the evidence. (Cf., e.g., *Oliver* v. *Board of Trustees* (1978) 181 Cal.App.3d 824, 832 ["fundamental tenets of appellate practice" require appellant's brief to state *all* evidence, not merely evidence most favorable to appellant's position]; *Rodriguez* v. *North American Rockwell Corp.* (1972) 28 Cal.App.3d 441, 446-448 [criticizing appellant for disregarding obligation, in attacking trial court's factual findings, to set forth all evidence in support of those findings, as well as contrary evidence].)

was unaware of the provision was not credible, and we have no basis for rejecting that determination. **[10]** Absent unconscionable circumstances in its creation, an agreement granting an attorney express authority to sign a client's name on documents is clearly not contrary to public policy. (*Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 793-794.) Indeed, it is essential that express authority be obtained by an attorney seeking the power to sign the client's name to documents on the client's behalf. (*Id.*)

The examiner's other legal arguments are also unavailing. **[11a]** The examiner argues that inclusion of a special power of attorney in a fee agreement creates a conflict of interest in and of itself and that conflict requires compliance with rule 5-101 of the Rules of Professional Conduct. **[12]** Respondent was not charged in the notice to show cause with violating rule 5-101 of the former Rules of Professional Conduct. Therefore, even if the examiner's contention had any merit, he could not now be found culpable of violating that rule. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929; *Leoni* v. *State Bar* (1985) 39 Cal.3d 609, 621, fn. 10.) It is a fundamental constitutional and statutory requirement that the respondent must be given notice of all charges and a reasonable opportunity to prepare his defense thereto. (Bus. & Prof. Code, § 6085; *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 420-421; *In re Strick* (1983) 34 Cal.3d 891, 899; *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163.)

[11b] In any event, respondent did not acquire any adverse interest by virtue of the special power of attorney. The referee found that respondent merely received from his client advance written authorization for the ministerial act of affixing her signature to the draft. Such authorization is common practice in the personal injury field and has long been recognized as proper. (*Weiss* v. *Marcus* (1975) 51 Cal.App.3d 590, 597-598.) The provisions of rule 5-101 have never been interpreted by the Supreme Court to apply in such circumstances.

[13a] The examiner also argues that Civil Code sections 2450, et seq., mandate a different format for special powers of attorney than the one which respondent used. Civil Code sections 2450, et seq., were not enacted until 1984, two years after the power of attorney was executed by Vinzon and one year after it was acted upon by respondent. **[14]** Statutes affecting a substantive right are generally construed prospectively to avoid a declaration of unconstitutionality. (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 495, pp. 685-686, and cases cited therein.) **[13b]** Moreover, section 2456, enacted simultaneously with section 2450, expressly provides, "Nothing in this chapter affects or limits the use of any other form for a power of attorney. Any form that complies with the requirements of any law other than the provisions of this chapter may be used in lieu of the form set for in section 2450." Accordingly, any formatting provisions of those code sections are irrelevant to the issues in this proceeding.

2. Section 6106.

[15a] The examiner argues that the review department can find that respondent's simulation of his client's endorsement on the medical payment draft, without expressly indicating that he was signing under power of attorney, constituted an attempt to deceive the bank and therefore violated section 6106. She makes this argument even though (1) the endorsement was found to have been placed on the draft pursuant to respondent's authority under the retainer agreement; (2) the draft was properly deposited in respondent's trust account after the endorsement was simulated, and (3) there is no evidence that auy fraud was intended. The examiner apparently takes the position that as a matter of law simulation of client endorsements on checks constitutes moral turpitude if the representational capacity of the signature is not expressly indicated, even if the client's approval was obtained in advance and memorialized in a formal power of attorney.

[16a] The official comment to Commercial Code section 3403 indicates that a properly authorized agent may simply sign the principal's name rather than indicating that s/he is signing as agent. The examiner nonetheless argues that *Palomo* v. *State Bar*, *supra*, 36 Cal.3d at pp. 793-95 supports her positton. **[15b]** *Palomo* holds that an attorney may not endorse a client's name to a check without express authority to perform that particular act, but does *not* hold that when such authority has been given, the representative capacity of the signature must be indicated on the check.

Hallinan v. *State Bar* (1948) 33 Cal.2d 246 does hold that an attorney who simulated a client's signature on a *release*, under a formal power of attorney, should have indicated that he was signing in a representative capacity, *since he knew the beneficiary of the release was concerned to obtain the personal signature of the releasor*. However, even assuming the holding in *Hallinan* applies to check endorsements, the legal nature and import of which is markedly different from the execution of a release, there is no evidence here that the bank placed any particular importance on obtaining Vinzon's personal endorsement of the check. **[16b]** Absent evidence to the contrary, the bank's expectations must be presumed to be in accord with the Commercial Code which permits authorized agents not to identify the fact of their agency in endorsing their principal's name.

Levin v. *State Bar* (1989) 47 Cal.3d 1140, also cited by the examiner, involved acts of moral turpitude, but is not factually comparable to this matter.[9] It was Levin's acts of overt dishonesty, not the mere endorsement of his client's name on a check, that led to the moral turpitude finding. (See *id.* at pp. 1145-1146.)[10]

[17] Finally, the examiner appears to contend that moral turpitude is demonstrated simply by respondent's failure to notify Vinzon that the draft had arrived and that he had endorsed it for her. Although respondent clearly violated rule 8-101(B)(1) by such conduct, his actions do not amount to dishonesty or other misconduct in any way characterizable as moral turpitude.

3. Uncharged Rule 8-101(A) Violation.

[18] The notice to show cause alleged that respondent had misappropriated funds to his own use and purposes, but did not charge respondent with a breach of former Rule of Professional Conduct 8-101(A), which concerns the proper payment of funds. The notice did, however, charge a violation of section 6106. In the very recent case of *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, the Supreme Court held that the factual allegations supporting the section 6106 charge against Sternlieb encompassed a rule 8-101(A) charge. (*Id.* at p. 321.) Here, the notice does not appear to have clearly put respondent on notice of a charge that he had violated former rule 8-101(A). Nor has the examiner ever argued that a rule 8-101(A) violation is properly encompassed in the charges. Since respondent was never apprised of a possible 8-101(A) violation, we decline to find culpability of a rule 8-101(A) violation here in light of the mandate that respondent be given adequate notice of all charges and a reasonable opportunity to respond thereto. (Bus. & Prof. Code, § 6085; *Gendron* v. *State Bar*, *supra*, 35 Cal.3d at pp. 420-421.)[11] **[19a - see fn 11]**

4. Rule 8-101(B)(4).

The referee found that respondent did not violate rule 8-101(B)(4) when he paid his own lien with

9. In *Levin*, the attorney committed the following misconduct: (1) in a case in which Levin personally was a co-defendant, he represented to the opposing party's attorney that he had settlement authority for his co-defendant which he did not have; (2) in that same matter, he persisted in attempting to contact the opposing party directly rather than through counsel; and (3) in another matter, he settled a case without authority from his client, forged the client's signature *on the release* and affirmatively represented it as genuine, and mishandled the settlement funds by delivering the client's share in cash to the client's cousin without obtaining a receipt.

10. The other cases cited by the examiner also are not on point. In both *Montalto* v. *State Bar* (1974) 11 Cal.3d 231, 235, and *Himmel* v. *State Bar* (1971) 4 Cal.3d 786, 788, 793-796, the attorneys forged their respective clients' signatures to checks *without the clients' consent*, and misappropriated the money. In *Resner* v. *State Bar* (1960) 53 Cal.2d 605, the attorney, who operated without a trust account, repeatedly deposited settlement checks into his personal account and then misappropriated the proceeds. On at least one occasion, the deposit of the check was preceded by the attorney's simulation of his client's endorsement *with the client's consent*. (*Id.* at p. 611.) In finding the attorney culpable of professional misconduct, the Supreme Court focused exclusively on the commingling and misappropriation, and did not even mention the simulation of the client's signature. Finally, *Stafford* v. *State Bar* (1933) 219 Cal. 415 involved an attorney who signed several clients' names to releases, deeds, and settlement agreements, not just checks, and who did so *without* authority from the clients; he also commingled and misappropriated money from several clients.

11. **[19a]** This does not preclude consideration of such misconduct for other purposes, including circumstances in aggravation. (See Discussion, Part B, *post*.)

the proceeds of the medical payment draft because payment was not due to Vinzon's doctor until her case was finally settled, which had not yet occurred, and respondent maintained the funds in his trust account until he was discharged. (Decision, ¶ 23.) The examiner nonetheless contends that the draft was "earmarked" for the payment of medical bills and could not be applied to satisfy the lien for attorney's fees and costs. This argument is misplaced. Respondent testified without contradiction (I R.T. pp. 89-91), and the referee found (decision, ¶ 23), that the draft was termed a "medical payment" draft, and was made out for the amount of Vinzon's medical bills, because it was issued pursuant to the "medical payment" portion of Vinzon's insurance policy, and not because it was required to be used for medical bills. The doctor was not named as a payee on the draft and was not entitled to be paid until the final settlement of Vinzon's uninsured motorist claim and then out of *any* settlement funds, not just the "medical payment" portion.

Respondent's counsel argues that respondent did not violate rule 8-101(B)(4) because, under the terms of respondent's retainer agreement, respondent, unlike the doctor, was entitled to enforce his lien at the conclusion of his representation of Vinzon, rather than waiting for Vinzon's ultimate recovery. This argument is unpersuasive.

He cites in support of his position *Weiss* v. *Marcus*, *supra*, 51 Cal.App.3d 590, in which the court concluded that Weiss stated a proper cause of action in alleging that upon his discharge, his contractual lien entitled him to recover "out of the proceeds of the settlement" the reasonable value of his services rendered prior to discharge. (*Id.* at p. 598.) The court in *Weiss* did not have before it the issue presented here. Weiss brought a separate action for recovery of fees and did not engage in any unilateral determination of the amount owed or any self-help from his trust account to satisfy his claim.

As discussed *ante*, we do consider respondent's timing and manner of payment to himself problematic. However, we can dispense with the charged rule 8-101(B)(4) violation because the charge must fail in any event. **[20]** Rule 8-101(B)(4) expressly requires that funds which "the client is entitled to receive" must be paid to the client promptly "as requested by [the] client." In the present case, the client was never entitled *to receive* the funds which were the subject of the two liens. When demand was made in the summer of 1986 after the case was settled, respondent was by then clearly entitled to receive the trust funds to satisfy his lien.

While the delay in notifying the client of the receipt of funds covered by the two liens was in violation of rules 8-101(B)(1) and 8-101(B)(3), there is no basis for finding that rule 8-101(B)(4) was violated here.

B. Aggravation.

[21] Under standard 1.2(b)(iii), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ["standard(s)"]), greater discipline may be imposed for a rule 8-101(B)(3) violation than might otherwise be appropriate if the member's misconduct was surrounded by bad faith, dishonesty, concealment, or overreaching, as well as for other violations of the State Bar Act or Rules of Professional Conduct or refusal or inability to account for improper conduct toward trust funds. The examiner introduced no evidence designated as evidence in aggravation, and the referee found that there were no aggravating circumstances. (II R.T. pp. 144-145; decision ¶ 36.) On review, although the examiner argues for increased discipline based on respondent's culpability, she does not contend that the referee should have found aggravating circumstances. Nonetheless, as indicated above, there is an aggravating circumstance clearly demonstrated on the record. **[22a]** Under California law, absent an enforceable contractual lien, an attorney commits a trust account violation by unilaterally determining his or her fee and withdrawing trust funds to satisfy the fee, even though the attorney may be entitled to a fee in the withdrawn amount. (*Silver* v. *State Bar* (1974) 13 Cal.3d 134, 142; *Brody* v. *State Bar* (1974) 11 Cal.3d 347, 350, fn. 5.) **[23a]** Here, respondent had a contractual lien, but withdrew before completion of the case thereby rendering uncertain the amount, if any, he was entitled to be paid.

[23b] When an attorney withdraws from a contingent fee case, the attorney's entitlement to enforce a pre-existing lien for fees depends on whether the

attorney had justifiable cause for withdrawing. (*Estate of Falco* (1987) 188 Cal.App.3d 1004, 1018-1020 [no justifiable cause for the attorney's withdrawal despite the clients' refusal to settle or cooperate]; *Hensel* v. *Cohen* (1984) 155 Cal.App.3d 563, 567-568 [no justifiable cause where the attorney's withdrawal resulted from the belief that the case could not be won]; *Pearlmutter* v. *Alexander* (1979) 97 Cal.App.3d Supp. 16, 20 [justifiable cause where the attorney's withdrawal resulted from the client's refusal to consummate an authorized settlement]. See also 1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, §§ 170, 173, pp. 197, 199.)[12] It appears inescapable that in the event of a withdrawal of an attorney from a contingent fee case, the attorney's right to enforce his lien and the extent of his recovery cannot be determined unilaterally by the attorney, any more than the fees could be so determined if there had never been a contractual lien in the first place. If the attorney and client cannot reach a new agreement, then the attorney's sole recourse is to an independent tribunal with the funds remaining in trust in the interim. (See former rule 8-101(A)(2) [now rule 4-100(A)(2)].)

[22b] That Vinzon eventually lost her small claims court action challenging respondent's entitlement to his fees is no defense to his conduct. She should not have had to sue him after he had taken the fees. By unilaterally determining his fee and withdrawing trust funds to satisfy the fee, an attorney violates former rule 8-101(A). (Cf. *Silver* v. *State Bar*, *supra*, 13 Cal.3d at p. 142 [Silver "had no right or authority unilaterally to determine that he was entitled to $1,000 for his services and to withhold the money, even if his services in truth were worth that figure"].)

[19b] While we declined to consider this trust account violation as an independent basis for discipline, it is an appropriate matter for us to consider in aggravation. "Although evidence of uncharged misconduct may not be used as an independent ground of discipline, it may be considered for other purposes relevant to the proceeding." (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35-36; see, e.g., *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 775.)

[24] However, we do not construe respondent's trust account violation to amount to an act of moral turpitude. In *Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d at p. 321, the Supreme Court similarly rejected culpability under section 6106 while finding culpability of a rule 8-101(A) violation because there was no evidence the attorney acted dishonestly in her unauthorized withdrawal of fees from her trust account. Here, respondent clearly did not commit an act of moral turpitude by his payment to himself of a reduced fee taken in the good faith belief of a claim of right. **[19c]** We therefore modify the referee's finding of no aggravation to make a finding that respondent's unilateral withdrawal of fees prior to the fixing of the amount thereof established a circumstance in aggravation of the rule 8-101(B)(3) violation. Following the Supreme Court's opinion in *Edwards*, we see no violation of respondent's right to notice of the rule 8-101(A) charge: the evidence was necessarily elicited in the course of proving the rule 8-101(B)(3) charge; has been used merely to establish a circumstance in aggravation; and was based on respondent's own testimony. (*Edwards* v. *State Bar*, *supra*, 52 Cal.3d at p. 36.)

C. Mitigation.

As of the hearing in this matter (July-November 1989), respondent had been a member of the bar for over ten years, with no disciplinary record before or since the time of his misconduct, which had occurred over six years earlier (January 1983). (Std. 1.2(e)(i), 1.2(e)(viii).) In an attempt to attribute his misconduct to youth and inexperience (see, e.g., *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1366), respondent testified that immediately after becoming a member of the bar, he had entered into a law partnership with three other attorneys who were no more experienced than he was, and that the result had been "a disaster." (II R.T. pp. 145-146.) His representation of Vinzon

12. Both the Courts of Appeals in *Estate of Falco*, *supra*, and *Hensel*, *supra*, criticized and distinguished *Pearlmutter* as factually not showing justifiable cause warranting the recovery of fees. (*Hensel*, *supra*, 155 Cal.App.3d at p. 568; *Estate of Falco*, *supra*, 188 Cal.App.3d at p. 1013.)

commenced shortly after that partnership broke up, when he was practicing in a two-partner firm which dissolved fairly soon thereafter. (II R.T. pp. 147-148.)[13] **[25 - see fn. 13]**

As already noted, respondent testified that his handling of the medical payment draft, including his simulation of Vinzon's endorsement thereon, was based on rights he interpreted to be given to him by the terms of his retainer agreement. (I R.T. pp. 56-57, 62-63, 79-82, 94-95, 100, 118-119, 121-124.)

The referee found that respondent had acted in good faith, was candid at the hearing,[14] and had recognized the need to change his procedures for handling medical payments which he had already implemented. She concluded that respondent was unlikely to commit further misconduct. (Decision, ¶¶ 38-39, 44; see stds. 1.2(e)(ii), 1.2(e)(v), 1.2(e)(vii), 1.2(e)(viii).) Although Vinzon was improperly kept in the dark for a lengthy period of time concerning the receipt of the partial settlement and respondent's fees and costs, neither Vinzon nor the doctor suffered monetary harm as a result of respondent's misconduct. (Std. 1.2(e)(iii).) Vinzon received all sums to which she was entitled when she was entitled to them (indeed, respondent waived part of his fee)[15] and Vinzon's second attorney protected the doctor fully by segregating the doctor's share of the settlement from the ultimate recovery and retaining it in his trust account for payment to the doctor pursuant to his lien. The resulting delay in payment to the doctor at Vinzon's request is not attributable to respondent.

D. Recommended Discipline.

As already noted, the referee recommended a public reproval. On review, the examiner argues that even if respondent is culpable only of violating rule 8-101(B)(1), he should receive at least 90 days of actual suspension, and that greater discipline would be appropriate if additional culpability is found.

The examiner argues that standard 2.2(a) mandates a one-year minimum for misappropriation and standard 2.2(b) "mandate[s]" that for violations of rule 8-101 not involving misappropriation, the minimum discipline is a three-month suspension, irrespective of mitigating circumstances. **[26]** However, the standards are not to be applied in "talismanic fashion" and do not mandate such result. (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221 [rejecting minimum one-year actual suspension called for by standards in matter involving one minor misappropriation mitigated by drug and alcohol problems from which attorney had recovered]; *Sternlieb* v. *State Bar*, *supra*, 52 Cal.3d 317 at p. 333 [rejecting 120-day suspension recommended by volunteer review department and ordering 30-day suspension for misappropriation resulting from unilateral withdrawal of fees from trust account].) All of the case law cited by the examiner in support of three months or greater actual suspension involved much greater misconduct and less mitigation than that in this case.[16]

Respondent's brief cites several summaries appearing in *California Lawyer* of unpublished deci-

13. **[25]** Respondent terminated his attorney-client relationship with Vinzon because he believed she would not be a good witness, had begun to doubt her credibility himself, and therefore believed that he could not give her effective representation. (II R.T. pp. 149-150.) Respondent's difficulty in working with his client justified respondent's consensual withdrawal. (See former Rules of Professional Conduct 2-111(C)(1)(d), 2-111(C)(2), 2-111(C)(5).)

14. Respondent was also found to have been candid with Vinzon's second attorney concerning his handling of the draft. (Std. 1.2(e)(v).)

15. While it is arguable that respondent was entitled only to the reasonable value of his time, instead of 40 percent of the recovery (see *Weiss* v. *Marcus*, *supra*, 51 Cal.App.3d. at p. 598), the record clearly demonstrates sufficient work to justify the reduced fee of $217.69 respondent took for his services under either method of calculation.

16. *Phillips* v. *State Bar* (1975) 14 Cal.3d 492 involved an attempt to deceive the State Bar by means of a forged document. *Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d 962 involved grossly negligent mismanagement of entrusted funds and refusal to provide an accurate accounting, as well as failure to perform legal services competently in another matter. *Lawhorn* v. *State Bar*, *supra*, 43 Cal.3d 1357 involved misrepresentations and unexplained delays in payment of client funds as well as numerous rule violations and *Boehme* v. *State Bar* (1988) 47 Cal.3d 448 involved intentional misappropriation. *Hipolito* v. *State Bar* (1989) 48 Cal.3d 621 also involved intentional misappropriation, and abandonment as well. *Hallinan*, *supra*, 33 Cal.2d 246 and *Levin*, *supra*, 47 Cal.3d 1140 involved misconduct far more egregious than that in this case.

sions of the former volunteer review department in which rule 8-101 violations resulted in public or private reprovals. [27] While not binding precedent, these matters do indicate that rule 8-101 violations have not always resulted in actual or even stayed suspensions. Indeed, in *Crooks* v. *State Bar* (1970) 3 Cal.3d 346 the Supreme Court ordered public reproval of an attorney for unauthorized (albeit good faith) removal of funds from escrow to pay disbursements coupled with unilateral withholding of $790 as unauthorized attorneys fees.

[28] Here, respondent's lengthy delay in notifying his client of receipt of a check in partial settlement of her case and failure to render a timely and appropriate accounting upon his withdrawal, aggravated by unilateral payment to himself, merits more than a public reproval. Certainly, it indicates that respondent's handling of trust account records should be reviewed by an accountant for some period of time to ensure protection of other clients. However, in view of the mitigating circumstances, subsequent corrective measures, and lack of harm to the client or her doctor, no actual suspension appears necessary to protect the public. We do have sufficient concerns, however, to order two months suspension, stayed, conditioned on one year's probation, including periodic auditing of respondent's trust account, and to recommend that respondent be ordered to pass a professional responsibility examination within one year. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 892.) Such recommendation appears sufficient to guard against repetition of respondent's misconduct.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law for two months, that execution of such order be stayed, and that respondent be placed on probation for one year on the following conditions:

1. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

2. That during the period of probation, he shall report not later than January 10, April 10, July 10, and October 10 of each calendar year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

3. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) that respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) money received for the account of a client and money received for the attorney's own account;

(2) money paid to or on behalf of a client and money paid for the attorney's own account;

(3) the amount of money held in trust for each client;

(b) that respondent has maintained a bank account in a bank authorized to do business in the

State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

(c) that respondent has maintained a permanent record showing:

(1) a statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(2) monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(3) monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) that respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

4. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professional Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

5. That, except to the extent prohibited by the attorney client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court or her designee at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge or designee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge or designee relating to whether respondent is complying or has complied with these terms of probation;

6. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of two months shall be satisfied and the suspension shall be terminated.

Finally, we recommend that respondent be required to take and pass the California Professional Responsibility Examination given by the State Bar prior to the expiration of one year from the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

FLETCHER F. BOUYER

A Member of the State Bar

[Nos. 86-O-15106, 87-O-11321]

Filed March 22, 1991; as modified, July 17, 1991

SUMMARY

Respondent was charged with misappropriating client funds, failing to pay medical liens, failing to perform competently and acts involving moral turpitude consisting of misappropriation, gross neglect in the handling of personal injury cases, signing clients' names to settlement checks without authorization, and issuance of numerous checks from his general office account which were drawn against insufficient funds. The hearing referee dismissed the charges based on the insufficient funds checks, because the respondent had a standing oral agreement with his bank to cover all checks, and no check was dishonored by the bank. Finding culpability on all the remaining counts, the referee recommended three years stayed suspension, three years probation, and one year actual suspension. (Leon S. Panle, Hearing Referee.)

The review department affirmed the dismissal of the check charges and the conclusion that respondent's grossly negligent office practices and near-total abdication of the handling of his clients' personal injury cases to his non-lawyer support staff constituted moral turpitude, and resulted in incompetent legal services, misappropriation of client trust funds due to inadequate trust account balances, inadequate records, and delayed accountings to clients. With respect to the endorsement of clients' signatures on settlement checks, respondent's practice of relying on oral endorsement authorizations secured from his clients by respondent's office staff, though disfavored, was held not to involve moral turpitude. Respondent's delayed disbursement of settlement funds to his clients had not been properly charged, because his clients had not requested the funds, and respondent had not been charged with violating the rule requiring notification to clients of the receipt of the funds. However, the failure to notify could be considered as an aggravating factor.

In determining the appropriate discipline, the review department concluded that disbarment was not called for where the temporary misappropriation of entrusted funds resulted from the attorney's laxity in supervising office staff, and not from any intent to defraud, and where remedial steps were instituted by the attorney, and the clients were repaid, upon discovery of the situation. The review department recommended a two-year suspension, stayed; a two-year probation period, and actual suspension for six months and until restitution was completed to one client and to medical lien holders.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

COUNSEL FOR PARTIES

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HEADNOTES

[1 a-c] **204.90 Culpability—General Substantive Issues**
221.00 State Bar Act—Section 6106
A justifiable and reasonably certain belief that a check will be paid by the bank despite insufficient funds is a valid defense to a charge of issuing checks drawn against insufficient funds. Where respondent had an oral agreement with a bank officer to pay all his checks automatically, which would not have been terminated without notice to respondent, and where all checks he wrote were honored and no creditor was put at risk, respondent's repeated issuance of insufficient funds checks did not constitute misconduct.

[2 a, b] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
Where attorney failed to reveal to clients the real reason for the delay in their receipt of settlement funds, and was grossly negligent in failing to supervise his staff in the handling of client funds and settling of personal injury cases, this misconduct, coupled with misappropriation from the attorney's client trust account due to his failure to maintain a sufficient balance, was an appropriate basis for a finding of moral turpitude.

[3 a, b] **194 Statutes Outside State Bar Act**
430.00 Breach of Fiduciary Duty
An attorney may not endorse a client's name to a check without express authority to perform that particular act. However, under Commercial Code section 3403, no specific form of authorization is required from a principal to an agent in order for the agent to sign the principal's name to a negotiable instrument, such as a settlement check.

[4] **221.00 State Bar Act—Section 6106**
Attorney's reliance on clients' oral authorizations to simulate their endorsements on settlement checks did not constitute a basis to find moral turpitude.

[5] **204.90 Culpability—General Substantive Issues**
715.10 Mitigation—Good Faith—Found
791 Mitigation—Other—Found
Although an attorney is culpable for misconduct committed by inadequately supervised office staff, the degree of the attorney's personal involvement in the misconduct is relevant to the degree of culpability and the appropriate discipline to be imposed.

[6] **204.10 Culpability—Wilfulness Requirement**
420.00 Misappropriation
Misconduct which is technically wilful may be less culpable if committed through negligence than if committed deliberately; term "wilful misappropriation" as used in attorney discipline cases covers broad range of conduct varying significantly in degree of culpability.

[7] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Attorney who failed to distribute settlement funds and pay medical liens promptly, as a result of his grossly negligent office practices and failure to supervise employees, was culpable of repeated or reckless failure to perform competently.

[8] **280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**
Even though attorney belatedly supplied accountings to his clients, he violated duty to keep adequate records by failing to require his staff to maintain office records adequate to ensure that he would know of receipt of client funds and distribute them promptly upon receipt.

[9 a, b] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Attorney cannot be found culpable of failing to pay funds to client promptly upon request where, due to attorney's failure to notify client of receipt of funds, client has not requested payment.

[10 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
280.20 Rule 4-100(B)(1) [former 8-101(B)(1)]
561 Aggravation—Uncharged Violations—Found
An uncharged violation of the rule requiring prompt notification to clients when client funds are received could be considered as an aggravating circumstance, where the respondent was put on notice of the nature of the uncharged misconduct in the notice to show cause and did not object to a finding of culpability under a different rule for the same conduct. Evidence of uncharged misconduct may not be used as ground of discipline, but may be considered for other relevant purposes.

[11 a, b] **710.53 Mitigation—No Prior Record—Declined to Find**
Six or seven years of trouble-free law practice prior to commission of misconduct was an insufficient period to be considered a mitigating factor, despite evidence that misconduct was aberrational, had not recurred, and had resulted from lax supervision of staff rather than venality.

[12] **745.10 Mitigation—Remorse/Restitution—Found**
Voluntary restitution to all but one client prior to the involvement of the State Bar was a mitigating factor.

[13] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
420.00 Misappropriation
Where attorney held settlement draft uncashed pending review of adequacy of settlement amount, attorney's misconduct consisted of failure to follow through, and improper handling of client funds, rather than misappropriation.

[14] **571 Aggravation—Refusal/Inability to Account—Found**
591 Aggravation—Indifference—Found
691 Aggravation—Other—Found
Failure to make restitution is an aggravating factor; thus, incomplete restitution to clients' medical providers constitutes an aggravating factor.

[15] **420.00 Misappropriation**
Deficiency in respondent's trust account balance, coupled with respondent's grossly negligent handling of trust funds and delegation of responsibility, in and of itself established misappropriation,

even where there was no evidence as to the cause of the shortfall or that it resulted from a deliberate conversion of funds by respondent.

[16] **135 Procedure—Rules of Procedure**
159 Evidence—Miscellaneous
162.19 Proof—State Bar's Burden—Other/General
750.10 Mitigation—Rehabilitation—Found
Where attorney represented to State Bar Court that no disciplinary investigations against him were pending, examiner's failure to rebut this contention, as permitted by rule 573, Trans. Rules Proc. of State Bar, warranted inference that State Bar did not dispute attorney's representation.

[17] **750.10 Mitigation—Rehabilitation—Found**
791 Mitigation—Other—Found
822.53 Standards—Misappropriation—Declined to Apply
If a misappropriation of entrusted funds results from an attorney's laxity in supervising office staff, and not from an intent to defraud, and remedial steps are instituted by the attorney upon discovery of the situation, further underscoring the lack of fraudulent intent, far less discipline than disbarment is appropriate.

[18] **801.30 Standards—Effect as Guidelines**
801.47 Standards—Deviation From—Necessity to Explain
The Standards for Attorney Discipline are treated by the Supreme Court as guidelines for imposing discipline, which it is not bound to follow in a "talismanic fashion," but from which it will generally not depart unless there is a compelling reason for doing so.

[19 a, b] **204.90 Culpability—General Substantive Issues**
791 Mitigation—Other—Found
822.53 Standards—Misappropriation—Declined to Apply
While gross negligence is not a defense to a charge of misappropriation, the absence of evidence of intentional misappropriation is a substantial factor in mitigation.

[20] **174 Discipline—Office Management/Trust Account Auditing**
A trust account auditing requirement and a course on law office management were appropriate conditions of probation where respondent's misconduct included mishandling of client funds and stemmed from his failure to supervise his office staff properly.

ADDITIONAL ANALYSIS

Culpability
Found
221.12 Section 6106—Gross Negligence
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
420.12 Misappropriation—Gross Negligence
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
221.50 Section 6106
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.54 Misappropriation—Not Proven

Aggravation

Found

521 Multiple Acts
541 Bad Faith, Dishonesty
582.10 Harm to Client
601 Lack of Candor—Victim

Declined to Find

575.90 Refusal/Inability to Account
595.90 Indifference

Standards

801.41 Deviation From—Justified

Discipline

1013.08 Stayed Suspension—2 Years
1015.04 Actual Suspension—6 Months
1017.08 Probation—2 Years

Probation Conditions

1021 Restitution
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management
1026 Trust Account Auditing

Other

171 Discipline—Restitution

OPINION

PEARLMAN, P.J.:

Respondent was admitted to the practice of law in 1979 and has no prior disciplinary record. The misconduct charged in the matter before us involves grossly negligent office practices which occurred from November 1985 through November 1986. This proceeding involved a total of four matters, two in which notices to show cause were filed (and then consolidated), and two investigation matters (involving the handling of a single matter for different plaintiffs) which were consolidated with them and tried by stipulation, without a notice to show cause having been filed.

The consolidated matters were heard by a referee appointed under the former volunteer State Bar Court system, who found culpability on all counts except one. Respondent was found culpable on the two consolidated investigation matters and one of the original notices to show cause, each of which involved misappropriation of client funds, failure to pay medical liens, and failure to communicate.[1] Based thereon, the referee recommended three years suspension, stayed, three years probation and one year actual suspension.

The remaining count involved checks written on respondent's general office account (*not* his trust account) which were drawn on insufficient funds, but not dishonored. The bank paid all of these checks (hereafter "the NSF checks") pursuant to a standing arrangement with respondent that he would cover them by the next day and pay a service charge. The referee dismissed this count.

Both parties requested review. The examiner contends that (1) the referee should not have dismissed the count involving the NSF checks, and (2) the appropriate discipline is disbarment. Respondent contends that (1) although he is culpable of misconduct in the three counts involving clients, the record demonstrates gross negligence due to insufficient staff supervision and not intentional misconduct; (2) some of the referee's findings and conclusions on those counts contain factual and legal errors; and (3) the recommended discipline is excessive (specifically, the period of actual suspension should not exceed six months if all of the findings are upheld, and less if respondent's culpability is reduced per respondent's other arguments).

Upon our independent review of the record we adopt most of the referee's culpability determinations, but find that respondent was grossly negligent and did not intentionally misappropriate funds from his clients. We therefore modify the recommended discipline in light of relevant Supreme Court precedent to include six months actual suspension and until restitution is completed.

FACTS

The referee made quite detailed findings of fact on the counts as to which he found culpability, which are, for the most part, supported by the evidence and not contested by either party. With the exception of a few (albeit significant) modifications discussed *post*, we adopt them. The following discussion is based on the undisputed portions of the findings, supplemented with factual details from the record.

A. Ervin Matter
(Investigation Matter No. 86-O-14499)

Complaining witness Willie James Ervin was in an automobile accident in June 1985. In July 1985, he hired respondent (through Haroun

1. Because the parties stipulated that the two investigation matters could be tried without the filing of a notice to show cause, there is no record of the exact allegations and charges made in those two matters. The State Bar (with respondent's consent) showed the referee a proposed stipulation which had been prepared by the State Bar but to which the parties had not agreed, and asked that the stipulation be treated as if it were a notice to show cause. (8/23/89 R.T. pp. 4-6.) However, the proposed stipulation was not marked as an exhibit or otherwise entered into the record, though some of its contents may be gleaned from references to it made by respondent's counsel in his closing argument. (See 8/23/89 R.T. pp. 134-141.) In any event, the parties expressly stipulated that the statute and rule violations charged in the two investigation matters were identical to those charged in the notice to show cause in the factually similar Moore matter. (8/23/89 R.T. pp. 143-145.)

Alhambra, respondent's office manager) to pursue personal injury and property damage claims on his behalf. (8/23/89 R.T. pp. 7-9, 16.) After November 1985, neither respondent nor Alhambra returned Ervin's frequent telephone calls about the status of the case. (8/23/89 R.T. pp. 15, 22-23.)

In December 1985, the matter was settled on Ervin's behalf without his consent, and his endorsement was placed on the settlement checks by someone in respondent's office without Ervin's consent.[2] (8/23/89 R.T. pp. 16-17, 19-20; exhs. 16, 17.) Neither respondent nor his staff told Ervin the case had settled, or paid Ervin his share of the settlement, until November 1986, almost a year after the matter was settled. (8/23/89 R.T. pp. 23-26.) In the interim, respondent's trust account balance fell below the amount respondent's office had received on Ervin's behalf and deposited into the trust account. (8/23/89 R.T. p. 18; exh. 9.)

B. Swanson Matter
(Investigation Matter No. 87-O-11719)

Complaining witness Mary Swanson (hereafter "Swanson") and her minor children (twins, named Jason and Jennifer (8/23/89 R.T. pp. 48, 58)) were in the car with Ervin at the time of his June 1985 accident. (8/23/89 R.T. pp. 21, 48.) Ervin and the Swansons were sharing a residence at that time, although they had different addresses by the time of trial. (8/23/89 R.T. pp. 37-38, 73; compare 8/23/89 R.T. p. 6 with 8/23/89 R.T. p. 47.) Ervin referred the Swansons to respondent, and Swanson retained respondent to pursue personal injury claims for herself and the children in connection with the accident. (8/23/89 R.T. pp. 48, 70-71.)

As did Ervin, Swanson testified that respondent did not return her telephone calls; that her case was settled without her knowledge or consent; and that the endorsements on her settlement checks were not her signature and were not made with her consent. (8/23/89 R.T. pp. 51-59; exhs. 22, 23.) As with Ervin, respondent delayed paying Swanson and Jennifer their shares of the settlement until November 1986, nearly a year after the settlement drafts were received. (8/23/89 R.T. p. 62; exh. 24.) Also as with Ervin, in the interim, respondent's trust account balance fell below the amount of the settlement funds he had received on Swanson's and Jennifer's account. (Exh. 9.) With respect to Jason's personal injury claim, respondent never cashed the settlement check, and Jason never received any funds in settlement of his claim. (See 8/23/89 R.T. pp. 63-67.)

C. Moore Matter (No. 87-O-11321)

Complaining witness Bennie Moore's story was very similar to those of Ervin and Swanson. Moore retained respondent in August 1985, through Alhambra, to represent her in an automobile accident case. (6/14/89 R.T. pp. 89-91.) Her case was settled at the end of December 1985 without her knowledge or consent,[3] and her name was endorsed on the settlement check without her authority. (6/14/89 R.T. pp. 92, 95-96; exhs. 4, 5.) Moore was not paid her share of the settlement until August 1986. (6/14/89 R.T. pp. 98-100; exh. 8.) Prior to August 1986, respondent failed to return telephone calls from Moore and her husband. (6/14/89 R.T. pp. 122-126.) As with Ervin and Swanson, between the date Moore's settlement proceeds were deposited in respondent's trust account and the date she received her share, the

2. There was no evidence that respondent knew of the client's lack of consent. Respondent was frequently out of his office during this period in connection with civil rights litigation. (6/14/89 R.T. pp. 140-141.) He had instructed Alhambra to obtain clients' oral consent before placing settlement funds in the trust account with a simulated client signature. (6/14/89 R.T. pp. 132-133; 6/15/89 R.T. pp. 31-32.) On review, respondent has conceded through his counsel that his office procedures during this period were negligent, and "probably" grossly negligent.

3. The referee resolved conflicting evidence on this point, and we defer to his finding, which respondent has not contended is unsupported by the evidence. (Decision at pp. 7-8 [finding of fact 5(b)].) However, there is documentary evidence in the record of a four-minute telephone call in December 1985 from respondent's office to Moore's telephone number. (6/15/89 R.T. pp. 8-10; exh. K.) (Respondent's counsel referred to this in his brief on review as an 18-minute call, but this characterization appears to have been based on a misreading of the relevant exhibit. (Exh. K.))

balance in the trust account fell below the amount owed to Moore. (Exh. 9.)

D. NSF Check Matter (No. 86-O-15106)

On 52 separate occasions during September, October and November 1986, respondent's general office account did not have sufficient funds to cover checks drawn on the account at the time the checks were presented for payment. All of these checks were paid by the bank even though the account had insufficient funds.[4] (6/14/89 R.T. pp. 20-21.) Respondent was assessed a $10.00 service charge each time this occurred. (6/15/89 R.T. pp. 16-18.)

Both respondent and Diane McDaniels, who was operations manager of respondent's bank branch at the relevant time (6/15/89 R.T. p. 15), testified that during this period, respondent had an informal arrangement with the bank regarding insufficient funds checks drawn on respondent's general office account. The arrangement was that upon receipt of an NSF check, the bank would call respondent (or his office personnel) and arrange for him to come in and deposit funds to cover the check later that day or the next day. (6/14/89 R.T. pp. 38-40, 43-44; 6/15/89 R.T. pp. 15-16, 19.) After making such a call, the bank would proceed to pay the check, and charge respondent a $10.00 fee. (6/15/89 R.T. pp. 16-18.) This arrangement was a courtesy to respondent as a long-standing customer. (6/15/89 R.T. p. 18.) It was oral and informal, and could have been terminated by the bank at any time. (6/15/89 R.T. p. 22.) However, it would not have been terminated without advance notice to respondent. (6/15/89 R.T. pp. 21-23.) By September 1986, the arrangement had been in effect and had been honored by the bank for a couple of years. (6/14/89 R.T. pp. 47-48.)

DISCUSSION

A. Dismissal of NSF Check Matter

The examiner requests reversal of the referee's recommendation of dismissal of the NSF check matter, relying on *Rhodes* v. *State Bar* (1989) 49 Cal.3d 50. In that case, the hearing panel had dismissed some of the NSF check counts on the basis of a finding that the attorney had an understanding with the bank that his NSF checks would be covered. The review department had reinstated the counts, finding that "petitioner knew his account had insufficient funds and *had no way of knowing whether his checks would be honored* by the bank." (*Id.* at p. 58, emphasis added.)

Respondent counters persuasively that *Rhodes* v. *State Bar, supra,* 49 Cal.3d 50 is distinguishable. **[1a]** In this matter, the evidence shows that respondent reasonably relied on an arrangement with the bank whereby all of his checks were supposed to be and in fact were paid, despite the inadequate balance in his account. Although oral and informal, this arrangement would not have been terminated without prior notice to respondent. Thus, respondent justifiably believed, with reasonable certainty, that unless and until he was told otherwise by the bank, all of his NSF checks would be paid upon presentment.

[1b] The Supreme Court in *Rhodes* v. *State Bar, supra,* 49 Cal.3d 50 recognized that a justifiable and reasonably certain belief that an NSF check will be paid is a valid defense to an NSF check charge. (*Rhodes* v. *State Bar, supra,* 49 Cal.3d at p. 58, fn. 9, citing *People* v. *Rubin* (1963) 223 Cal.App.2d 825, 835.)[5] In this regard, the situation in this case is very different from that in *Rhodes* v. *State Bar.* Rhodes's bank "did *not* represent that it would honor *all* of [Rhodes's] checks

4. There was some testimony from bank employees, based on "Refer to Maker" stamps present on some of the checks, that some of the checks might have been paid only after being returned to the payee and resubmitted. (See 6/14/89 R.T. pp. 15-17, 21-23; 6/15/89 R.T. pp. 20-21, 26-27.) However, neither of the bank employees was able to state positively that this had occurred. Indeed, there was also testimony that the stamp might have been placed on the checks in error. (6/15/89 R.T. pp. 20-21, 24, 27.) In any event, all of the checks were paid. (6/14/89 R.T. p. 29.)

5. *People* v. *Rubin* was disapproved on other grounds in *People* v. *Poyet* (1972) 6 Cal.3d 530, 536. In *People* v. *Poyet*, the Court disapproved of the suggestion in *People* v. *Rubin* that negotiation of a check does not necessarily represent that there are currently sufficient funds in the bank, but only that in the ordinary course of business the check will be honored.

for insufficient funds." (*Rhodes* v. *State Bar*, *supra*, 49 Cal.3d at p. 58, emphasis added.) Furthermore, Rhodes's arrangement depended on the checks being presented for payment to a particular officer, and Rhodes had no way of knowing whether that would occur or not. (*Id.*) Finally, many of Rhodes's checks had in fact been returned unpaid, and Rhodes "was therefore on notice that *he could not reasonably rely* on the informal agreement." (*Id.*, emphasis added; fn. omitted.)

[1c] In this case, respondent's agreement was with a particular operations officer, and could have changed if and when that officer left the bank, but, unlike in *Rhodes* v. *State Bar*, *supra*, 49 Cal.3d 50, the agreement automatically applied to all checks presented while it was in effect, and it would not have been terminated without prior notice. These distinctions are critical. Here, contrary to the examiner's claim and contrary to the facts in *Rhodes* v. *State Bar*, respondent did not put his creditors at risk of nonpayment by writing them NSF checks. Thus, the State Bar did not prove by clear and convincing evidence that any of respondent's checks had to be resubmitted. Even if they were, however, that was contrary to respondent's arrangement with the bank that they would be honored, and it is undisputed that they were all paid. (6/14/89 R.T. p. 29.) Respondent's belief that his NSF checks would be paid was not only justifiable (based on substantial prior experience with the arrangement) but correct; all of his NSF checks were in fact paid, and no creditor was harmed. These facts distinguish this case not only from *Rhodes* v. *State Bar*, but also from the other NSF check cases cited to us by the parties.[6] We therefore adopt the recommendation of dismissal of this count.

B. Basis for Finding of Moral Turpitude

Respondent has not attacked the referee's conclusions that respondent committed acts of moral turpitude in violation of section 6106 of the Business and Professions Code (hereinafter section 6106). However, as we discuss *post*, to the extent that the referee's conclusion of moral turpitude was based on his finding that respondent was personally involved in settling his clients' cases without their consent or in placing their signatures on checks without their authorization, the conclusion is invalid, because the findings are without evidentiary support. **[2a]** After respondent discovered the problem, respondent did, however, fail to reveal to his clients that his office had received the funds long before he paid them their shares of the settlements.[7] (See 8/23/89 R.T. pp. 42-43, 45, 63, 86; decision at p. 11 [finding of fact 7].)

[2b] Moreover, respondent had been grossly negligent, bordering on reckless, in earlier failing to supervise his staff's handling of client funds and in delegating the handling of personal injury settlements almost entirely to his office staff, with little or no supervision. This gross negligence, coupled with the misappropriation of which respondent was culpable due to the shortfall in his trust account balance that occurred while he was holding his client's funds, constitutes an appropriate basis upon which to base a finding of moral turpitude and of culpability on the section 6106 charge. (See, e.g., *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 37 [misappropriation caused by serious, inexcusable violation of duty to oversee entrusted funds is deemed willful even in the absence of deliberate wrongdoing]; *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 474-475 [gross negligence in handling client funds, shortfall in trust account and careless supervision of his staff constituted moral turpitude notwithstanding attorney's lack of intent to misappropriate funds]; *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 859 [attorney's gross negligence in failing to supervise office staff, resulting in an office practice where his staff signed affidavits and declarations on behalf of others, amounted to moral turpitude].)

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6. See *Tomlinson* v. *State Bar* (1975) 13 Cal.3d 567, 571-572, 577, fn. 13 (attorney disbarred for multiple acts of serious misconduct including issuance during a five-year period of over 550 checks that attorney knew were not backed by sufficient funds and that were returned for insufficient funds; 28 of these checks were drawn on trust accounts, and several remained unpaid as of the hearing date); *Alkow* v. *State Bar* (1952) 38 Cal.2d 257, 264 (attorney suspended for three years for multiple acts of serious misconduct including repeated issuance of both trust account and personal checks "which he *knew* would *not* be honored" [emphasis added]).

7. When respondent explained to Ervin and Swanson that he had reduced his fee, respondent at least implicitly attributed the delay in their receiving payment to the failure of the case to settle earlier rather than to his own failure to disburse the funds promptly. (See 8/23/89 R.T. pp. 42-43, 45, 63, 86.)

On review, the examiner argues that there is yet another basis on which to make a finding of moral turpitude, that is, the simulation of clients' endorsements on settlement checks by respondent's office staff without the clients' prior approval. The examiner cites *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 793-795 in support of this contention. [3a] But *Palomo* v. *State Bar* only holds that an attorney may not endorse a client's name to a check without express authority to perform that particular act. (*Id.* at p. 794.) It does *not* require that such authority must be given formally or in writing. Thus, *Palomo* v. *State Bar* is some authority for the proposition that respondent's reliance on oral client authorization, while risky (as he now acknowledges), did not by itself constitute moral turpitude.[8]

Moreover, the examiner's contention is contrary to California statutes and case law governing check endorsements by authorized agents. [3b] Commercial Code section 3403, subdivision (1), provides that an agent's signature on a negotiable instrument binds the principal if the signature is authorized, and that *no specific form of authorization* is required. The official code comment to the underlying Uniform Commercial Code section indicates that the agent may simply sign the principal's name rather than indicating that he or she is signing as an agent, although it does not recommend this practice. (See 23B West's Ann. Cal. U. Com. Code (1964 ed.) § 3403, p. 267; *id.* (1990 supp.), p. 16; see also *Kiekhoefer* v. *United States Nat. Bank* (1934) 2 Cal.2d 98, 105-108 [holding, under predecessor statute to Cal. U. Com. Code, § 3403, subd. (1), that attorney-in-fact who was authorized to endorse checks made payable to principal validly endorsed check by simulating principal's signature without indicating he was signing as agent].) [4] Based on the foregoing, we decline to find that respondent's reliance on the clients' oral authorization of check endorsement constituted a separate basis for finding moral turpitude.[9]

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8. None of the other cases cited to us by the parties is precisely on point. *Hallinan* v. *State Bar* (1948) 33 Cal.2d 246, 248-249 held that an attorney who simulated a client's signature on a *release*, under a formal power of attorney, should have indicated that he was signing in a representative capacity, since he knew the beneficiary of the release was concerned to obtain the personal signature of the releasor. However, the holding in *Hallinan* was not extended to check endorsements, the legal nature and import of which is markedly different from that of releases.

In *Vaughn* v. *State Bar*, *supra*, 6 Cal.3d at pp. 856, 857-859, the respondent attorney's secretary endorsed and deposited a check made out to the attorney for his fees. As a result of negligent recordkeeping, the attorney's staff later took action to collect the fees, not realizing the payment had been made. The secretary also signed the attorney's name to a *declaration* in that connection. For this and other misconduct, the attorney received a public reproval. The Supreme Court was deeply troubled by the secretary's having signed the declaration, and by the attorney's sloppy recordkeeping, but did *not* indicate that the secretary's having endorsed the *check* on the attorney's behalf was cause for discipline.

Both *Garlow* v. *State Bar* (1982) 30 Cal.3d 912 and *Levin* v. *State Bar* (1989) 47 Cal.3d 1140 involved acts of moral turpitude, but neither case is factually comparable to this matter. The attorney in *Garlow* v. *State Bar* forged a client's signature without authorization on a declaration, and then represented to the court that the signature was genuine and suborned perjury to that effect. (*Garlow* v. *State Bar*, *supra*, 30 Cal.3d at p. 917.) In *Levin* v. *State Bar*, the attorney committed the following misconduct: (1) in a case in which Levin personally was a co-defendant, he represented to the opposing party's attorney that he had settlement authority for his co-defendant which he did not have; (2) in that same matter, he persisted in attempting to contact the opposing party directly rather than through counsel, and (3) in another matter, he settled a case without authority from his client, forged the client's signature on the release and affirmatively represented it as genuine, and mishandled the settlement funds by delivering the client's share in cash to the client's cousin without obtaining a receipt. (*Levin* v. *State Bar*, *supra*, 47 Cal.3d at pp. 1143-1145.) It was Levin's acts of overt dishonesty, not his mere endorsement of his client's name on a check, that led to the moral turpitude finding in that case. (See *id.* at pp. 1145-1146.)

9. *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 286-287, is distinguishable. In *Aronin* v. *State Bar*, the attorney was held to have committed an act of moral turpitude when he wrote his clients' signatures on the verification of a pleading, a practice specifically forbidden by statute. (*Id.* at pp. 286-287, citing Code Civ. Proc., § 446.) The forged client signatures were misleading to the court and opposing counsel, because under the statute the presence of the signatures constituted a representation that the clients personally had signed the verification. Because the statute governing check endorsements affirmatively permits agents to endorse their principals' names, the bank that pays the check does not have a legitimate expectation that the check was endorsed by the payee personally. Accordingly, the endorsements in this matter were not acts of moral turpitude.

C. Respondent's Requested Modifications to Decision

1. Deletion of Conclusions re Violations of Sections 6068 (a) and 6103 of the Business and Professions Code.

Respondent argues on review that the referee's findings of violations of Business and Professions Code sections 6068 (a) and 6103, as to each of the counts on which he found culpability, should be deleted on the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815. The examiner did not address this issue in her reply brief. For the reasons discussed in *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562; *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 617-618, and *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1059-1060, respondent is correct. We do not adopt these portions of the referee's findings and conclusions.

2. Correction of Findings re Respondent's Personal Involvement in Misconduct.

The referee found, in several portions of his decision, that misconduct was committed by "respondent or a member of his staff under his direction." (E.g., decision at p. 3, lines 1-2.) Respondent argues on review that these findings are unsupported by the record, because the undisputed evidence shows that if anyone settled cases or simulated client signatures without the clients' consent, it was not respondent personally, but his office staff, acting contrary to respondent's instructions, and without his knowledge.

Respondent correctly characterizes the evidence. (See, e.g., 6/14/89 R.T. pp. 130-133, 142; 6/15/89 R.T. pp. 31-34; 8/23/89 R.T. pp. 93, 113, 125-127, 129-132.) **[5]** The examiner's sole argument on this point is that respondent remains culpable even if his misconduct was committed by his inadequately supervised office staff rather than by respondent personally. This is correct, of course (see, e.g., *Palomo* v. *State Bar*, *supra*, 36 Cal.3d at pp. 795-796), and respondent does not dispute it. Nonetheless, respondent wishes the findings corrected because his degree of personal involvement is relevant to the degree of his culpability, and thus to the degree of discipline appropriate to his misconduct.[10] **[6 - see fn. 10]** We agree and modify the referee's findings accordingly, as specified below.

Respondent also argues that there is no evidentiary or other basis for the referee's distinction between the "simulation" of client signatures found to have occurred with respect to the Ervin and Swanson matters, and the "forgery" of the client's signature found to have occurred with respect to the Moore matter. Respondent is correct that there is no basis to draw a distinction in this regard between the Moore matter and the other two.

The examiner's brief does not directly respond to this contention. Because the checks were deposited in the trust account, and there was no evidence of any intent to defraud the clients, we believe the referee's use of the expression "simulated" was more appropriate, and modify the findings accordingly as specified below, making the wording consistent with respect to all three counts.

Accordingly, we amend the decision as follows:

(a) *Finding 2.a (Decision p. 3, lines 1-2)*: Change "Respondent or a member of his staff under his direction" to "Due to respondent's grossly inadequate supervision of his staff, a member of respondent's staff".

(b) *Finding 2.b (Decision p. 3, lines 8-10)*: Change "In December 1985, without the prior knowledge or consent of his client, Respondent or a member of his staff under his direction settled Ervin's personal injury claim for $5,000.00" to "In December 1985, due to respondent's grossly inadequate

10. **[6]** As the examiner impliedly acknowledged in her brief on review, misconduct which is technically wilful may be less culpable if it is committed through negligence than if it is committed deliberately. (See, e.g., *Edwards* v. *State Bar*, *supra*, 52 Cal.3d at p. 38 ["As the term is used in attorney discipline cases, 'willful misappropriation' covers a broad range of conduct varying significantly in the degree of culpability."]; *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1367.)

supervision of his staff, a member of respondent's staff settled Ervin's personal injury claim, without Ervin's prior knowledge or consent, for $5,000.00".

(c) *Finding 3.a (Decision p. 4, lines 19-20)*: Change "Respondent or a member of his staff under his direction" to "Due to respondent's grossly inadequate supervision of his staff, a member of respondent's staff".

(d) *Finding 3.b (Decision p. 4, line 28 through p. 5, line 1)*: Change "Respondent or a member of his staff under his direction" to "Due to respondent's grossly inadequate supervision of his staff, a member of respondent's staff".

(e) *Finding 5.b (Decision p. 8, lines 1-2)*: Change "the Respondent, without authorization from Moore, either forged or caused to be forged" to "due to respondent's grossly inadequate supervision of his staff, a member of respondent's staff, without authorization from Moore, simulated".

CONCLUSIONS AS TO CULPABILITY

Besides the conclusion that respondent had violated Business and Professions Code sections 6068 (a), 6103 and 6106 (discussed *ante*), the referee concluded as to each of the Ervin-Swanson and Moore matters that respondent had violated former rules 6-101(A)(2), 8-101(B)(3), and 8-101(B)(4) of the Rules of Professional Conduct.[11] None of these conclusions is challenged by respondent on review, but all are nonetheless before us for reconsideration.

A. Rule 6-101(A)(2).

[7] The conclusion that respondent repeatedly failed to perform competently or acted with reckless disregard in violation of rule 6-101(A)(2) is justified on all counts by the fact that respondent's failure to distribute the settlement funds and pay the medical liens promptly (an aspect of competent performance) resulted from the combination of his grossly negligent office practices and his near-total abdication to Alhambra of the responsibility for negotiating personal injury settlements, obtaining the clients' approval thereof, and handling the settlement proceeds.

B. Rule 8-101(B)(3).

[8] The findings of violation of rule 8-101(B)(3) in failing to maintain complete records and render appropriate accounts in each matter are also justified by the record before us. The testimony with regard to respondent's having given (or at least shown) accountings to his clients was conflicting, and in the Ervin-Swanson matter, though not in the Moore matter (see decision at pp. 8-9 [finding of fact 5.f]), the referee found that respondent *had* shown the clients an accounting. (Decision at pp. 3-4, 5 [findings of fact 2.e, 3.e].) However, the evidence showed in both matters that respondent failed to require his staff to maintain records adequate to ensure that he would know about the receipt of client funds and would be in a position to distribute them promptly upon receipt. This misconduct is adequate to support the rule 8-101(B)(3) violations in both matters despite the fact that respondent did give belated accountings to Ervin and Swanson.

C. Rule 8-101(B)(4).

Rule 8-101(B)(4) requires that funds to which a client is entitled must be paid to the client promptly "as requested by [the] client."[12] (See *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 170.) [9a] In the present case, because the clients did not know that respondent was in possession of their settlement proceeds, and because respondent did not respond to their attempts to communicate during the relevant time period, the clients did not actually request to be paid. Neither the referee nor the parties before us have addressed client demand as a prerequisite for the finding that respondent violated the rule.

11. All further references herein to the Rules of Professional Conduct are to the former rules which were in effect from January 1, 1975, through May 26, 1989.

12. Current rule 4-100(B) of the Rules of Professional Conduct preserves former rule 8-101(B) substantively unchanged.

By failing to inform the clients that he had received their settlement proceeds, respondent plainly violated rule 8-101(B)(1), requiring attorneys to notify clients promptly when they receive funds to which the client is entitled. But respondent was not charged with violating rule 8-101(B)(1) in any of the counts.

Thus, the question is whether respondent should be found culpable of violating rule 8-101(B)(4) because his other, uncharged misconduct (his violation of rule 8-101(B)(1) by failing to notify the clients promptly of the receipt of funds due them) created a circumstance under which the clients had no reason or ability to request payment. In *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 126-127, the Supreme Court specifically refused to hold that failure to transmit to a client funds that were properly payable to that client was a violation of rule 8-101(B)(4) when there was no evidence that the client requested the funds. (See also *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962; *Lawhorn* v. *State Bar*, *supra*, 43 Cal.3d 1357; *Rhodes* v. *State Bar*, *supra*, 49 Cal.3d 50.)

[9b] Since rule 8-101(B)(1) was promulgated to cover precisely the sort of misconduct that occurred in this case, the State Bar should have sought discipline under that rule, and should not have attempted to prosecute under rule 8-101(B)(4) instead, when its elements were not present. Accordingly, we strike the findings of rule 8-101(B)(4) violations as to all three counts. **[10a]** We note, however, that violation of rule 8-101(B)(1) may properly be taken into account as an aggravating circumstance in arriving at the appropriate discipline for respondent's misconduct. (See discussion, *post*.)

AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravation

The referee's decision did not explicitly designate any findings as factors in aggravation. However, his finding of fact number 7 (decision at p. 11) appears to have been intended as an aggravation finding. It includes findings, all of which are supported by substantial evidence, that respondent's misconduct involved multiple acts, harm to clients, concealment, and lack of candor to clients. (See decision at pp. 6, 9 (findings of fact 3.h, 5.g) [clients were contacted by medical lienholders whom respondent had failed to pay]; 8/23/89 R.T. pp. 42-43, 45, 63, 86 [respondent failed to reveal to his clients that the delay in their receiving settlement funds was due to respondent's own negligence].)[13]

While we adopt these aggravating factors, we note that all of the alleged misconduct occurred in two underlying client matters (treating the personal injury case involving Swanson and Ervin as one matter) and derived from a single source (respondent's failure to supervise his employees properly and his poor office practices). **[10b]** We do, however, add a finding of violation of rule 8-101(B)(1) as a factor in aggravation pursuant to standard 1.2(b)(iii). Since respondent was on notice of the nature of the misconduct charged and did not object to culpability under rule 8-101(B)(4) for his conduct in violation of rule 8-101(B)(1), he can hardly object to the inclusion of the same facts as a finding in aggravation instead of culpability. (*Edwards* v. *State Bar*, *supra*, 52 Cal.3d at pp. 35-36.) "Although evidence of uncharged misconduct may not be used as an independent ground of discipline, it may be considered for other purposes relevant to the proceeding." (*Id.*)

B. Mitigation

[11a] In mitigation, respondent introduced evidence that most of the misconduct found in this case—the unauthorized settlements and client endorsements, the failure to pay clients and their medical providers promptly, and the deficient trust account balance—was the product of lax office practices and inadequate employee supervision rather than deliberate venality. (See, e.g., 8/23/89 R.T. pp. 110-113.) While acknowledging that these facts do not elimi-

13. The referee also found that respondent's misconduct involved "bad faith." This finding is not justified by any of the underlying facts found by the referee, and we do not adopt it; as explained in more detail *post*, respondent's misconduct amounted to gross negligence but did not involve bad faith.

nate his culpability, respondent argued them in mitigation, and introduced evidence that he had voluntarily cured the office management problems that led to his misconduct. (See 6/14/89 R.T. pp. 134-135, 146; 8/23/89 R.T. pp. 147-153.) Thus, respondent contended that the misconduct he committed in this matter was aberrational and had not recurred.

The referee essentially accepted respondent's contentions, noting as well that respondent had voluntarily reduced his fees in the Ervin-Swanson case as partial recompense for the delay in payment. (Decision at pp. 12-13; 8/23/89 R.T. pp. 42-44, 86, 118-120.) Respondent has no disciplinary record apart from these consolidated cases. One other matter dating from the same time period was made the subject of a notice to show cause, but the charges were dismissed in that matter (No. 87-O-13117), and the State Bar has not requested review of the dismissal, which has become final. **[11b]** We accept respondent's testimony that his misconduct during the 1985-1986 time period was not typical of the way he practiced law. Nonetheless, as of the date of his misconduct, respondent had only been in practice some six or seven years, which was an insufficient period of trouble-free practice to consider as substantial mitigation. (See, e.g., *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 658.)

[12] We do consider as a mitigating factor respondent's voluntary restitution to all but one of the clients whose funds had been misappropriated as soon as he discovered the problem, well before the involvement of the State Bar. (8/23/89 R.T. p. 152.) On review, the examiner argues that the problems which caused respondent's misconduct have not been cured, because as of the date of trial respondent still had not paid one of the clients (Jason)[14] **[13 - see fn. 14]** and still owed a total of $2,884.95 to his clients' medical providers.[15] The examiner argues that respondent's misappropriation thereby "continued" up to the time of trial. **[14]** Failure to make restitution is legitimately considered as an aggravating factor (standard 2.2(a), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V [hereafter "standard(s)"]), and we find that incomplete restitution to medical providers constitutes an aggravating factor here.

Overall, respondent's evidence adequately demonstrated that his misconduct stemmed from inadequate office management and not from any venal intent. Nonetheless, he was grossly negligent for a substantial period of time in complying with his ethical responsibilities vis-a-vis his personal injury clients. Respondent put on evidence that he had an expanding practice and was preoccupied with civil

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14. **[13]** As to Jason Swanson, respondent did not make restitution. However, he had never misappropriated Jason's settlement funds; rather, he had held the settlement draft uncashed in his file, apparently in order to preserve Jason's claim in the event the settlement amount proved to be inadequate. (See 8/23/89 R.T. pp. 63-67, 81, 101, 105-107 [after receiving settlement draft, respondent refrained from cashing it, and told Swanson he did not want to finalize Jason's settlement until he knew whether complications would arise from Jason's head injuries].) Thus, in Jason's case respondent's misconduct consisted of failure to follow through on the matter, and improper handling of client funds, rather than misappropriation. The Supreme Court's opinion in *Lister* v. *State Bar* (1990) 51 Cal.3d 1117, 1126-1128 is on point. There, an attorney who refrained from depositing a refund check from the Internal Revenue Service to his client was found not culpable of misappropriation. The court reasoned that the attorney had a reasonable belief that depositing the check might compromise the client's position in a tax dispute. (*Id.* at pp. 1127-1128.) However, the court did find the attorney culpable for "caus[ing] the matter to drift for two and one-half years." (*Id.* at p. 1128.) Moreover, respondent's personal involvement in advising Swanson with regard to Jason's settlement is some evidence that he did not totally abdicate his responsibilities in personal injury cases to Alhambra. As of the date of the hearing in this matter, respondent still had the unnegotiated check in his possession, and evidently intended to disburse the funds upon the conclusion of the State Bar proceedings. (8/23/89 R.T. pp. 106-107.) We assume he will disburse the funds promptly upon the issuance of the Supreme Court's order herein, if he has not already done so. In any event, respondent has not objected on review to the referee's recommendation (which we adopt) that respondent be ordered to make restitution to Jason in the form of interest on the funds he obtained for Jason but did not disburse to him.

15. The referee made detailed findings regarding the outstanding balances due certain medical providers, and the amounts that had already been paid. (Decision at p. 7 [chart].) Neither party contends that these findings were in error, and they are supported by the record. We hereby adopt them.

rights litigation during the period in question. (6/14/89 R.T. pp. 140-141, 156; 6/15/89 R.T. pp. 34-35.) Alhambra testified that he generally discussed proposed settlements with respondent before they were finalized, but neither respondent nor Alhambra said they recalled discussing the settlements of these matters specifically. (8/23/89 R.T. pp. 90, 112-113; but see 6/14/89 R.T. pp. 130-132, 152-153 [respondent testified Alhambra was competent to evaluate settlement offers in soft tissue injury cases].)

[15] The checks with the clients' simulated endorsements were deposited in the trust account, and respondent was under the impression that client authorization for the signatures had been obtained. Nevertheless, there were subsequent deficiencies in the trust account balance. There is no evidence concerning the cause for these deficiencies; as a result, there is no indication that they resulted from deliberate conversion of the funds by respondent. Nonetheless, the shortfall in and of itself establishes misappropriation coupled with respondent's grossly negligent handling of client funds and delegation of responsibility for seeing to it that the funds were properly maintained. (*Edwards* v. *State Bar*, *supra*, 52 Cal.3d at p. 37; see also *id.* at pp. 37-39 [three years stayed suspension, probation, and one year actual suspension for misappropriation resulting from mismanagement of trust account]; *Giovanazzi* v. *State Bar*, *supra*, 28 Cal.3d at pp. 474-475 [three years stayed suspension, probation, and thirty days actual suspension for improper business transaction with client, filing dishonest pleadings, and misappropriation of client trust funds resulting from poor supervision of office staff].)

Respondent was already in the process of implementing a better office management system when he discovered the problems that had occurred with these matters. (See, e.g., 6/14/89 R.T. pp. 138-139, 146.) He made restitution to the clients voluntarily before any proceedings were brought and reduced his fees in the Ervin-Swanson matter to make up for the delay. He has since taken additional measures to prevent these problems from recurring (8/23/89 R.T. pp. 148-151, 153), and there is no evidence that they have recurred.[16] **[16 - see fn. 16]**

RECOMMENDED DISCIPLINE

Respondent and the examiner are poles apart on the issue of discipline. The examiner urges disbarment, based primarily on the argument that respondent's evidence in mitigation is insufficient to overcome the presumptive sanction of disbarment for misappropriation. (See standards 1.2(b)(iii), 1.2(b)(v).) The examiner also cites *Chang* v. *State Bar* (1989) 49 Cal.3d 114. In that case, the attorney was disbarred for a single act of misappropriation of approximately $7,900. However, the attorney's course of conduct amounted to deliberate theft rather than mere negligence in handling funds. (*Id.* at pp. 128-129.) Moreover, the attorney lied to the State Bar investigator about the matter, never acknowledged the impropriety of his conduct, and made no efforts at restitution. (*Id.*) There was no mitigating evidence whatsoever and the Supreme Court concluded that there was a high risk that the attorney might commit further misconduct if allowed to continue to practice. That is not the case here.

Respondent argues that the length of recommended actual suspension should be reduced from one year to six months or less based in large part on the precedents of *Waysman* v. *State Bar* (1986) 41 Cal.3d 452 and *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785. In *Palomo* v. *State Bar*, an attorney with one prior instance of discipline (*id.* at p. 790) was found culpable of (1) endorsing a client's name on a $3,000 check without the client's consent; (2) depositing the proceeds in his payroll account; (3) failing to notify the client and pay over the funds promptly, and (4) misappropriating and commingling the funds. (*Id.* at pp. 790-791, 793-795.) Palomo himself had

16. **[16]** Respondent represented to the review department in his brief that, other than the charges involved in this matter and another case that was pending at the time of briefing and oral argument, but which has since been dismissed, there are no other pending disciplinary complaints against respondent. (Other complaints had been filed, but they were all dismissed at the investigation stage.) If there were other investigation matters pending, respondent's reliance on this contention would have given the examiner the right to refer to them to rebut this contention. (Rule 573, Trans. Rules Proc. of State Bar.) We infer from her failure to do so that the accuracy of respondent's representation is not disputed by the State Bar.

endorsed the client's name to the check, but the remaining misconduct resulted from errors by Palomo's office staff rather than any deliberate intent by Palomo to misappropriate the money. (*Id.* at pp. 795, 798.) As in this case, Palomo's lax office management practices did not affect just one client, but pervaded his practice for a period of time. (*Id.* at p. 798.) Palomo was given a one-year stayed suspension and one year probation, with no actual suspension. (*Id.*)

In *Waysman* v. *State Bar*, *supra*, 41 Cal.3d 452, an attorney with no prior record was found culpable of commingling and misappropriating $24,000 from a single client. (*Waysman* v. *State Bar*, *supra*, 41 Cal.3d at p. 454.) The funds were the proceeds of a settlement draft which arrived while Waysman was out of town. Waysman told his secretary to obtain the client's signature, and to deposit the check into the general office account rather than the trust account because it would clear faster than in the latter. (*Id.* at pp. 454-455.) When Waysman returned to his office, he found that his secretary had quit, and her departure combined with other circumstances had left his office finances in considerable disarray. In the confusion, the $24,000 in client funds had been spent. (*Id.* at p. 455.) At the time of the incident, Waysman suffered from alcoholism. (*Id.*) Waysman received a six-month stayed suspension, no actual suspension, and probation for one year and until restitution was made. (*Id.* at p. 459.)

[17] In both *Waysman* v. *State Bar*, *supra*, 41 Cal.3d 452 and *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, the Supreme Court accepted the principle that if a misappropriation occurs due to the attorney's laxity rather than intent to defraud, and if that lack of intent is reinforced by the attorney's having taken remedial steps immediately upon discovery of the problem, far less discipline than disbarment is appropriate. (*Waysman* v. *State Bar*, *supra*, 41 Cal.3d at p. 458; *Palomo* v. *State Bar*, *supra*, 36 Cal.3d at pp. 797-798.) That is precisely the situation in this case.

Since *Waysman* v. *State Bar* and *Palomo* v. *State Bar* were decided, standards were adopted by the State Bar Board of Governors calling for a minimum of one year actual suspension for misappropriation irrespective of mitigating circumstances. (Standard 2.2(a).) In cases involving commingling, the standards call for a minimum of three months actual suspension irrespective of mitigating circumstances. (Standard 2.2(b).) **[18]** The Supreme Court treats the standards as guidelines for imposing discipline which it is not bound to follow in "talismanic fashion" (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221), but will generally depart from only when it sees a compelling reason for doing so. (*Aronin* v. *State Bar*, *supra*, 52 Cal.3d at p. 291; see also *Bates* v. *State Bar*, *supra*, 51 Cal.3d at pp. 1060-1062 [upholding six months actual suspension recommended by former review department for misconduct covered by standard 2.2(a)].)

The Supreme Court has expressly reiterated the basic principle followed in *Waysman* v. *State Bar*, *supra*, 41 Cal.3d 452 and *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785 in cases heard after the promulgation of the standards. (See, e.g., *Lawhorn* v. *State Bar*, *supra*, 43 Cal.3d at pp. 1367-1368; *Edwards* v. *State Bar*, *supra*, 52 Cal.3d at pp. 37-39.) The examiner has not demonstrated that the present matter is distinguishable from this line of cases.[17] **[19a - see fn. 17]**

In *Lawhorn* v. *State Bar*, *supra*, 43 Cal.3d 1357, while stopping short of disbarment, the Supreme Court did order much greater discipline than in *Waysman* v. *State Bar*, *supra*, 41 Cal.3d 452 or *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785: a five-year stayed suspension, with two years actual suspension, for a single misappropriation of some $1,355 committed by an attorney whose acts in intentionally removing client funds from his trust account for fear

17. The examiner's argument regarding respondent's efforts to reform his office practices is discussed *ante*.

[19a] The examiner did argue that the Supreme Court cases differentiating between technically wilful and deliberately venal misappropriation "involved insignificant amounts, substantial mitigation, or both." This contention does not address the fact that the evidence here of respondent's lack of any deliberate intent to misappropriate is of the same general nature as in *Waysman* v. *State Bar*, *supra*, 41 Cal.3d 452 and *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, and constitutes "substantial mitigation" as it did in those cases.

that his ex-wife would attach them were found to have been "foolish and . . . definitely wrong," but not "venal." (*Lawhorn* v. *State Bar*, *supra*, 43 Cal.3d at p. 1367.)

In *Sugarman* v. *State Bar*, *supra*, 51 Cal.3d at pp. 618-619, the Supreme Court imposed three years stayed suspension, probation, and a one-year actual suspension for misconduct consisting of misappropriation of client funds caused by the poor practices of a since-terminated office employee, plus an improper business transaction with another client which had caused unrectified financial loss.

The referee below considered the closest precedent to the present case to be *Hipolito* v. *State Bar*, *supra*, 48 Cal.3d at pp. 627-628, and used it as the basis for his discipline recommendation. (See decision at p. 14.) There, the Supreme Court explained *Lawhorn* v. *State Bar*, *supra*, 43 Cal.3d 1357 further, stating that the two-year actual suspension in that case had resulted from Lawhorn's intentional, affirmative misrepresentation to his client, his attempt to avoid his client, and his failure to make restitution until after the client threatened to report him to the State Bar. (*Hipolito* v. *State Bar*, *supra*, 48 Cal.3d at pp. 627-628.) In *Hipolito* v. *State Bar*, the attorney had misappropriated $2,000 from a client by depositing a settlement check in his general account, after tendering to the client a personal check for the client's share of the settlement. The personal check was returned for insufficient funds, and, as a result of severe financial difficulties, the attorney was unable to make restitution promptly. (*Id.* at p. 624.) In a second matter involving another client, the attorney was found culpable of abandonment and failure to communicate. (*Id.*) In mitigation, the attorney had demonstrated remorse, made restitution voluntarily as soon as he was able, and hired a management firm to prevent his misconduct from recurring. Concluding that the attorney's misconduct "stemmed from inexactitude and insolvency, not greed or venality" (*id.* at p. 628), the Supreme Court ordered three years stayed suspension, three years probation, and actual suspension for one year. (*Id.* at pp. 628-629.)

Subsequently, in *Bates* v. *State Bar*, *supra*, 51 Cal.3d 1056, the Supreme Court addressed another situation involving wilful misappropriation of client trust funds and misrepresentations to the client's new counsel regarding the funds. This misconduct was aggravated by the attorney's delay in making restitution until after the conclusion of the State Bar hearing. In light of mitigating circumstances (primarily alcoholism from which Bates had recovered, but also Bates's 14-year prior record of discipline-free practice and good reputation for competence and integrity), the Supreme Court approved the former review department's recommendation of three years stayed suspension, probation, and only six months actual suspension. (*Id.* at pp. 1060-1062.)

In *Edwards* v. *State Bar*, *supra*, 52 Cal.3d 28, the attorney's misconduct consisted of willful misappropriation of client funds coupled with habitual negligence in handling his client trust account. Mitigating factors included prompt, full restitution, an 18-year clean record of practice, and voluntary steps by the attorney to improve his management of trust funds. The former review department recommended two years of actual suspension, with three years stayed suspension and probation. The Supreme Court rejected the recommended actual suspension of two years in favor of one year. (*Id.* at pp. 38-39.)

In *Lawhorn*, *Hipolito*, *Edwards* and *Bates*, the respondent intentionally committed misconduct under mitigating circumstances. Here, as in *Waysman*, *Palomo*, and *Giovanazzi*, there is no evidence of intentional misappropriation. **[19b]** While respondent's gross negligence does not constitute a defense to culpability, the cases discussed, *ante*, demonstrate that the absence of proof of intentional misappropriation is a factor in mitigation affecting the appropriate discipline.

Respondent does not argue that no actual suspension is appropriate on the facts of this case. Indeed, here there are several factors militating in favor of some period of actual suspension: multiple victims; lengthy period of inattention to responsibilities; incomplete restitution; and no excuse for the misconduct based on serious personal problems such as alcoholism or family or financial difficulties as in *Waysman*, *Sugarman*, *Bates*, *Lawhorn* and *Hipolito*. On the other hand, in *Bates*, *Edwards*, *Hipolito* and *Lawhorn*, the attorneys committed the misappropriations through their own personal acts, whereas

here, as in *Waysman*, *Palomo* and *Giovanazzi*, although technically wilful, the misappropriations occurred without respondent's actual knowledge or participation. Respondent's lengthy period of lax supervision is troubling, but it is mitigated by his subsequent institution of better office practices to prevent recurrence of the problem; voluntary restitution to all the clients whose checks were wrongly cashed by his office; and reduction of fees to offset the harm done by delay. Nonetheless, restitution remains incomplete with respect to the medical providers and one client has not yet received his settlement funds.

Upon independent review of the record and analysis of relevant case law in light of our more limited findings of culpability, we modify the referee's recommended discipline and recommend two years suspension, stayed, with two years probation on conditions including actual suspension for six months and until restitution is made as specified in our formal recommendation, *post*.

[20] In light of the nature of respondent's misconduct, we have added to the probation conditions recommended by the referee a provision requiring periodic auditing of respondent's trust account(s), if any. In view of respondent's past difficulties in properly supervising his office staff, we further recommend that, before resuming the practice of law, respondent provide his probation monitor referee with written certification that respondent has attended in its entirety a course or seminar in law office practices or management conducted by the California Continuing Education of the Bar (CEB) or a similar course of study approved in advance by the probation monitor referee. (See *Aronin* v. *State Bar*, *supra*, 52 Cal.3d at pp. 292-293; *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 782-783.) We also recommend that respondent be required to take and pass the newly adopted California Professional Responsibility Examination within one year, and that he be ordered to comply with rule 955, California Rules of Court.

FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent be suspended from the practice of law in California for two (2) years; that execution of the suspension be stayed, and that respondent be placed on probation for two (2) years on the following conditions:

1. That respondent shall be suspended from the practice of law in California during the first six (6) months of said period of probation and until respondent makes restitution as follows and provides satisfactory evidence thereof to the Probation Department of the State Bar Court (or shows to the satisfaction of his probation monitor that payment was made prior to the issuance of the Supreme Court's order herein):

(a) Payment to clients as follows:

(i) to Willie Ervin, ten percent (10%) per annum interest on $5,500.00 for the period from December 15, 1985, through November 15, 1986;

(ii) to Mary Swanson, ten percent (10%) per annum interest on $4,575.00 for the period from January 15, 1986, through November 15, 1986;

(iii) to Jennifer Swanson, ten percent (10%) per annum interest on $1,312.50 for the period from January 15, 1986, through November 15, 1986;

(iv) to Jason Swanson, $1,600.00, plus ten percent (10%) per annum interest for the period from June 5, 1987, through the date payment is or was made to Jason Swanson of such $1,600.00; and

(v) to Bennie Moore, ten percent (10%) per annum interest on $4,412.85 for the period from December 31, 1985, through August 11, 1986; and

(b) Payments of medical liens:

(i) $44.70, plus interest at ten percent (10%) per annum from November 25, 1985, to the date said $44.70 is or was paid, to the Association of Medical Group Specialists on account of Willie Ervin;

(ii) $2,142.25, plus interest at ten percent (10%) per annum from January 15, 1986, to the date said $2,142.25 is or was paid, to Superior Care on account of Mary Swanson; and

(iii) $698.00, plus interest at ten percent (10%) per annum from January 15, 1986, to the date said $698.00 is or was paid, to Superior Care on account of Jennifer Swanson;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than thirty (30) days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

4. That if respondent is in possession of clients' funds, or has come into possession thereof during the period covered by each quarterly report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(i) Money received for the account of a client and money received for the attorney's own account;

(ii) Money paid to or on behalf of a client and money paid for the attorney's own account; and

(iii) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "clients' funds account";

(c) That respondent has maintained a permanent record showing:

(i) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(ii) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "clients' funds account(s)" as appears in monthly bank statements of said account(s);

(iii) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held; and

(iv) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences; and

(d) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

5. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the

period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar;

6. That prior to resuming the practice of law, respondent shall provide his probation monitor referee with written certification that respondent has attended in its entirety a course or seminar in law office practices or management conducted by the California Continuing Education of the Bar (CEB), or a similar course of study approved in advance by the probation monitor referee.

7. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

8. That respondent shall promptly report, and in no event in more than ten (10) days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

9. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective; and

10. That at the expiration of the period of this probation, if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of three (3) years shall be satisfied and the suspension shall be terminated.

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within thirty (30) calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the order showing his compliance with said order.

It is further recommended that respondent be ordered to take and pass the California Professional Responsibility Examination prescribed by the State Bar within one (1) year from the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT B

A Member of the State Bar

[No. 88-TT-xxxxx (confidential matter)]

Filed April 22, 1991

SUMMARY

In an involuntary inactive enrollment proceeding pursuant to Business and Professions Code section 6007(b)(3), a hearing judge ordered a mental examination of the respondent pursuant to Business and Professions Code section 6053. After respondent refused to undergo the mental examination, the judge applied rule 644 of the Transitional Rules of Procedure of the State Bar of California to presume the existence of facts warranting respondent's involuntary transfer to inactive status. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent's appointed counsel requested review. The review department held that the standard of proof for involuntary inactive enrollment is clear and convincing evidence, and that the test for the constitutional validity of a mental examination order is whether the mental examination serves a compelling government interest and constitutes the least intrusive means of accomplishing that interest. The review department concluded that section 6053 does not violate the California constitutional right of privacy because it serves a compelling government interest in protecting the public, courts, and profession from mentally incompetent attorneys and because its grant of discretion to order a mental examination is consistent with the requirement that the least intrusive means be used to satisfy the compelling government interest. The review department also held that the rules governing an involuntary inactive enrollment proceeding incorporate by reference the requirement in the civil discovery statutes that a mental examination order must rest on a finding of good cause. Because the examiner and the hearing judge did not comply with the good cause requirement in this case, and because it had not been shown that a compulsory mental examination constituted the least intrusive means of ascertaining the respondent's mental condition, the review department reversed the hearing judge's decision and remanded the case for further proceedings.

The review department also held that the probable cause determination necessary for the initiation of an involuntary inactive enrollment proceeding pursuant to Business and Professions Code section 6007(b)(3) does not suffice as good cause to order a mental examination, and that a determination of mental incompetency does not necessarily require a mental examination. Further, the review department held that rule 644 of the Transitional Rules of Procedure of the State Bar of California must be interpreted as merely allowing a permissive inference of mental infirmity, rather than shifting the burden of proof, if an attorney fails without good cause to undergo a mental examination as ordered.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

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HEADNOTES

[1] **101 Procedure—Jurisdiction**
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
2119 Section 6007(b)(3) Proceedings—Other Procedural Issues
Decisions in involuntary inactive enrollment proceedings under section 6007(b) are reviewable by the review department pursuant to rules 450-453, Trans. Rules Proc. of State Bar.

[2 a, b] **162.11 Proof—State Bar's Burden—Clear and Convincing**
2115 Section 6007(b)(3) Proceedings—Burden of Proof
2210.90 Section 6007(c)(2) Proceedings—Other Procedural Issues
Like the standard of proof in disciplinary proceedings and in proceedings under section 6007(c), the standard of proof in involuntary inactive enrollment proceedings under section 6007(b)(3) is clear and convincing evidence.

[3] **199 General Issues—Miscellaneous**
802.21 Standards—Definitions—Prior Record
2190 Section 6007(b)(3) Proceedings—Miscellaneous
2290 Section 6007(c)(2) Proceedings—Miscellaneous
A proceeding for involuntary inactive enrollment is not disciplinary in nature.

[4 a, b] **113 Procedure—Discovery**
193 Constitutional Issues
2113 Section 6007(b)(3) Proceedings—Mental or Physical Examination
The test for the constitutional validity of a mental examination order is whether the mental examination serves a compelling government interest and constitutes the least intrusive means of accomplishing that interest. Mere convenience or avoidance of administrative costs does not make a means the least intrusive; otherwise the overriding value would be expediency, not the compelling government interest.

[5] **101 Procedure—Jurisdiction**
193 Constitutional Issues
As a sui generis arm of the Supreme Court, the State Bar Court may recommend that the Supreme Court declare a statute or rule unconstitutional, but in proceedings not requiring Supreme Court action, the State Bar Court's authority is limited to interpreting existing law.

[6] **113 Procedure—Discovery**
193 Constitutional Issues
2113 Section 6007(b)(3) Proceedings—Mental or Physical Examination
Section 6053, which allows the State Bar Court to order a mental examination when an attorney's mental condition is a material issue in a State Bar proceeding, does not violate the California constitutional right of privacy, because section 6053 serves a compelling government interest in

protecting the public, courts, and profession from mentally incompetent attorneys and because section 6053's grant of discretion to order a mental examination may be construed so as to allow such examinations to be ordered only when they are the least intrusive means to satisfy the compelling government interest. In addition, the limited distribution of the mental examination report and the confidentiality of the proceeding serve as further protections of the attorney's privacy and thereby bolster the constitutionality of section 6053.

[7] **113 Procedure—Discovery**
135 Procedure—Rules of Procedure
194 Statutes Outside State Bar Act
2113 Section 6007(b)(3) Proceedings—Mental or Physical Examination
The rules governing the proceedings for the transfer of an attorney to inactive status incorporate by reference Code of Civil Procedure section 2032(d). (Rules 315, 321, 643, Trans. Rules Proc. of State Bar.) Proceedings to obtain an order for a mental examination under section 6053 must comply with the procedural and substantive requirements of Code of Civil Procedure section 2032(d).

[8] **113 Procedure—Discovery**
193 Constitutional Issues
194 Statutes Outside State Bar Act
2113 Section 6007(b)(3) Proceedings—Mental or Physical Examination
Where no evidence or finding indicated that a compulsory mental examination constituted the least intrusive means of determining a respondent's mental condition, the issuance of mental examination orders violated not only the applicable statutory requirements but also the respondent's California constitutional right of privacy.

[9] **169 Standard of Proof or Review—Miscellaneous**
193 Constitutional Issues
2113 Section 6007(b)(3) Proceedings—Mental or Physical Examination
2115 Section 6007(b)(3) Proceedings—Burden of Proof
The probable cause determination necessary for the initiation of an involuntary inactive enrollment proceeding pursuant to section 6007(b)(3) does not suffice to order a mental examination pursuant to section 6053. Such an order necessitates the much stronger procedural and constitutional safeguards afforded by showings from the State Bar of "good cause" and "least intrusive means."

[10 a-c] **113 Procedure—Discovery**
148 Evidence—Witnesses
159 Evidence—Miscellaneous
193 Constitutional Issues
2113 Section 6007(b)(3) Proceedings—Mental or Physical Examination
2115 Section 6007(b)(3) Proceedings—Burden of Proof
A determination of mental incompetency does not require a psychiatric examination. Witness testimony regarding a respondent's behavior and documents allegedly reflecting the respondent's mental infirmity may be introduced as evidence of incompetency, and a qualified psychiatrist may be appointed to render an opinion about the respondent's mental condition on the basis of such testimonial and documentary evidence. Then, if the judge remains unable to make the necessary determination without a mental examination of the respondent and the respondent refuses to consent to such an examination, an order for a compulsory mental examination may be justified as the least intrusive means of accomplishing the government's compelling interest in protecting the public, courts, and profession from mentally incompetent attorneys.

[11 a-d] **107 Procedure—Default/Relief from Default**
113 Procedure—Discovery
135 Procedure—Rules of Procedure
147 Evidence—Presumptions
161 Duty to Present Evidence
169 Standard of Proof or Review—Miscellaneous
2113 Section 6007(b)(3) Proceedings—Mental or Physical Examination
2115 Section 6007(b)(3) Proceedings—Burden of Proof

Although rule 644 of the Transitional Rules of Procedure purports to allow a presumption affecting the burden of proof if an attorney fails without good cause to undergo an ordered mental examination, rule 644 must be interpreted as merely allowing a permissive inference of mental infirmity, in order to ensure due process. Rule 644 would not be valid if it operated to relieve the examiner of the burden of proving mental incompetence by clear and convincing evidence. The presumption authorized by rule 644, if applied, would conflict with the appropriate presumption that an attorney remains mentally competent to practice law in the absence of proof to the contrary, and would be tantamount to the imposition of a default judgment for failure to obey a discovery order, in violation of rule 321 of the Transitional Rules of Procedure.

[12] **192 Due Process/Procedural Rights**
194 Statutes Outside State Bar Act
2190 Section 6007(b)(3) Proceedings—Miscellaneous
2290 Section 6007(c)(2) Proceedings—Miscellaneous

The facts of each case will determine whether a particular rule of civil or criminal law should be applied in State Bar proceedings to ensure due process. This principle applies in involuntary inactive enrollment proceedings as well as disciplinary proceedings.

[13 a, b] **147 Evidence—Presumptions**
162.19 Proof—State Bar's Burden—Other/General
2115 Section 6007(b)(3) Proceedings—Burden of Proof

An attorney's license to practice law creates a continuing presumption, in the absence of proof to the contrary, that the attorney is not only morally fit but also mentally competent to practice law. This presumption underlies the rule in disciplinary proceedings that all reasonable doubts are to be resolved in favor of respondents and that, if equally reasonable inferences may be drawn from a fact, the inference to be accepted is the one leading to a conclusion of innocence.

ADDITIONAL ANALYSIS

Other

2125 Section 6007(b)(3) Proceedings—Inactive Enrollment Not Ordered

OPINION

PEARLMAN, P. J.:

We review the decision of a hearing judge of the State Bar Court to enroll respondent[1] as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6007, subdivision (b), paragraph (3).[2] Pursuant to section 6053, the hearing judge ordered a mental examination of respondent.[3] Respondent refused to undergo the mental examination, and the hearing judge applied rule 644 of the Transitional Rules of Procedure of the State Bar of California[4] to presume the existence of facts warranting transfer of the member to inactive status.[5] Because the mental examination order by the hearing judge did not rest on a finding of good cause for its issuance in accordance with Code of Civil Procedure section 2032, subdivision (d) and a finding that the order was the least intrusive means of determining respondent's mental condition, we reverse the decision below and remand the case for further proceedings in accordance with this opinion.

I. FACTS AND PROCEEDINGS BEFORE THE STATE BAR COURT

Respondent was admitted to the practice of law in this state more than 15 years ago and has no record of discipline.

In October 1988, the State Bar filed a verified application informing respondent that the Office of Trial Counsel would move the State Bar Court to issue an order for respondent to undergo a mental examination pursuant to Business and Professions Code section 6053 and to issue a notice to show cause for respondent's inactive enrollment pursuant to section 6007 (b).

Attached to the application was a memorandum of points and authorities in which the examiner stated

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1. Proceedings pursuant to Business and Professions Code section 6007 (b) are required to be confidential. (Trans. Rules Proc. of State Bar, rule 225(a)(i).) Because this case raises important issues of first impression, the examiner and respondent's appointed counsel have consented to the publication of this opinion omitting the identification of respondent by name. All statutory references herein refer to the Business and Professions Code, unless otherwise noted.

2. At the time this proceeding began in the fall of 1988, section 6007, subdivision (b), paragraph (3) provided that the Board of Governors of the State Bar shall involuntarily transfer a member of the State Bar to inactive status if "[a]fter notice and opportunity to be heard before the board or a committee, the board finds that the member, because of mental infirmity or illness, or because of the habitual use of intoxicants or drugs, is (i) unable or habitually fails to perform his or her duties or undertakings competently, or (ii) unable to practice law without substantial threat of harm to the interests of his or her clients or the public. No proceeding pursuant to this paragraph shall be instituted unless the board or a committee finds, after preliminary investigation, or during the course of a disciplinary proceeding, that probable cause exists therefor." Since January 1, 1989, section 6007, subdivision (b), paragraph (3) has also provided that "[t]he determination of probable cause is administrative in character and no notice or hearing is required." Section 6086.5 authorizes the State Bar Court to act in place of the Board of Governors in "disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of Section 6007," as provided by the Transitional Rules of Procedure of the State Bar of California.

3. Section 6053 provides that if "the mental or physical condition of [a] member of the State Bar is a material issue [in an investigation or proceeding], the board or the committee having jurisdiction may order the member to be examined by one or more physicians or psychiatrists designated by it. The reports of such persons shall be made available to the member and the State Bar and may be received in evidence in such investigation or proceeding."

4. All references to rules herein refer to the Transitional Rules of Procedure of the State Bar of California, effective September 1, 1989, unless otherwise noted.

5. Rules 640 through 645 govern the involuntary transfer of a member to inactive status under section 6007 (b). Rule 644 states that "[u]pon failure without good cause of the member to obey an order of the hearing panel for physical or mental examination of the member, the existence of facts warranting transfer of the member to inactive status may be presumed. Such presumption shall be a 'presumption affecting the burden of proof' as defined in Evidence Code sections 605 and 606."

Evidence Code section 605 defines a presumption affecting the burden of proof as "a presumption established to implement some public policy." Evidence Code section 606 states that "[t]he effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

that three investigation matters were pending against respondent. The examiner alleged that respondent was suffering from a mental infirmity which might affect respondent's ability to defend against charges or assist counsel in the defense of any disciplinary proceedings. The examiner asserted that the pending investigation matters could not proceed to a determination until the State Bar Court determined whether respondent should be transferred to inactive status. Also attached to the application was the examiner's declaration, which set forth information about the matters which were later to constitute the counts in the notice to show cause for the current State Bar proceeding.

In November 1988, the State Bar Court held a hearing concerning the Office of Trial Counsel's application for the issuance of a mental examination order and notice to show cause. Respondent participated in this hearing, but did not appear at the portion of the hearing continued to the following month.

In December 1988, the examiner filed an ex parte application for an independent mental examination in the current State Bar Court proceeding. The State Bar Court referee issued a notice to show cause setting forth the counts agalnst respondent and ordered respondent to submit to psychiatric evaluation within ten weeks.

In June 1989, the State Bar Court appointed counsel for respondent pursuant to rule 641 and, on its own motion, extended the date for respondent to undergo a psychiatric evaluation to August 31, 1989. The chief deputy clerk of the State Bar Court independently engaged a psychiatrist to conduct the ordered examination of respondent, informed respondent's appointed counsel of the actions taken regarding the psychiatric examination, and urged respondent's counsel to make every effort to ensure that respondent kept his appointment with the psychiatrist. In a declaration dated September 22, 1989, the psychiatrist stated that neither respondent nor his appointed counsel had contacted the psychiatrist to arrange for respondent's psychiatric evaluation.

In August 1989, following the appointment of full-time hearing judges to replace volunteer referees in the State Bar Court, this proceeding was assigned to a hearing judge, who presided from then onwards over the matter. In December 1989, the hearing judge held a hearing at which the examiner and respondent's appointed counsel appeared, but at which respondent did not appear. At this hearing, the examiner moved that, pursuant to rule 644, the existence of facts warranting respondent's transfer to inactive status be presumed. Concluding that the examiner had failed to show by clear and convincing evidence that respondent's failure to comply with the psychiatric examination order was without good cause, the hearing judge denied the examiner's motion.

At the December hearing, respondent's appointed counsel raised various objections to the order requiring respondent to undergo a psychiatric examination. Among these objections was the argument that the order violated respondent's fundamental right of privacy. The hearing judge acknowledged that a psychiatric examination would invade respondent's privacy, but determined that such an invasion was reasonable because of a compelling interest in inquiring into respondent's mental fitness to practice law. Also, the judge indicated that probable cause for requiring a psychiatric examination had been established pursuant to section 6007 (b)(3). The judge did not consider any less intrusive means of determining whether respondent was mentally competent to practice law.

At the conclusion of the December hearing, the hearing judge arranged to continue the case to April 1990. The judge also indicated that, pursuant to section 6053, respondent would be ordered to undergo a psychiatric examination before the April hearing.

In an order filed in January 1990, the hearing judge announced the intention to appoint one of three named psychiatrists to examine respondent, enclosed curricula vitae for the psychiatrists, and allowed each of the parties 14 days to reject one of the psychiatrists. This order was served on respondent, his appointed counsel, and the examiner. Having received no opposition to any of the three psychiatrists, the hearing judge filed another order in February 1990. This order, which was served on respondent, his appointed counsel, and the examiner, designated

a new psychiatrist to examine respondent and required respondent to be examined by the new psychiatrist not later than March 9, 1990. The record does not indicate that, before issuing the February order, the hearing judge made any determination as to whether a psychiatric examination was the least intrusive means of determining respondent's mental condition.

Acting on his own behalf in April 1990, respondent filed with the State Bar Court a statement addressing the California Supreme Court. The hearing judge construed the statement as a pleading in the current case to challenge the February 1990 order directing respondent to undergo a mental examination by the new psychiatrist. Respondent alleged denial of due process, lack of jurisdiction, invalidity of section 6053, and impropriety of the appointment of the new psychiatrist. In the statement, respondent explained that he had once retained the new psychiatrist to examine a former client. Fearing some sort of conspiracy, respondent indicated that he intentionally had not notified the court earlier of this relationship and had not exercised his option to reject the new psychiatrist.

Later in April 1990, the continued hearing was held pursuant to section 6007 (b)(3). Respondent's appointed counsel and the examiner appeared, but respondent did not appear. The examiner relied solely on rule 644 as creating a presumption shifting the burden of proof to respondent because of failure to undergo a mental examination. Respondent's appointed counsel had been unable to communicate with respondent and offered no evidence in rebuttal.

In May 1990, the hearing judge filed a decision in the matter. The hearing judge found that in the late 1970's respondent had retained the new psychiatrist to evaluate a former client, but that the new psychiatrist had never met respondent, had been advised after filing a written report that respondent was no longer working on the case, and did not initially remember respondent. Further, the hearing judge found that respondent intentionally had failed to notify the court of his prior contact with the new psychiatrist and had not made an appointment for a psychiatric examination with the new psychiatrist. The hearing judge concluded that respondent had not shown good cause for failing to comply with the section 6053 order of February 1990 and that the appointment of the new psychiatrist was valid pursuant to section 6053. Based on this conclusion, the hearing judge applied rule 644 to presume the existence of facts warranting respondent's involuntary transfer to inactive status.

Respondent's appointed counsel requested review of the decision on several grounds.[6] **[1 - see fn. 6]** Counsel argued that section 6053 and the mental examination order issued pursuant to section 6053 violated respondent's right of privacy, as set forth in article 1, section 1 of the California Constitution.[7] Further, counsel claimed that rule 644 is invalid and that the hearing judge improperly applied rule 644 to create a presumption shifting the burden of proof.

II. DISCUSSION

A. Standard of Proof

[2a] We agree with the conclusion of the hearing judge, respondent's appointed counsel, and the examiner that "clear and convincing evidence" is the standard of proof for a proceeding pursuant to section 6007 (b)(3). In disciplinary proceedings, the examiner must prove the respondent's culpability by "convincing proof and to a reasonable certainty."

6. [1] Both parties have treated the decision of the hearing judge below as reviewable by the review department pursuant to rule 450. We agree. All inactive enrollment decisions of referees pursuant to section 6007 (b) were automatically subject to review by the prior volunteer review department under rules 450 to 453 although no express provision so stated. Under section 6086.65 (d) of the State Bar Act, "Any decision or order reviewable by the Review Department and issued by a judge of the State Bar Court . . . may be reviewed . . . upon timely request of a party to the proceeding." A timely request for review having been made, the review department duly set the matter for oral argument and issuance of this opinion on review in accordance with rules 450 to 453.

7. Article 1, section 1 of the California Constitution currently provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

(*Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 226; *Furman* v. *State Bar* (1938) 12 Cal.2d 212, 229-230.) This burden of proof may be referred to as "clear and convincing evidence."

[3] A proceeding for involuntary inactive enrollment is not disciplinary in nature. Section 6007 (b)(3) specifically contrasts a "proceeding pursuant to this paragraph" with a disciplinary proceeding, as does section 6086.5, which authorizes the State Bar Court to handle "disciplinary and reinstatement proceedings and proceedings pursuant to subdivisions (b) and (c) of Section 6007 . . . ."

No case, statute, or rule specifies the standard of proof for a proceeding under section 6007 (b)(3). Nonetheless, the standard of clear and convincing evidence is so basic to State Bar proceedings that any deviation from this standard is ordinarily spelled out in the State Bar Act or the Transitional Rules of Procedure. For example, section 6093 (c) and rule 613 provide that the standard of proof in a probation revocation proceeding shall be "the preponderance of the evidence." Because the rules governing the transfer of an attorney to inactive status contain no such provision, the absence of such a provision indicates that the usual standard of clear and convincing evidence applies.

[2b] This conclusion appears mandated by the California Supreme Court's application of the clear and convincing evidence standard of proof in reviewing an order of involuntary inactive enrollment under section 6007 (c) in the same manner it applies such standard in reviewing orders recommending suspension or disbarment of an attorney. (*Conway* v. *State Bar* (1989) 47 Cal.3d 1107, 1123, 1126.) Although serving different purposes, the remedy arising from both 6007 (c) and 6007 (b) proceedings is the same. In a proceeding under section 6007 (b)(3), an examiner may seek involuntary inactive enrollment of the respondent because the respondent, regardless of whether he or she even has any clients, is mentally unable to perform his or her duties or undertakings competently or to practice law without substantial threat of harm to the interests of the public. Since the right to practice law of an attorney accused of mental incapacity is as important as the right to practice law of an attorney accused of actual wrongdoing, we interpret the clear and convincing evidence standard applied in *Conway* to 6007 (c) proceedings to be equally applicable to 6007 (b) proceedings.

B. Right of Privacy and Mental Examination

In November 1972, California voters amended article 1, section 1 of the state Constitution to include privacy among the inalienable rights of the people. The California Supreme Court has asserted that the concept of privacy relates "to an enormously broad and diverse field" of personal actions and beliefs. (*White* v. *Davis* (1975) 13 Cal.3d 757, 774.)[8] The Court has also explained that the 1972 constitutional amendment did not purport to prohibit all invasions of individual privacy, but did require a "compelling interest" to justify any such invasion. (*Id.* at p. 775; see also *Doyle* v. *State Bar* (1982) 32 Cal.3d 12, 19; *City of Santa Barbara* v. *Adamson* (1980) 27 Cal.3d 123, 131-133; *Britt* v. *Superior Court* (1978) 20 Cal.3d 844, 855-856.) Some cases, however, have indicated that unless an intrusion substantially burdens or affects an individual's privacy, the test for validity is not whether a compelling interest justifies the intrusion, but whether the intrusion is reasonable. (See *Schmidt* v. *Superior Court* (1989) 48 Cal.3d 370, 389-390; *Wilkinson* v. *Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1047, 1051; *Miller* v. *Murphy* (1983) 143 Cal.App.3d 337, 343-348.)

In *Long Beach City Employees Assn.* v. *City of Long Beach* (1986) 41 Cal.3d 937, the California Supreme Court stated that an individual's right of privacy encompasses mental privacy, including thoughts, emotions, expressions, and personality, and that "[i]f there is a quintessential zone of human privacy it is the mind." (*Id.* at pp. 943-944; see also

8. See, e.g., *Griswold* v. *Connecticut* (1965) 381 U.S. 479, 485-486 (privacy of marital relationship); *Stanley* v. *Georgia* (1969) 394 U.S. 557, 564-565 (privacy of liberty to read and observe what one pleases in one's own home); *City of Carmel-By-The-Sea* v. *Young* (1970) 2 Cal.3d 259, 266-268 (privacy of personal financial affairs); *In re Lifschutz* (1970) 2 Cal.3d 415, 431-432 (privacy of psychotherapist-patient relationship).

White v. *Davis*, *supra*, 13 Cal.3d at pp. 774-775.) The Court found "that polygraph examinations inherently intrude upon the constitutionally protected zone of individual privacy." (*Long Beach City Employees Assn.* v. *City of Long Beach*, *supra*, 41 Cal.3d at p. 948.)[9] Because the Court focused on the equal protection issue raised by the plaintiff, it did not determine whether these examinations violated the right of privacy. To make such a determination, the Court said that it would inquire whether the defendant "had demonstrated a compelling government interest in administering the polygraph examinations . . . and whether this interest could be accomplished by less intrusive means." (*Long Beach City Employees*, *supra*, 41 Cal.3d at p. 948, fn. 12.)

A mental examination constitutes a far greater intrusion on individual privacy than a polygraph examination. As the California Supreme Court has observed, an analyst conducting a mental examination undertakes "by careful direction of areas of inquiry to probe, possibly very deeply, into the psyche, measuring stress, seeking origins, tracing aberrations, and attempting to form a professional judgment or interpretation of the examinee's mental condition." (*Edwards* v. *Superior Court* (1976) 16 Cal.3d 905, 911.)[10] **[4a]** Thus, the test for validity of a mental examination order must be whether the mental examination serves a compelling government interest *and* constitutes the least intrusive means of accomplishing that interest.

The requirement for the use of the least intrusive means is "a logical corollary" of the requirement for a compelling government interest. (*Wood* v. *Superior Court* (1985) 166 Cal.App.3d 1138, 1148; see also *City of Carmel-By-The-Sea* v. *Young*, *supra*, 2 Cal.3d at pp. 263, 268.) The conflict between the government's compelling interest and the individual's right of privacy must be unavoidable, because if it can be avoided, "the real conflict is not between the compelling interest and the constitutional interest but between the *means* chosen to achieve the compelling interest and the constitutional interest." (*Wood* v. *Superior Court*, *supra*, 166 Cal.App.3d at p. 1148, original emphasis.) This is why the California Supreme Court requires that the least intrusive means be used to protect the compelling government interest. (*Ibid.*; *Board of Medical Quality Assurance* v. *Gherardini* (1979) 93 Cal.App.3d 669, 680; see also *Robbins* v. *Superior Court* (1985) 38 Cal.3d 199, 213; *Doyle* v. *State Bar*, *supra*, 32 Cal.3d at p. 20; *Committee to Defend Reproductive Rights* v. *Myers* (1981) 29 Cal.3d 252, 270; *Britt* v. *Superior Court*, *supra*, 20 Cal.3d at pp. 855-856.) **[4b]** Mere convenience or avoidance of administrative costs does not make a means the least intrusive; otherwise, the overriding value would be expediency, not the compelling government interest. (See *Castro* v. *State of California* (1970) 2 Cal.3d 223, 241-245; *Wood* v. *Superior Court*, *supra*, 166 Cal.App.3d at p. 1148; *Fults* v. *Superior Court* (1979) 88 Cal.App.3d 899, 904.)

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9. In *Wilkinson* v. *Times Mirror Corp.*, *supra*, 215 Cal.App.3d at p. 1051, the appellate court held that Matthew Bender & Company, Inc., did not violate the state constitutional right of privacy by requiring job applicants to consent to urinalysis tests for alcohol and drugs as a condition of employment because of the notice provided to prospective employees of the testing program, the limited intrusiveness of the collection process, and the procedural safeguards restricting access to the test results. Contrasting the urinalysis tests demanded by Matthew Bender with the compulsory polygraph examinations demanded by the City of Long Beach, the *Wilkinson* court observed that "the challenged conduct in *Long Beach* not only substantially burdened the employees' rights of mental privacy; it effectively annulled those rights." (*Id.* at p. 1048, fn. 8.)

10. Also, in *In re Bushman* (1970) 1 Cal.3d 767, 776-777, disapproved on other grounds in *People* v. *Lent* (1975) 15 Cal.3d 418, 485, fn. 1, the California Supreme Court stated that the imposition of psychiatric treatment as a probation condition in a criminal matter exceeded the trial court's jurisdiction where no evidence supported the trial court's conclusion that psychiatric care was necessary. Decided nearly three years before the amendment adding privacy to the inalienable rights set forth in the California constitution, *Bushman* nonetheless narrowly construed the trial court's authority to impose psychiatric treatment.

We therefore turn to the question of the interpretation of section 6053 in light of respondent's constitutional right of privacy.[11] **[5 - see fn. 11]**

C. Section 6053

[6] Section 6053 allows, but does not require, the ordering of a mental examination when an attorney's mental condition is a material issue in a State Bar proceeding. Respondent's appointed counsel argued that because the legislature enacted section 6053 three years before the constitutional amendment which added privacy to the inalienable rights set forth in article 1, section 1 of the California Constitution, section 6053 must yield to the newer constitutional provision. This argument would be correct only if section 6053 violated the right of privacy. No such violation, however, appears on the face of the statute. Moreover, the applicable standard is that "When faced with a statute reasonably susceptible of two or more interpretations, of which at least one raises constitutional questions, we should construe it in a manner that avoids any doubt about its validity." (*Association for Retarded Citizens* v. *Dept. of Developmental Services* (1985) 38 Cal.3d 384, 394.) Moreover, section 6053 clearly serves a compelling government interest in protecting the public, courts, and profession from mentally incompetent attorneys. (See *Conway* v. *State Bar*, *supra*, 47 Cal.3d 1107, 1117.)

The sole remaining question in interpreting section 6053 in light of the constitutional right of privacy is to determine whether section 6053's grant of discretion to order a mental examination is consistent with the requirement that the least intrusive means be used to satisfy the compelling government interest. Section 6053 does not require a mental examination in every proceeding where the attorney's mental condition is a material issue. Instead, it merely provides that the body having jurisdiction *may* order a mental examination of an attorney. We interpret this provision as allowing a mental examination only if such an examination is the least intrusive means of determining an attorney's mental condition. In adopting this interpretation, we comply with our duty to construe a statute which may raise constitutional questions "in a manner that avoids *any* doubt about its validity." (*Association for Retarded Citizens* v. *Dept. of Developmental Services*, *supra*, 38 Cal.3d at p. 394, original emphasis; cf. *California Housing Finance Agency* v. *Elliott* (1976) 17 Cal.3d 575, 594.)

Section 6053 provides that the psychiatrist's report concerning a mental examination must be made available only to the attorney involved and the State Bar. It also allows the body having jurisdiction in a proceeding where an attorney's mental condition is a material issue to receive the report in evidence. Except in rare circumstances, the files and records of such proceeding shall not be public. (Trans. Rules Proc. of State Bar, rule 225(a)(i).) The limited distribution of the report and the confidentiality of the proceeding serve as further protections of the attorney's privacy and thereby bolster the constitutionality of section 6053.

We turn next to the validity of the motion made below for mental examination of respondent and the ensuing order pursuant to section 6053.

D. Mental Examination Motion and Orders

[7] Section 6053 permits an application for an order of mental examination whenever in an investi-

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11. **[5]** A court of record may declare a statute unconstitutional. An administrative agency is prohibited from doing so by article III, section 3.5 of the California Constitution, but "remains free to *interpret* the existing law in the course of discharging its statutory duties." (*Regents of Univ. of Cal.* v. *Public Employees Relations Bd.* (1983) 139 Cal.App.3d 1037, 1042, original emphasis). This court is neither a court of record, nor an executive branch administrative agency, but a sui generis arm of the Supreme Court. (*Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300-301.) In cases involving suspension or disbarment our decisions take the form of a recommendation to the Supreme Court, and no constitutional impediment appears to prevent us from recommending that a rule or statute be declared unconstitutional by the Supreme Court should such a declaration appear to be called for according to applicable legal principles and precedents. However, with respect to decisions of this court which may be implemented without Supreme Court action, such as the decision in this proceeding, we deem the judges of the State Bar Court limited to interpreting the existing law; and that is what we undertake to do here.

gation or proceeding, the mental condition of the member is a material issue, but does not specify the procedure for obtaining a mental examination order. The rules governing the formal proceedings for transfer of a member of the State Bar to inactive status incorporate by reference the applicable portions of the Civil Discovery Act (Code Civ. Proc., §§ 2016 et seq.) with specified limitations, including limitations on the sanctions available for failure to comply with a mental examination order. (See Trans. Rules Proc. of State Bar, rules 315, 321, 643.) The rules do not alter Code of Civil Procedure section 2032, subdivision (d), which sets forth requirements concerning the physical or mental examination of a person other than a plaintiff seeking recovery for personal injuries.[12]

Pursuant to Code of Civil Procedure section 2032, subdivision (d), a State Bar examiner seeking a mental examination of a respondent after formal proceedings have commenced must file a motion specifying the "the time, place, manner, conditions, scope, and nature of the examination, as well as the identity" of the psychiatrist. Accompanying the motion must be "a declaration stating facts showing a reasonable and good faith attempt to arrange for [a mental] examination by [a written] agreement" with the respondent. The State Bar's verified application of October 1988 and its ex parte application for a mental examination of December 1988 preceded the institution of formal proceedings and thus were not technically required to comply with the requirements for a motion seeking a mental examination as specified by Code of Civil Procedure section 2032, subdivision (d). As we shall discuss, however, the applications were nonetheless required to meet "the least intrusive means test." Moreover, the application was not ruled upon until after the commencement of formal proceedings under section 6007 (b) at which point the provisions of Code of Civil Procedure section 2032 came into play, although it appears that the parties and the court below did not focus on the potential applicability of Code of Civil Procedure section 2032, subdivision (d).

Pursuant to Code of Civil Procedure section 2032, subdivision (d), the State Bar Court shall grant a motion seeking a mental examination of a respondent "only for good cause shown." Among other things, the order granting such a motion must specify "the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination." The State Bar Court referee's order of December 1988 neither stated a showing of "good cause" nor specified any of the matters set forth by Code of Civil Procedure section 2032, subdivision (d). The hearing judge's order of February 1990 also failed to state a showing of "good cause"; and although it named a psychiatrist and set a deadline for a mental examination, it did not precisely delineate the manner, diagnostic tests and procedures, conditions, and scope of the examination.

At the December 1989 hearing, the judge explained that the February mental examination order would issue on the basis of a "probable cause" determination. Here, respondent did not put his mental condition in controversy. Even if an individual puts his or her present mental condition in contro-

12. Code of Civil Procedure section 2032, subdivision (d) currently provides: "[¶] If any party desires to obtain discovery by a physical examination other than that described in subdivision (c) [which concerns a plaintiff seeking recovery for personal injuries], or by a mental examination, the party shall obtain leave of court. The motion for the examination shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination. The motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt to arrange for the examination by an agreement under subdivision (e) [which allows a written agreement between the parties in lieu of following the provisions of subdivisions (c) and (d)]. Notice of the motion shall be served on the person to be examined and on all parties who have appeared in the action. [¶] The court shall grant a motion for a physical or mental examination only for good cause shown. . . . The order granting a physical or mental examination shall specify the person or persons who may perform the examination, and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination. If the place of the examination is more than 75 miles from the residence of the person to be examined, the order to submit to it shall be (1) made only on the court's determination that there is good cause for the travel involved, and (2) conditioned on the advancement by the moving party of the reasonable expenses and costs to the examinee for travel to the place of examination."

versy, the individual has not totally waived his or her right of privacy; and any compulsory mental examination must be limited by the need to show good cause for inquiring into specific matters and to protect the plaintiff's constitutional right of privacy. (*Vinson* v. *Superior Court* (1987) 43 Cal.3d 833, 841-844.) A leading commentator has observed that the test in such situations should be even greater. "[J]udges should require a *strong* showing of 'good cause' before ordering defendants" who have not put their mental condition in controversy to undergo mental examinations. (1 Hogan, Modern California Discovery (4th ed. 1988) § 8.5, p. 463, emphasis added.)

Like Code of Civil Procedure section 2032, subdivision (d), Federal Rule of Civil Procedure 35(a) requires "good cause" for compulsory mental examinations.[13] In *Schlagenhauf* v. *Holder* (1964) 379 U.S. 104, the United States Supreme Court vacated an order requiring a bus driver to undergo a mental examination. Having suffered injuries when a bus collided with the rear of a tractor-trailer, certain passengers sought the order pursuant to federal rule 35(a) in order to prove the driver's negligence. As the court observed, federal rule 35 precludes "sweeping examinations of a party who has not affirmatively put his own mental" condition in controversy. Mental examinations, said the Court, "are only to be ordered upon a discriminating application . . . of the limitations" imposed by the "good cause" requirement of federal rule 35(a). (*Id.* at p. 121.)

After *Schlagenhauf*, a federal district court prohibited the mental examination of a mentally retarded defendant in a negligence action precisely because of federal rule 35(a)'s "good cause" requirement and the right of privacy. (See *Marroni* v. *Matey* (E.D.Pa. 1979) 82 F.R.D. 371.) The district court explained that the plaintiffs had made no showing that the information which they desired was otherwise unavailable. The defendant's privacy interests, said the district court, required "that less intrusive methods of discovery first be explored." (*Id.* at p. 372.)[14]

[8] In the present case, no evidence or finding indicated that a mental examination constituted the least intrusive means of determining respondent's mental condition. Indeed, respondent's appointed counsel vigorously objected to the intrusion of a mental examination and insisted on the protection of respondent's privacy. The mental examination orders thus violated not only section 2032, subdivision (d) of the Code of Civil Procedure, but also article 1, section 1 of the California Constitution.[15]

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13. Federal Rule of Civil Procedure 35(a) currently provides: "[¶] When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician, or mental examination by a physician or psychologist or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

14. See also *Schottenstein* v. *Schottenstein* (Fla. Dist. Ct. App. 1980) 384 So.2d 933, 936 (mere showing that the children of a divorced couple were upset after visiting their father was not sufficient grounds for requiring them to undergo mental examinations, which constituted invasions of privacy and were tolerable only upon a showing of good cause).

15. But see *Board of Trustees* v. *Superior Court* (1969) 274 Cal.App.2d 377, decided three years before the people added privacy to the inalienable rights specified in article 1, section 1 of the California Constitution. In *Board of Trustees*, an appellate court ordered a teacher to submit to a mental examination where the teacher was resisting a school district's efforts to remove her for alleged mental incapacity. The trial court found the teacher mentally incompetent on the basis of outdated expert testimony and was reversed. (*Id.* at p. 379.) On retrial the school district, acting pursuant to Code of Civil Procedure section 2032, moved the court to appoint a psychiatrist to make a current examination of the teacher. The court denied the motion, and the school district sought a writ of mandate ordering the examination. Granting the writ, the appellate court stated that, while it did not rule out the sufficiency of the record to demonstrate good cause, it was "unnecessary to determine whether 'good cause' as used in [ordinary] civil proceedings" had been met in the Education Code proceedings then before it. (*Id.* at p. 380.) Unlike the Education Code proceedings, involuntary inactive enrollment proceedings require compliance with Code of Civil Procedure section 2032, subdivision (d).

[9] For the future guidance of the State Bar and its membership, we stress that the "probable cause" determination necessary for the initiation of an involuntary inactive enrollment proceeding pursuant to section 6007 (b)(3) does not suffice for the ordering of a mental examination pursuant to section 6053. The latter necessitates the much stronger procedural and constitutional safeguards afforded by showings from the State Bar of "good cause" and "least intrusive means."

[10a] The California Supreme Court has made it clear that a determination of mental incompetency does not require psychiatric examination. In some older cases, the Court upheld trial court determinations of mental incompetency where no psychiatric testimony whatsoever was mentioned. Other evidence, however, was offered in such cases; and the allegedly incompetent individual appeared in court, took the witness stand, and underwent cross-examination. (See *Estate of Cowper* (1918) 179 Cal. 347, 348-349; *Matter of Coburn* (1913) 165 Cal. 202, 214-217.)

In more recent cases, the California Supreme Court has upheld trial court determinations of mental incompetence where psychiatric testimony was given, but where the psychiatrists who testified had not examined the allegedly incompetent individuals. For example, in *Guardianship of Brown* (1976) 16 Cal.3d 326, a stroke victim, Brown, seemed aware at times, but established no rapport with a court-appointed psychiatrist. Brown's own physician testified that Brown could not communicate, but did respond to some requests. Because Brown was present in the courtroom, the trial court could observe his demeanor and responsiveness. Although no psychiatric examination of Brown was possible, the California Supreme Court determined that the trial court had been justified in finding Brown mentally incompetent. (*Id.* at p. 337.)

In *Guardianship of Walters* (1951) 37 Cal.2d 239, the California Supreme Court upheld a trial court determination that a woman in her late seventies was mentally incompetent. At trial, Walters took the stand. On direct examination, her testimony was clear, and her memory was excellent. On cross-examination, she was evasive and forgetful. Also, a psychiatrist testified that at the time of the trial court proceeding Walters suffered from arteriosclerosis and was mentally incompetent. (*Id.* at p. 247.) The psychiatrist based his opinion on his observation of Walters, his study of two transcripts of testimony given by her in other proceedings four years earlier, and a lengthy hypothetical question. The psychiatrist did not examine Walters, but did see her in court three times and noted that she had a marked tremor of the head, which he said was a positive indication of arteriosclerosis. The psychiatrist also described her testimony in the two transcripts as uncertain, confused, and forgetful. The California Supreme Court stated that although the psychiatrist's conclusion would have carried more weight if he had examined Walters, the conclusion was not unjustified as a matter of law. Although Walters produced two other psychiatrists and her family physician to attest to her mental competency, two of her experts admitted that she had a tremor; and one of her experts conceded that the tremor might indicate arteriosclerosis. In addition, the California Supreme Court noted that the trial judge observed Walters and was entitled to consider her testimony and demeanor. (*Id.* at pp. 248-249.)

We recognize that in *Guardianship of Brown* and *Guardianship of Walters* the individuals whose mental conditions were at issue appeared in court. We also acknowledge that respondent has not appeared at any of the proceedings in his case since November 1988 and may continue not to appear. The record, however, does not suggest that such a situation will pose any insuperable problems. The allegations of the notice to show cause presumably were drafted on the assumption that, if proved, they would warrant respondent's inactive enrollment under section 6007 (b)(3). Yet no psychiatrist examined respondent in order to draft the notice. **[10b]** The individuals whose complaints formed the basis for the notice to show cause will presumably be available at the remanded proceeding to testify about respondent's allegedly bizarre behavior. Pleadings which respondent filed and which allegedly reflect mental infirmity will presumably be available at the remanded proceeding for introduction into evidence by the examiner and for analysis by the judge. The hearing judge also has the power to appoint a qualified psychiatrist, who can provide expert opinion at

the remanded proceeding. Based on testimonial and documentary evidence, the psychiatrist will presumably be able to render an opinion about respondent's mental condition. Respondent's appointed counsel will have the opportunity to rebut such evidence and present evidence in favor of respondent. The hearing judge will thus be able to consider all of these facts and circumstances, including any psychiatric opinions offered by either side, in order to determine whether the examiner has established by clear and convincing evidence that respondent is mentally incompetent to practice law.

[10c] If, at that time, the judge is unable to make the necessary determination without ordering a mental examination of respondent, and respondent refuses to consent to such examination, such an order might nevertheless then be justified as the least intrusive means of accomplishing the compelling interest. In such event, an issue could be raised as to the effect of respondent's noncompliance with such an order. Nevertheless, it appears in the present case that crucial witnesses and documents upon which the notice to show cause relied would have to be unavailable at the remanded proceeding before the trial judge would be in a position to determine the necessity of ordering a mental examination of respondent.

E. Rule 644

[11a] If, upon remand, a mental examination order is deemed appropriate in this case and if the respondent refuses without good cause to comply with it, then rule 644 will come into play. Despite the fact that rule 644 purports to allow a presumption affecting the burden of proof if an attorney fails without good cause to undergo an ordered mental examination, in accordance with precedents from criminal law, we interpret rule 644 as merely allowing a permissive inference.

[12] The California Supreme Court has observed that the facts of each case will determine "whether a particular rule of civil or criminal law . . . should be applied in State Bar disciplinary matters" to ensure due process. (*Emslie* v. *State Bar*, *supra*, 11 Cal.3d at p. 226.) The same approach should apply to involuntary inactive enrollment proceedings.

In *People* v. *Roder* (1983) 33 Cal.3d 491, 499, the California Supreme Court considered the interpretation of an apparently mandatory statutory presumption which could be rebutted. Because the jury could have interpreted instructions based on the presumption as relieving the prosecution of its burden of proving every element of the criminal offense beyond a reasonable doubt, the Court construed the presumption as a permissive inference, which did not shift the burden of proof. (*Id.* at pp. 505-507; see also *People* v. *Stevens* (1986) 189 Cal.App.3d 1020, 1025; 1 Witkin, Cal. Evidence (3d ed. 1986) § 182, pp. 155-156.)

The State Bar's adoption of rule 644 reflects its judgment that refusal to undergo a mental examination without good cause may merit consideration in determining the mental competence of an attorney. **[11b]** Rule 644 would not be valid if it operated to relieve the examiner of the burden to prove by clear and convincing evidence that an attorney is not mentally competent to practice law. Respondent's case highlights this problem because the examiner relied solely on the presumption allowed by rule 644 and produced no other evidence to prove the case against respondent. Nevertheless, to ensure due process for an attorney in a proceeding under section 6007 (b)(3), we interpret rule 644 as allowing a permissive inference of mental infirmity, but not as authorizing a presumption which shifts the burden of proof.

[13a] In making such an interpretation, we note that the California Supreme Court has described an attorney's license to practice law as "a representation by the court, speaking as of the date of the license, that the licensee is a trustworthy person who reasonably may be expected to act fairly and honestly in the practice of his profession." From then onward, "in the absence of proof to the contrary, the original representation exists as a continuing presumption." (*Roark* v. *State Bar* (1936) 5 Cal.2d 665, 668.) This continuing presumption of moral fitness underlies the rule in disciplinary proceedings that all reasonable doubts are to be resolved in favor of the respondents and that, if equally reasonable inferences may be drawn from a fact, the inference to be accepted is the one leading to a conclusion of innocence. (*Himmel* v. *State Bar* (1971) 4 Cal.3d 786, 793-794.)

[13b] We believe that it is appropriate to presume, in the absence of proof to the contrary, that an attorney is not only morally fit, but also mentally competent. [11c] Because the creation of a presumption affecting the burden of proof conflicts with such a continuing presumption of mental competence, this conflict also prompts us to interpret rule 644 as authorizing only a permissive inference.

The need for consistency with other rules governing the transfer of an attorney to involuntary inactive enrollment serves as a further separate argument for our interpretation of rule 644. Rule 643 incorporates the discovery provisions set forth in rules 300 through 324. [11d] Pursuant to rule 321, an attorney who disobeys an order to undergo a mental examination is not to suffer a judgment by default. The presumption set forth in rule 644, however, is tantamount to the imposition of a default judgment because transfer to involuntary inactive enrollment may result solely from refusal to undergo a mental examination. Thus, rule 644 must be interpreted as merely allowing a permissive inference of mental infirmity.

III. DISPOSITION

We reverse the hearing department decision and remand this case, with the directions that the hearing judge should conduct further proceedings in accordance with the guidance expressed in this opinion.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT C

A Member of the State Bar

[No. 84-O-15433]

Filed April 22, 1991

SUMMARY

Respondent was charged with misconduct in four client matters and with failure to cooperate in the State Bar's investigation. The hearing referee found respondent not culpable of most of the charges, but did find culpability of failing to communicate with a client in one matter, and failing to cooperate with the State Bar investigation. The referee recommended a public reproval, conditioned on passage of the Professional Responsibility Examination. (Paul C. Maier, Hearing Referee.)

The examiner requested review, seeking additional culpability findings of failing to perform services competently and of conducting an improper business transaction with a client. The review department rejected the proposed additional findings, holding that respondent's decision not to pursue a fruitless damages claim did not violate either version of the former rule governing failure to perform competently, and that respondent's possession of his client's assignment of a promissory note and deed of trust was not an improper acquisition of an adverse interest in the client's property, because there was no actual intent to assign an interest in the note to respondent.

The review department also struck the finding of culpability of failure to cooperate with the State Bar investigation, because it was based on the investigator's deposition testimony, which should not have been admitted at trial in lieu of live testimony since the State Bar did not show that it was unable to procure the investigator's attendance at trial despite reasonable diligence.

Based on the single remaining culpability finding of "common law" failure to communicate with a client, which caused minimal harm to the client, and given the mitigating circumstances including respondent's many years of practice without prior discipline, the review department determined that the private reproval which would otherwise be the appropriate discipline would be improperly punitive, and that the matter should be disposed of by admonition.

COUNSEL FOR PARTIES

For Office of Trials: Gregory B. Sloan

For Respondent: Tom Low

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
Where attorney completed all work he could have reasonably performed for client, attorney neither withdrew from employment nor was discharged, and was not culpable of prejudicial withdrawal from employment.

[2] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
The rule prohibiting prejudicial withdrawal from employment applies to attorneys who are discharged as well as to those that withdraw. Where respondent was discharged by a client, but nevertheless took reasonable steps to avoid prejudice to the client, record did not support a violation of the rule.

[3] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Rule 453, Trans. Rules Proc. of State Bar, requires review department, in all cases brought before it, to independently review record. Review department accords great weight to findings of fact by hearing department resolving testimonial issues. However, it may make findings, conclusions and recommendations differing from those of the hearing department.

[4] **130 Procedure—Procedure on Review**
166 Independent Review of Record
Issues raised or addressed by parties on review do not limit scope of issues to be resolved by review department.

[5] **169 Standard of Proof or Review—Miscellaneous**
802.30 Standards—Purposes of Sanctions
Review department's overriding concern is same as that of Supreme Court: preservation of public confidence in profession and maintenance of high professional standards.

[6 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
204.90 Culpability—General Substantive Issues
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where attorney's alleged failure to perform competently occurred after effective date of revised version of rule governing duty of competence, and notice to show cause charged attorney only with violating previous version of rule and notice was not amended, attorney was properly found not culpable of violating earlier version of rule.

[7] **204.90 Culpability—General Substantive Issues**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where attorney's decision not to pursue client's damages action was not made until after effective date of revised rule regarding duty to perform competently, attorney's conduct in deciding not to pursue damages was covered by revised rule and attorney could not be found culpable of violating earlier version of rule.

[8 a, b] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where attorney agreed to seek recovery of a client's vehicle and damages for loss of its use, and attorney promptly recovered vehicle but decided not to pursue damages because vehicle was

inoperable, attorney was not culpable of violating either original or revised version of former rule regarding duty to perform competently.

[9] **204.90 Culpability—General Substantive Issues**
214.30 State Bar Act—Section 6068(m)
Statutory duty to communicate with clients is not an appropriate basis for discipline for failure to communicate which occurred well before effective date of statute.

[10 a, b] **213.10 State Bar Act—Section 6068(a)**
410.00 Failure to Communicate
Prior to enactment of statute establishing attorney's duty to communicate with clients, Supreme Court had long held that failure to communicate was a proper ground for discipline. This common law duty to communicate falls within the parameters of an attorney's oath and duties, under attorney's general duty to uphold the law. Where attorney failed to inform client of attorney's decision not to pursue fruitless damages claim, finding of violation of duty to uphold the law by failing to communicate with client was appropriate basis for culpability.

[11] **106.30 Procedure—Pleadings—Duplicative Charges**
213.10 State Bar Act—Section 6068(a)
220.10 State Bar Act—Section 6103, clause 2
410.00 Failure to Communicate
Where respondent was found culpable of violating statutory duty to uphold the law by failing to adhere to common law duty to communicate with client, additional charge that respondent violated attorney's "oath and duties" under separate statute was duplicative, and resolution of case would not be affected by finding such violation.

[12] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
Wilfulness is established by proof that the attorney acted or omitted to act purposely. No rational relationship exists between an attorney's years in practice and the attorney's ability to act or omit to act purposefully on a specified occasion.

[13 a-c] **273.00 Rule 3-300 [former 5-101]**
Where a client gave an attorney an assignment of a promissory note and deed of trust, but the attorney did not record the assignment or collect payments under the note until after issuance of court order assigning the note to the attorney in payment of attorney's fees, and the attorney did not make any use of the executed assignment that was unfair or detrimental to the client until after the court order, the attorney did not knowingly acquire an interest in the client's property until after the issuance of the court order, and the attorney's conduct did not violate the rule governing business transactions with clients.

[14 a, b] **164 Proof of Intent**
204.20 Culpability—Intent Requirement
273.00 Rule 3-300 [former 5-101]
Intent is a necessary element of an assignment. Where the physical transfer of an assignment of a promissory note and deed of trust from client to attorney was not intended to transfer an interest in the promissory note to the attorney, the transfer did not result in an acquisition by the attorney of an interest in the client's property, and thus did not violate the rule governing attorneys' business transactions with clients.

[15] **213.90 State Bar Act—Section 6068(i)**
Argument that accused attorney can wait and cooperate with attorney employed by State Bar rather than one of its investigators is not supported by authority and is contrary to express language of statute setting forth duty to cooperate with State Bar investigations.

[16] **204.90 Culpability—General Substantive Issues**
213.90 State Bar Act—Section 6068(i)
Attorney was properly found not to be culpable of violating statutory duty to cooperate with State Bar investigation where alleged violation predated effective date of statute.

[17 a-d] **113 Procedure—Discovery**
135 Procedure—Rules of Procedure
194 Statutes Outside State Bar Act
Discovery in State Bar proceedings must be completed within 90 days after service of notice to show cause, subject to reasonable extension. (Trans. Rules Proc. of State Bar, rule 316.) Where examiner noticed and took deposition well after 90-day cutoff, and did not seek extension of discovery period, deposition was clearly discovery, even though examiner's purpose in taking it was to preserve evidence for trial. However, provision of Civil Discovery Act governing time to object to deposition notice on certain grounds did not apply, because respondent's objection was not based on grounds set forth in Civil Discovery Act but on examiner's failure to comply with State Bar rules of procedure.

[18] **113 Procedure—Discovery**
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act
Even if respondent waived procedural objection to deposition by appearing and participating, deposition transcript should not have been admitted in evidence, because examiner failed to show that State Bar had been unable to procure deponent's attendance at trial despite reasonable diligence, as required by provision of Civil Discovery Act governing use of depositions at trial.

[19] **120 Procedure—Conduct of Trial**
135 Procedure—Rules of Procedure
159 Evidence—Miscellaneous
Error in admitting evidence in State Bar proceedings does not invalidate a finding of fact unless the error resulted in the denial of a fair hearing. (Trans. Rules Proc. of State Bar, rule 556.) In light of deposition witness's hazy memory and respondent's contrary testimony, proper determination weighing the conflicting testimony could not be made without face-to-face assessment, and admission of witness's deposition transcript therefore denied respondent a fair trial.

[20 a-e] **213.10 State Bar Act—Section 6068(a)**
410.00 Failure to Communicate
710.10 Mitigation—No Prior Record—Found
844.79 Standards—Failure to Communicate/Perform—No Pattern—No Discipline
1094 Substantive Issues re Discipline—Admonition
Where respondent successfully performed services for which he was retained, and his sole culpability was for single act of failing to inform client of respondent's entirely proper exercise of judgment not to pursue damages, and both harm to client and extent of misconduct were minimal, appropriate discipline would have been private reproval. However, in light of attorney's many years of practice without prior disciplinary record, and other extenuating circumstances, discipline

would be punitive and would not further purposes of attorney discipline. Since finding of culpability precluded dismissal, admonition was an appropriate disposition.

[21] **801.30 Standards—Effect as Guidelines**
802.30 Standards—Purposes of Sanctions
Standards for Attorney Sanctions for Professional Misconduct serve as guidelines, and must be viewed with the objective of achieving the purposes of attorney discipline, which do not include punishment of the errant attorney, but rather are protection of the public, the profession, and the courts; maintenance of high professional standards; and preservation of public confidence in the legal profession.

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a)
410.01 Failure to Communicate
Not Found
213.15 Section 6068(a)
213.95 Section 6068(i)
214.35 Section 6068(m)
220.15 Section 6103, clause 2
221.50 Section 6106
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
273.05 Rule 3-300 [former 5-101]
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.05 Rule 4-100(A) [former 8-101(A)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
Mitigation
Found
720.10 Lack of Harm
735.10 Candor—Bar
Found but Discounted
740.32 Good Character

OPINION

NORIAN, J.:

In this proceeding we review the recommendation of a referee of the former, volunteer State Bar Court, that respondent,[1] who was admitted to the practice of law in this state nearly 40 years ago and has no prior record of discipline, be publicly reproved and as a condition thereof, be required to take and pass the Professional Responsibility Examination. The recommendation is based on the referee's conclusions that in one matter, respondent failed to communicate with his client in violation of Business and Professions Code sections 6068 (a) and 6103 (all further section references are to the Business and Professions Code unless otherwise stated), and in another matter, respondent failed to cooperate with the State Bar in its investigation of several matters in violation of sections 6068 (a), 6068 (i) and 6103.[2] The State Bar examiner seeks review, requesting we modify the referee's decision to add violations of former Rules of Professional Conduct,[3] rule 6-101(2) (failing to perform services competently) in count one and rule 5-101 (avoiding adverse interests) in count three. The examiner does not challenge any of the other findings and conclusions of the referee nor does he seek modification of the recommended discipline.

After independently reviewing the record, we conclude that respondent failed to communicate with his client in one matter in violation of section 6068 (a). In light of the extenuating circumstances of the misconduct and the presence of compelling mitigation, including respondent's many years of practice without prior discipline, we have determined that respondent should be admonished pursuant to rule 415 of the Transitional Rules of Procedure of the State Bar.

BACKGROUND

On December 9, 1988, a notice to show cause was filed charging respondent with professional misconduct in five separate counts. Respondent filed an answer to the charges and appeared at trial with counsel. The trial spanned four days in July and August 1989. The referee filed his decision on November 29, 1989, finding respondent culpable of failing to communicate in count one and failing to cooperate in the investigation in count five. No culpability was found on the remaining charges in the remaining counts. Based on the existence of compelling mitigating circumstances, the referee recommended a public reproval with the condition that respondent take and pass the Professional Responsibility Examination.

FACTS AND FINDINGS

The referee made the following findings of fact and conclusions of law. With the exception of the modifications discussed *post*, we have independently reviewed the record and consider the findings and conclusions well supported by the record and adopt them as our own.

A. Count One (Wanda H.)

In August 1982 Wanda H. employed respondent to recover possession of her 1974 Ford van and recover damages. At the time of employment Wanda H. paid respondent $500 as advance legal fees and in

1. If respondent received a private reproval, he would be entitled not to be identified by name in this opinion. (See rule 615, Trans. Rules Proc. of State Bar.) In light of our disposition by admonition, we deem it equally appropriate not to identify him by name herein.

2. Section 6068 describes the duties of an attorney which include, under subdivision (a), the duty to support the Constitution and state and federal laws. Under subdivision (i) of section 6068, an attorney has the duty to cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. Section 6103 provides, in relevant part, that any violation of an attorney's duties constitutes cause for disbarment or suspension.

3. The former Rules of Professional Conduct were in effect from January 1, 1975 to May 26, 1989. Rule 6-101(2) of those rules was in effect from January 1, 1975 to October 23, 1983, at which time it was amended. New Rules of Professional Conduct became operative May 27, 1989. References herein to rule 6-101(2) are to the rule in effect from 1975 to 1983. All other references to the rules, unless otherwise stated, are to the former Rules of Professional Conduct in effect from 1975 to 1989.

December 1982 paid an additional $135 for costs. Wanda H. was the legal owner of the van. Her son and daughter-in-law were the registered owners and had possession of the van. The son and daughter-in-law became entangled in a marital dispute and the daughter-in-law's brother towed the van to his garage. At the time the van was towed the son and daughter-in-law owed $5,500 to Wanda H. for the van. After the van was towed, no further payments were made on the balance.

Respondent filed a complaint in September 1982 to recover possession of the van and damages for loss of use. Respondent obtained a writ of possession and the van was recovered by Wanda H. on November 1, 1982.[4] The van was inoperative both when towed by the daughter-in-law's brother and when Wanda H. took possession, and remained inoperative for at least six months thereafter.

Beginning in August 1983, Wanda H. wrote respondent four letters requesting status reports. Respondent did not reply. In the last letter, dated November 29, 1983, she advised him that she was referring the matter to the State Bar. Respondent wrote her on December 1, 1983, informing her that he was negotiating with opposing counsel to settle the matter. Respondent determined that pursuing the lawsuit would be pointless because no loss of use damages were incurred because the van was inoperative.[5] Respondent did not inform Wanda H. of the inability to recover damages and no further communications occurred between respondent and Wanda H.

This count of the notice to show cause charged violations of sections 6068 (a) and 6103 and rules 2-111(A)(2), 2-111(A)(3) and 6-101(2). The referee made the following conclusions of law.

Respondent did not violate rule 2-111(A)(2) in that the evidence of prejudice to the client was not clear and convincing. Wanda H. was not damaged by the loss of use of the van because the van was inoperative.[6] **[1 - see fn. 6]**

Respondent did not violate rule 2-111(A)(3)[7] in that he fully earned the $500 that was paid to him as fees and Wanda H. did not expect to receive any money back. Additionally, the costs incurred exceeded those paid by the client.

Respondent did not violate former rule 6-101(2) "in that there is no such rule." Rather, the referee acknowledged the existence of rules 6-101(A)(2) and 6-101(B)(2), which were not charged in the notice to show cause. He went on to conclude that even assuming that the notice to show cause was properly interpreted to charge the violation of one or both of these rules, the evidence did not show a violation in that respondent acted competently in the recovery of the van and properly exercised his judgment in not pursuing damages.

Respondent violated sections 6068 (a) and 6103 in that he failed to communicate to Wanda H. his decision not to pursue damages.

B. Count Two (Donna and George C.)[8]

Respondent was employed by Donna and George C. in March 1986 to represent their nephew, Douglas C., in connection with a juvenile court proceeding as well as charges that involved weapons possession and a stolen car. In addition, respondent was to inquire into the possibility of instituting a guardianship proceeding to make the C.'s the guardians of Douglas C., or alternatively, of Douglas C. becom-

4. The record supports this date rather than October 1, 1982, as found by the referee. (See R.T. p. 133.)

5. Neither the decision nor record indicate when respondent made this determination.

6. **[1]** We also note that respondent completed all the work he could have reasonably performed for Wanda H. Thus, respondent did not withdraw from employment, nor was he discharged.

7. A conclusion on this charge was unnecessary as the examiner withdrew the charge at trial. (R.T. pp. 302, 489.)

8. The referee concluded that respondent was not culpable of the charged misconduct in this count. Neither the examiner nor respondent have sought review of the referee's findings of fact and conclusions of law. We have independently reviewed the record and have concluded the findings and conclusions are supported by the record and adopt them as our own. As the findings and conclusions are not in dispute, we set them forth only briefly.

ing emancipated. At the time respondent was employed for the above matters, he was representing George C. in an unrelated civil proceeding. Respondent was paid $2,125 by the C.'s which was for all of the matters for which respondent was employed.

The notice to show cause in this count charged violations of sections 6068 (a), 6068 (m) and 6103 and rules 2-111(A)(2), 2-111(A)(3) and 6-101(A)(2). The referee concluded that there was no clear and convincing evidence that respondent failed to competently perform all of the services he was obligated to perform for both the C.'s and Douglas C. or that he did not earn the entire fee paid him. Having so concluded, the referee found no violation of the charged rules and statutes.

C. Count Three (Steven S.)

Respondent was employed by Steven S. in September 1979[9] to handle the dissolution of his marriage. An interlocutory judgment of dissolution was entered in October 1980, at which time Steven S. owed respondent $2,900 for fees.

At the time of the interlocutory judgment, Steven S. was the holder of a note and trust deed. Trung C. V. and his wife were the obligors and trustors. Steven S. assigned the note to respondent in payment of the attorney's fees due respondent and the attorney's fees due the attorney for Steven S.'s wife. At the time of the interlocutory judgment, $3,300 was owed to opposing counsel as well as the $2,900 owed to respondent. The note was payable with interest in monthly installments and a balloon payment at its expiration. The outstanding balance on the note was approximately $9,600 at the time of the interlocutory judgment. There was some discussion between Steven S., respondent and opposing counsel with regard to the discounted value of the note at the time of the interlocutory judgement. The referee found that the note had a fair market value of approximately $5,800 at that time.

There was a discrepancy in the testimony regarding the assignment of the note. Respondent testified the note was assigned outright at its discounted value. Steven S. testified that the note was assigned with the agreement that after the attorney's fees were satisfied Steven S. was to receive the excess payments. The Orange County Superior Court, in the interlocutory judgment, awarded the note to respondent in its entirety, subject to the payment of the wife's attorney's fees.

The document evidencing the assignment is contained in exhibits 26 and 23 and is a standard form "Assignment of Deed of Trust." Respondent testified that between December 20, 1979, and November 17, 1980, the assignment of the trust deed was in his file.[10] (R.T. pp. 418-419.) Respondent also testified that Steven S. was thinking of moving out of town and wanted to determine what to do with the note. According to respondent, Steven S. had financial obligations for support and taxes and wanted to "find out the value of it and he just signed it and left it with me." (*Id.*) Steven S. continued to receive the payments because respondent did not consider the assignment delivered. (*Id.*) Respondent did not discuss the discounted value of the note until sometime after Steven S. signed the assignment. (*Id.*)

The referee found that Steven S. executed the assignment on December 20, 1979, but that the notary certificate is dated November 17, 1980, and the assignment was recorded on November 17, 1980. The referee also found that it was undisputed that payments under the note were made to Steven S. through October of 1980, when the note was ordered assigned to respondent in the interlocutory judgment. The referee concluded that notwithstanding that Steven S. executed the assignment in December 1979, the actual assignment occurred in October 1980, at the time of the interlocutory judgment, when it was agreed that the note was assigned in full at its discounted value in payment of the legal fees then owing. Respondent collected the total sum of $10,845,

9. The record supports this date rather than 1983 as charged in the notice to show cause. Respondent has not objected to this variance.

10. Steven S. gave conflicting testimony with regard to when he executed the assignment. (See exh. 23, pp. 8, 11, 13.)

paid the opposing counsel's fees in full, and kept the balance.

In May 1983 Steven S. requested fee dispute arbitration to recover from respondent the sum of $4,645, which represented the difference between the amount of the attorney's fees paid and the amount collected under the note. (See Bus. & Prof. Code, §§ 6200-6206.) The arbitration proceeding, which was advisory, was held on October 4, 1983. During the hearing Steven S. apparently had a cerebral hemorrhage and the hearing was adjourned and never concluded. On December 2, 1983, the arbitrator made an award in Steven S.'s favor for the full $4,645. In December 1983 Steven S. hired another attorney to recover the sums ordered by the arbitration. In January 1984 respondent filed a request for trial de novo in Municipal Court in Orange County, but took no further action with respect to that request. In May 1984 Steven S.'s new attorney petitioned to confirm the arbitration award in Superior Court in Orange County. The court made its order confirming the award and entered judgment for Steven S. against respondent for $4,645 plus interest and attorneys fees of $850. The judgment was served on respondent. At the State Bar hearing in October 1989, respondent introduced into evidence an agreement executed in September 1989 between himself and Steven S. settling all claims between them for the payment of $4,645 to Steven S.

The notice to show cause in this count charged violations of sections 6068 (a), 6103 and 6106 and rules 5-101, 8-101(A) and 8-101(B)(4). The referee made the following conclusions of law.

Respondent did not violate rule 5-101 because he had not obtained an interest in Steven S.'s property as the assignment was of a third-party note in payment of fees. The transaction was a simple payment of an obligation by the transfer of property, not a security transaction. Further the transaction was not a business transaction, and in any event the transaction was fair and reasonable to Steven S. as the assigned note at the time had a market value of approximately $6,000 which was in discharge of Steven S.'s obligation of $6,200 to the two attorneys.

Respondent did not violate rule 8-101(A) or 8-101(B)(4) in that there was no clear and convincing evidence that respondent failed to handle trust funds properly or that he failed to pay or deliver his client's funds. Respondent was not obligated to pay the excess payments under the note to Steven S. At the time the note was assigned it was agreed that the present value of the note was approximately the same as the attorneys' fees due and the assignment was an assignment in full, notwithstanding the arbitration award.

Respondent did not violate sections 6068 (a), 6103 or 6106 because respondent had not violated any of the charged rules.[11]

D. Count Four (Isabel R.)[12]

Respondent was hired by Isabel R. in April 1986 to represent her son, Gabe N., who was then in jail in northern California, in connection with outstanding traffic warrants both in northern California and Orange County, and in connection with the proposed transfer of Gabe N. to Orange County to answer the Orange County warrants. Isabel R. paid respondent $1,500 as a retainer for fees and costs to be incurred in connection with this employment. On May 7, 1986, Isabel R. discharged respondent.

The notice to show cause in this count charges violations of sections 6068 (a), 6068 (m) and 6103 and rules 2-111(A)(2), 2-111(A)(3), 6-101(A)(2)

11. We also note that section 6106 establishes that the commission, by an attorney, of any act involving moral turpitude, dishonesty or corruption is cause for suspension or disbarment. No such acts occurred, therefore, respondent did not violate this section.

12. As with count two, the referee concluded that respondent was not culpable of violating any of the charges contained in the notice to show cause. Neither party has requested our review of the referee's findings and conclusions in this count. We have independently reviewed the record and have concluded the referee's findings and conclusions are supported by the record and adopt them as our own. As the findings and conclusions are not in dispute, we deem it appropriate to set them forth only briefly.

and 6-101(B)(1). The referee concluded that respondent competently performed the services for which he was employed during the time period he represented Gabe N. and further, that respondent took reasonable steps to prevent prejudice to his client after he was discharged. Finally, the referee concluded that respondent was entitled to delay returning the fees paid him because there was a controversy regarding whether he had earned the money, and that in any event, there was substantial evidence that respondent earned the entire fee paid him. Having so concluded, the referee found no violation of the charged statutes and rules.[13] **[2 - see fn. 13]**

E. Count Five (Failure to Cooperate with State Bar)

In late 1985, an investigator for the State Bar wrote respondent two letters (exhs. 24 and 25), requesting his reply to the Wanda H. complaint. Respondent received the letters, but did not reply. On August 27, 1986, a different investigator for the State Bar wrote respondent a letter (exh. 22), requesting his reply to the Donna and George C. complaint and directing his attention to the provisions of section 6068 (i) (duty to cooperate). On October 6, 1986, an investigator for the State Bar wrote respondent a letter requesting his reply to the complaints of Donna and George C. and Isabel R. and directing his attention to section 6068 (i). Respondent received both the 1986 letters and did not reply.

After the above matters were transferred to the State Bar's Office of Trials for prosecution, respondent fully cooperated with the assigned State Bar attorneys. Respondent explained that his lack of cooperation with the investigators was because he preferred to deal with attorneys rather than investigators.

The notice to show cause in this count alleged that respondent failed to cooperate with the State Bar in its investigation of counts one (Wanda H.), two (Donna and George C.) and four (Isabel R.) in violation of sections 6068 (a), 6068 (i) and 6103. The referee concluded that respondent violated sections 6068 (a), 6068 (i) and 6103 by his failure to cooperate with the State Bar in its investigation of the Donna and George C. and Isabel R. matters.

With regard to the failure to cooperate in the Wanda H. matter, the referee concluded respondent did not violate the charged sections because section 6068 (i) was not effective until January 1, 1986 and the investigator's letters were sent in 1985.

F. Aggravation/Mitigation

In mitigation, the referee found that respondent had practiced law for 30 years without prior discipline. In addition, stipulated testimony from a witness was accepted which indicated that the witness had known respondent for 20 years and that respondent is honest and competent.[14] Furthermore, respondent's misconduct took place six years prior to the hearing and while respondent did not cooperate in the investigation stage, he fully cooperated with the Office of Trials. No evidence of aggravation was offered and the referee made no findings of aggravating circumstances.

DISCUSSION

[3] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it, this review department, like the Supreme Court, must independently review the record. (See *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928.) We accord great weight to findings of fact made by the hearing department which resolve testimonial issues. (*In re Bloom* (1987) 44 Cal.3d 128, 134; rule 453(a), Trans. Rules Proc. of State Bar.) However, we may make findings, conclusions and

13. **[2]** We also note that rule 2-111(A)(2) applies to discharged attorneys as well as those that withdraw. (*Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999.) Here, respondent was discharged by the client. Nevertheless, respondent took reasonable steps to avoid prejudice to his client, which included a trip to Orange County after he was discharged. Under these circumstances, the record does not support a violation of this rule.

14. The stipulated testimony did not reveal whether the witness was aware of the findings on culpability. (See standard 1.2(e)(vi), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V.)

recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar.) **[4]** Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (*Id.*) **[5]** Our overriding concern is the same as that of the Supreme Court; the preservation of public confidence in the profession and the maintenance of high professional standards. (See standard 1.3, Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ["standard(s)"]; *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117.)

The examiner asserts that respondent should be found culpable of violating former rule 6-101(2) in the Wanda H. matter (count one) in that he failed to perform services and communicate with the client, and of violating rule 5-101 in the Steven S. matter (count three) in that he acquired an adverse interest in his client's property without complying with the rule.

The respondent argues that: A violation of former rule 6-101(2) was not proven in count one. *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815 and *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931, preclude violations of sections 6068 (a) and 6103 in count one; and in any event, the failure to communicate was not wilful and therefore did not give rise to a 6-101(2) violation. There is no violation of former rule 5-101 in count three because the rule does not apply to the fact situation as found by the referee. There should be no finding of a failure to cooperate in count five because an accused attorney may wait, because of the complexity of the matter, to communicate with an attorney of the State Bar rather than the initial investigator. The evidence upon which the failure to cooperate was found (deposition of investigator) was erroneously admitted and should be excluded and the count dismissed. Respondent asserts that the entire matter should be dismissed.

A. Rule 6-101(2) (Count One)

The examiner argues that respondent abandoned Wanda H. by not completing the damages portion of the lawsuit and failed to communicate to her that he was not pursuing damages, in violation of former rule 6-101(2). Respondent asserts that he performed a tremendous amount of legal work for Wanda H. and pursuing damages would have been frivolous.

The referee concluded that respondent did not violate rule 6-101(2) because there is no such rule. On its face, this appears to be in error. Rule 6-101(2) was in effect from January 1, 1975 to October 23, 1983.[15] The events in the Wanda H. matter occurred from August 1982 through at least December 1983. Thus, the rule covered at least a part of the events in question.

[6a] The distinction between former rule 6-101(2) and rules 6-101(A)(2) and 6-101(B)(2) was discussed at trial (R.T. p. 303) in connection with respondent's unsuccessful motion to dismiss after the examiner presented his case. In light of that discussion, it is inconceivable that the referee would conclude that there was no rule 6-101(2). Rather, it seems appropriate to construe the referee's conclusion to mean that there was no such rule at the time of the alleged failure to perform. **[7]** Respondent wrote Wanda H. in December 1983 (exh. 13) informing her that he was negotiating with opposing counsel. Neither the decision nor the record provide a specific date or time period when respondent decided not to pursue damages. However, it is reasonable to conclude that the decision did not occur before the December 1983 letter. Thus, even if the failure to pursue damages was a failure to perform services

15. Former rule 6-101(2) provided "A member of the State Bar shall not wilfully or habitually . . . [¶] (2) Fail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed." The substance of this provision appeared in the amended version of rule 6-101 in effect from 1983 to 1989 and now appears in rule 3-110.

competently, as the examiner asserts, it did not occur until after October 1983 and therefore former rule 6-101(2) would not apply.[16] **[8a - see fn. 16]** **[6b]** As the notice did not charge violations of rules 6-101(A) or 6-101(B), which were in effect from October 1983 to 1989, and the notice was not amended, the referee's conclusion, construed as set forth above, is supported by the record.

[8b] The referee further concluded that even if the notice to show cause were interpreted to charge violations of rules 6-101(A)(2) or 6-101(B)(2), respondent acted competently in recovering the van, properly exercised his judgment in not pursuing damages and there was no evidence that respondent intentionally or repeatedly failed to act competently or failed to possess the time, resources or ability to complete the work, as specified by the rule. These conclusions are supported by the record. The complaint filed by respondent sought return of the vehicle or its value, damages for loss of use and costs of suit. (Exh. 18.) It is undisputed that the vehicle was inoperative during the time Wanda H. was deprived of possession.

B. Sections 6068 (a) and 6103 (Count One)

The referee concluded that respondent's failure to communicate his decision not to pursue damages in the Wanda H. matter was a violation of sections 6068 (a) and 6103 in that it was a violation of the duty "to keep the client informed of matters of significance concerning the representation." (Decision, p. 7.) Respondent argues that under *Baker, supra*, and *Sands, supra*, violations of those sections are not appropriate and in any event, any failure to communicate was not wilful because it was only "one instance in over 38 years of practice." Although we reject respondent's claim that years of practice negate wilfulness, we conclude that under controlling Supreme Court precedent, culpability under section 6068 (a) is appropriate. However, as discussed *post*, respondent's many years of blemish-free practice are a significant mitigating circumstance which does affect our disposition of the matter.

[9] Currently, an attorney has a statutory duty to respond promptly to reasonable status inquiries from clients and keep clients reasonably informed of significant developments in the matter the attorney is handling for the client. (Bus. & Prof. Code, § 6068 (m).) This subsection was not added to section 6068 until 1986 and did not become effective until January 1, 1987. (Stats. 1986, ch. 475, § 2.) The failure to communicate in the present case occurred well before the effective date of this subsection and therefore it is not an appropriate basis for discipline under section 6068 (m). (*Baker* v. *State Bar, supra*, 49 Cal.3d at p. 815.)

[10a] Prior to the enactment of subsection (m), there was no express statutory provision establishing an attorney's duty to communicate with a client. Nevertheless, the Supreme Court has long held that the "[f]ailure to communicate, and inattention to the needs of, a client are proper grounds for discipline. [Citations.]" (*Spindell* v. *State Bar* (1975) 13 Cal.3d 253, 260; see also *Taylor* v. *State Bar* (1974) 11 Cal.3d 424, 429-432; *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 124-127.) This "common law" duty to communicate has been recently affirmed in *Aronin* v. *State Bar* (1990) 52 Cal.3d 276, 287-288. The Supreme Court has, at times, viewed an attorney's failure to communicate with a client, which occurred prior to the enactment of section 6068 (m), as falling within the parameters of an attorney's oath and

16. **[8a]** In any event, the examiner's argument for culpability under former rule 6-101(2) fails on the merits. The examiner would have us hold that respondent's failure to pursue a claim for damages was a wilful or habitual failure to perform under rule 6-101(2), citing *McMorris v. State Bar* (1983) 35 Cal.3d 77. McMorris had been found culpable in five separate matters, four of which involved failure to perform services in violation or rule 6-101(2). (*Id.* at p. 80.) In the two matters relied on by the examiner, McMorris failed to perform any of the services for which he had been employed, which resulted in the dismissal of the client's case in one of the matters for failure to bring the action to trial within five years. (*Id.* at p. 81.) In the other two matters, McMorris also failed to perform most or all of the services for which he was employed. (*Id.*) Respondent's conduct here pales in comparison. Respondent agreed to seek recovery of the van and damages. He filed a complaint, obtained a writ of possession and had the sheriff recover the van, all within an approximate three-month period. (State Bar exh. 18.) Respondent's decision not to pursue damages appears well-founded considering the van was inoperable.

duties, under the general provisions of sections 6068 (a) (duty to support the laws). (See, e.g., *Taylor* v. *State Bar*, *supra*; *Aronin* v. *State Bar*, *supra*.)

[10b] Although respondent recovered the van, he failed to inform his client that he was not pursuing damages. Irrespective of the merits of the claim for damages, respondent had a duty to communicate to his client his decision that pursuing damages was fruitless. His failure to do so deprived his client of the benefit of his professional advice. In addition, as the referee observed, the client was deprived of an opportunity to consult with another attorney if she chose to do so. The referee's conclusion that respondent failed to communicate with his client in violation of section 6068 (a) is supported by the record and is an appropriate basis for culpability pursuant to the above cases.

Contrary to respondent's assertion, we do not believe that *Baker* and *Sands* eliminate section 6068 (a) as a substantive violation. Rather, as indicated in *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561-562, the Court was unable to find a sufficient factual basis in *Baker* and *Sands* for a section 6068 (a) violation. (*Id.* at p. 561.) Indeed, the Court in *Sands* deleted the State Bar's conclusion that Sands violated 6068 (a) in only three of the four client matters. (*Sands* v. *State Bar*, *supra*, 49 Cal.3d at p. 931.) The fourth matter was based on conduct amounting to bribery. (*Id.* at pp. 928-930.) The Court adopted the State Bar's conclusion that that conduct violated section 6068 (a). (*Id.* at p. 931.)

We do not, however, view section 6103 as an appropriate basis for culpability. The Supreme Court has repeatedly indicated that section 6103 does not define a duty or obligation of an attorney, but provides for the imposition of discipline for violations of oaths and duties that are defined elsewhere. (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815; *Sands* v. *State Bar*, *supra*, 49 Cal.3d at p. 931; *Middleton* v. *State Bar*, *supra*, 51 Cal.3d 548, 561; *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 618.)

We recognize that in *Aronin* v. *State Bar*, *supra*, 52 Cal.3d 276, 287-288, the Court seemingly found a substantive violation of section 6103 based on the attorney's failure to communicate. However, we note that the Court only adopted, without explanation, the State Bar's conclusion that section 6103 had been violated, which was not disputed by Aronin. (*Id.*) Under these circumstances, *Aronin* does not appear to us to constitute an express determination that section 6103 defines a duty or obligation, the violation of which would result in a substantive violation.

[11] In any event, the Court's analysis in *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060, regarding the duplicative nature of charging sections 6068 (a) and 6103 along with specific rule violations for the same misconduct, is equally applicable here. "If . . . misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of sections 6068, subdivision (a), and 6103." (*Id.*) Here we have found a violation of section 6068 (a). No purpose would be served by finding a substantive violation of 6103 as our resolution of this case would not be affected. Our disposition "does not depend on whether multiple labels can be attached to the misconduct." (*Id.* at p. 1059.)

Respondent has not cited any authority for his argument that his many years of practice render his action in count one not wilful. **[12]** Wilfulness is established by proof that the attorney acted or omitted to act purposely. (*Phillips* v. *State Bar* (1989) 49 Cal.3d 944, 952.) No rational relationship exists between years of practice and ability to act or omit to act purposefully on a specified occasion. In any event, the record before us indicates that respondent knew what he was doing and not doing with regard to his failure to communicate with the client. Respondent testified he decided not to pursue the damages because there were none. (R.T. pp. 317-319.) He also testified he informed Wanda H. of this decision. (*Id.*) Wanda H. testified he did not. (R.T. pp. 165-167.) The referee resolved this conflict against respondent and we are bound to accord that resolution great weight. (Rule 453, Trans. Rules Proc. of State Bar.) Respondent's current claim that his failure to communicate was not wilful is inconsistent with his claim at trial that he did communicate. Respondent's actions with regard to this issue can only be characterized as wilful and we so conclude.

C. Rule 5-101 (Count Three)

The referee concluded that rule 5-101 did not apply to the Steven S. matter because the assignment of the trust deed[17] was not a security transaction, "but a simple payment of an obligation by the transfer of property." (Decision, p. 25.)

The examiner argues that the assignment occurred when Steven S. signed the document in December of 1979; that the assignment states that it was made to secure payment of attorney's fees and that there was no evidence that any attorney's fees were owing at that time. Under these facts, the examiner asserts that respondent could have unilaterally eliminated any interest Steven S. had in the property after December 1979 and therefore the requirements of rule 5-101 apply under *Hawk* v. *State Bar* (1988) 45 Cal.3d 589.

First, we note that the requirements of the law prior to *Hawk* with respect to the acquisition of security interests in clients' property were not clear. In *Fall* v. *State Bar* (1944) 25 Cal.2d 149, 159, the court "said nothing to condemn an attorney for taking as his fee the client's assignment of the note secured by deed of trust." (*Hawk* v. *State Bar*, *supra*, 45 Cal.3d at 599.) The facts here predate the Supreme Court's decision in *Hawk* by a number of years.

[13a] The referee's decision that no rule 5-101 violation occurred is supported by the record. Respondent did not record the assignment until November 1980 after a court order assigning the note to him and did not notify the trustors to make payments to him until then. This supports respondent's position that, prior to the court order, he understood himself merely to be holding the note pending Steven S.'s decision as to what to do with it. **[14a]** In short, the referee impliedly concluded that Steven S. and respondent did not intend the transfer of the note in December 1979 to be the acquisition by respondent of an interest in Steven S.'s property. There is no clear and convincing evidence that respondent and Steven S. intended otherwise.

[14b] Intent is an essential element of an assignment. "While no particular form of assignment is necessary, the assignment, to be effectual, must be a manifestation to another person by the owner of the right indicating his intention to transfer, without further action or manifestation of intention, the right to such other person, or to a third person. [Citation.]" (*Cockerell* v. *Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 291.) **[13b]** Thus, while there was a physical transfer of the "Assignment of Deed of Trust" to respondent, the transfer was not intended to be a transfer of an interest in the promissory note and/or trust deed for purposes of rule 5-101. Accordingly, respondent did not "acquire" an interest in Steven S.'s property.

[13c] Moreover, rule 5-101 specifies that a member of the State Bar shall not "knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" without fulfilling the three requirements of the rule. Even if Steven S.'s execution of the assignment of the deed of trust and respondent's possession thereof could be construed as the acquisition of an adverse interest, there is no evidence that respondent *knowingly* acquired any interest in 1979. He did not treat the document he received as a current assignment to him of an interest in the property. Additionally, respondent did not make any use of the executed assignment that was unfair or detrimental to his client and waited for a court order assigning the note to him in 1980 before he took any action on it. Under these facts, the record supports the referee's conclusion that respondent did not violate rule 5-101.

D. Section 6068 (i) (Count Five)

[15] Respondent argues that the section 6068 (i) violation (failure to cooperate with investigation of the Donna and George C. and Isabel R. matters) in count five should be deleted because an accused attorney can wait and cooperate with an attorney employed by the State Bar rather than one of its investigators. Respondent cites no authority for this position and we are not aware of any. Indeed, this

17. The decision refers to the transaction as an assignment of a deed of trust. The assignment was actually of the promissory note and trust deed. (See exh. 23.)

assertion is contrary to the express language of section 6068 (i): "To cooperate . . . in any disciplinary investigation or other . . . proceeding."

The referee found culpability in this count based on the deposition of a State Bar investigator.[18] **[16 - see fn. 18]** Respondent argues that the deposition (exh. 22) was erroneously admitted into evidence because it was taken after the discovery cut-off date and we should exclude the deposition and dismiss the count. The examiner counters that the deposition was not discovery since his purpose was to preserve testimony for trial rather than discover facts. Further, the examiner argues that respondent did not serve his objections to the deposition at least three days prior to the deposition, and therefore waived his objections under section 2025, subdivision (g), of the Code of Civil Procedure. (See also rule 315, Trans. Rules Proc. of State Bar [unless modified by the State Bar rules of procedure, Civil Discovery Act applies to State Bar proceedings].)

[17a] The examiner found out just before trial that the investigator was not going to be available to testify at trial because of her vacation. In State Bar matters, discovery must be completed within 90 days of the service of the notice to show canse. (Rule 316, Trans. Rules Proc. of State Bar.) For good cause, reasonable extensions of time may be granted. (*Id.*)

The notice to show cause was served on December 13, 1988. The examiner noticed the deposition for July 6, 1989 and served the notice by mail on respondent on June 21, 1989. Trial was set for July 17, 1989. **[17b]** Thus, the deposition was well after the 90- day discovery cut-off. The examiner did not seek an extension of the discovery period. Respondent served written objections to the deposition on the examiner by mail on June 30, 1989, based on section 2024 of the Code of Civil Procedure and rules 316 and 317 of the Transitional Rules of Procedure of the State Bar, on the ground the discovery period had ended. However, respondent did not seek a protective order. Instead, he appeared at the deposition, asserted his objections, and then cross-examined the investigator.

At trial, respondent renewed his objection to the deposition when the examiner offered the transcript into evidence. (R.T. pp. 243-256.) The referee admitted the transcript despite the examiner's lack of compliance with State Bar rules of procedure on the ground of waiver because respondent appeared at the deposition and cross-examined the witness. (R.T. pp. 466-476.)

[17c] The examiner's arguments in favor of his use of the improperly obtained deposition are not well-founded. He cites no authority for his position that the deposition was not discovery. Indeed, he argues respondent waived his objections to the deposition by not complying with the section 2025 of the Code of Civil Procedure, which is part of the Civil Discovery Act of 1986. (See Code Civ. Proc., §§ 2016-2036.) The examiner would have us hold that the deposition is not discovery for purposes of its introduction at trial, but is discovery for purposes of ascertaining the validity of respondent's objections. We hold that the deposition was clearly discovery.

[17d] In any event, section 2025, subdivision (g), of the Code of Civil Procedure provides that a party waives any error or irregularity in a deposition notice if, after being served with a deposition notice which does not comply with subdivisions (b) to (f) of section 2025 (dealing with when and where a deposition may be taken), the party does not serve timely written objections specifying the error. This statute does not apply here because the error complained of does not fall within subdivisions (b) to (f). The error here is the examiner's failure to comply with the State Bar rules of procedure.

[18] The referee admitted the transcript on the ground that respondent waived his objections by participating at the deposition. We need not decide

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18. The investigator's deposition was the only evidence offered by the examiner to prove respondent's failure to cooperate in the Donna and George C. and Isabel R. matters. A different State Bar investigator testified at trial regarding respondent's alleged failure to cooperate in the Wanda H. matter. **[16]** As noted, the referee concluded that respondent was not culpable of failing to cooperate in the Wanda H. matter because the alleged violation predated the effective date of section 6068 (i). This conclusion is supported by the record and we adopt it as our own.

this issue, for even assuming he did waive his objections, the transcript should not have been admitted into evidence because the examiner failed to meet the requirements for use of a deposition at trial under section 2025, subdivision (u), of the Code of Civil Procedure. The relevant part of this subdivision provides that the party offering the deposition of an absent witness must establish that he or she has "... exercised reasonable diligence but [was] unable to procure the deponent's attendance by the court's process." (Code Civ. Proc., § 2025, subd. (u)(3)(B).)

The examiner offered no evidence that he exercised reasonable diligence to procure the investigator's testimony at trial. The investigator was apparently served with a subpoena to appear at trial. (Exh. 22, at p. 11.) However, the examiner made no effort either to compel her attendance after she indicated her travel plans or to seek a continuance of the trial. In addition, the investigator's vacation had been planned for approximately two years prior to the deposition. (*Id.* at p. 30.) The examiner agreed to the July 1989 trial date in this matter at the mandatory settlement conference in May 1989. The examiner did not demonstrate that he was reasonably diligent in ascertaining the availability of his witness prior to agreeing to the July trial date. Accordingly, we conclude that the examiner did not exercise reasonable diligence in procuring the investigator's testimony and therefore, it was error to admit the deposition. (Compare *Ritter* v. *State Bar* (1985) 40 Cal.3d 595, 601.) Any purported waiver of objections to the taking of the deposition did not render the transcript admissible in evidence.

[19] Nevertheless, error in admitting evidence in State Bar proceedings does not invalidate a finding of fact unless the error resulted in the denial of a fair hearing. (Rule 556, Trans. Rules Proc. of State Bar; see *Ritter* v. *State Bar*, *supra*.) Respondent testified at trial that he did respond to some of the investigators' inquiries. (R.T. p. 477.) Without a face-to-face assessment of the investigator's testimony, in light of her seemingly hazy memory of whether respondent replied to her inquiries (exh. 22, p. 11), a proper determination weighing conflicting testimony could not be made. In our view, this denied respondent a fair trial on this count. Accordingly, we exclude the deposition. With this evidence excluded, the record fails to support culpability on the charge of failing to cooperate with the State Bar in its investigation of the Donna and George C. and Isabel R. matters.

DISPOSITION

As noted above, we have concluded that respondent failed to communicate to his client his decision not to pursue damages in the Wanda H. matter, in violation of section 6068 (a). We are not aware of any prior decisions of the Supreme Court on facts similar to the present case. A sampling of the reported Supreme Court cases that imposed discipline based on a "common law" failure to communicate demonstrates the uniqueness of the present case.

In *Spindell* v. *State Bar*, *supra*, 13 Cal.3d 253, the attorney had been hired in 1966 to represent his client in a domestic relations case. For over a three-year period, Spindell ignored repeated attempts by his client to contact him concerning the progress of the matter. On one of those occasions, Spindell's secretary advised the client that it was permissible to remarry, which the client did in reliance thereon, when no final decree had been obtained. The dissolution complaint was not even filed until June 1968. (*Id.* at pp. 257-258.) Spindell himself characterized his failure to communicate and his delay in obtaining the dissolution as "extreme neglect". (*Id.* at p. 260.)

In *Taylor* v. *State Bar*, *supra*, 11 Cal.3d 424, the attorney was hired in early 1966 to pursue a personal injury action on behalf of a minor. For the next three years, on the few occasions the clients were able to contact Taylor, he assured them that the case was progressing well. In late 1969 the clients obtained new counsel and the case was settled. For more than three years Taylor was not able to locate the driver of the car that caused the injury. Taylor had no adequate explanation for his failure to prosecute the action. It was Taylor's "course of inattention and sporadic effort over a long period of time" that the Court found to be inconsistent with his oath and duties. (*Id.* at pp. 429-432.)

In *Chefsky* v. *State Bar*, *supra*, 36 Cal.3d 116, the attorney had been hired in a marriage dissolution matter. He advised the client to file bankruptcy because she was heavily in debt. The client paid

Chefsky to do so. Chefsky prepared a bankruptcy petition, but never filed it. A bank filed suit against the client, which she forwarded to Chefsky. He failed to take any action and the bank obtained a judgment against the client. In both of these matters, Chefsky was found to have failed to communicate with the client. (*Id.* at pp. 124-127.) The Court concluded that the silence and inattention supported the State Bar's finding that Chefsky failed to communicate reasonably with his client. (*Id.* at p. 127.)

In *Aronin* v. *State Bar*, *supra*, 52 Cal.3d 276, the attorney was hired to recover a lease deposit. Although Aronin apparently performed some services for the client, he failed to return numerous phone calls the client made to him for many months in 1984 and 1985. (*Id.* at pp. 287-288.)

[20a] In contrast, respondent performed the services for which he was hired by Wanda H. He successfully recovered the van and properly exercised his judgment not to pursue damages. Respondent obtained for his client all that could reasonably be obtained. Admittedly, he failed to inform his client that he was not pursuing damages. Nevertheless, we do not view a single failure to communicate of this magnitude to rise to the level of the misconduct that occurred in the above cases.

[20b] Standard 2.4(b) provides that an attorney found culpable of "wilfully failing to communicate with a client shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client." As we have noted, respondent performed significant legal services for his client to accomplish the purpose for which he was employed and properly exercised his judgment in not pursuing damages. His subsequent failure to inform his client of his decision, though not excused, is certainly extenuated by the services he performed and the results he obtained prior to the misconduct.

[20c] The referee found that there was no harm to the client as a result of respondent's misconduct. We find no basis in the record for disturbing this finding. Wanda H. was left in limbo as to the status of her lawsuit which in turn deprived her, at least for some period of time, of an opportunity to consult other counsel or pursue her claim in some other way. Nevertheless, nothing in the record suggests the outcome would have been any different. Thus, for purposes of standard 2.4(b), both the "extent of the misconduct" and "the degree of harm to the client" are minimal.

[20d] We consider respondent's single failure to communicate in this case, absent mitigating circumstances, to merit a private reproval. However, respondent's many years of practice are a significant mitigating circumstance. The "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

[21] The standards serve as guidelines (*id.* at p. 267, fn. 11), and must be viewed with the objective of achieving the purposes of attorney discipline. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 126.) "The proper objectives of attorney discipline do not include punishment of the errant attorney; rather, they are protection of the public, the profession, and the courts, maintenance of high professional standards, and preservation of public confidence in the legal profession. [Citations.]" (*Rose* v. *State Bar* (1989) 49 Cal.3d 646, 666; see also standard 1.3.)

[20e] In light of the extenuating circumstances and respondent's lengthy period of practice without prior discipline, we conclude that discipline for the single failure to communicate in this case would not further the objectives of attorney discipline and would be punitive in nature. Nevertheless, we have found respondent culpable of violating his duty to communicate with his client and a dismissal is therefore not suitable. In view of all these factors, we consider an admonition an appropriate disposition of this matter.

CONCLUSION

For the foregoing reasons, we hereby admonish respondent pursuant to rule 415 of the Transitional Rules of Procedure of the State Bar.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

H. TED HERTZ

A Member of the State Bar

[No. 85-O-15434]

Filed April 26, 1991; as modified, May 10, 1991

SUMMARY

Respondent was found culpable of disbursing to himself and his client, without authorization, $15,000 which respondent was to have held in trust for his client and the client's ex-spouse in a marital dissolution matter. Respondent had disbursed $10,000 to the client to reimburse the client for paying community debts, and had taken $5,000 for his own fees, which he later replaced. Respondent had also misled opposing counsel, the trial court, the Court of Appeal, and the State Bar investigator as to the location of the entrusted funds. Although the State Bar examiner requested only a one-year actual suspension, the hearing referee recommended that respondent be disbarred. (Elliot R. Smith, Hearing Referee.)

Respondent sought review, claiming prejudicial error on the part of the hearing referee. Specifically, respondent contended that the referee should have granted his motion for a mistrial based on the allegedly prejudicial effect on the referee of the then-examiner's revelation during trial that the examiner had accepted employment as counsel to the State Bar Court. Respondent also challenged the admission into evidence of his ex-wife's testimony on the grounds of confidentiality of marital communications. The review department found no prejudicial error on these issues.

Although it adopted most of the referee's findings, the review department deleted a finding that respondent committed acts of moral turpitude in making the unauthorized disbursements, based on the lack of clear notice of such a charge in the notice to show cause, and relevant case law making moral turpitude questionable given the facts of the matter. The review department also added findings in mitigation, and reduced the recommended discipline from disbarment to a five-year suspension, stayed, five years probation, and actual suspension for two years and until respondent complied with standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

COUNSEL FOR PARTIES

For Office of Trials: Harriet J. Cohen

For Respondent: H. Ted Hertz, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **106.20 Procedure—Pleadings—Notice of Charges**
204.90 Culpability—General Substantive Issues
561 Aggravation—Uncharged Violations—Found
Where notice to show cause charged respondent with making misrepresentations to opposing counsel and at trial, and respondent testified at disciplinary hearing that similar misrepresentations were also made to court of appeal and to State Bar investigator, this later conduct was properly treated not as bearing on substantive culpability, but on the issue of discipline.

[2 a, b] **103 Procedure—Disqualification/Bias of Judge**
162.20 Proof—Respondent's Burden
To prevail on a claim of error by the hearing referee in denying respondent's motion for mistrial based on the assertedly prejudicial effect on the referee of the examiner's revelation during the hearing that the examiner had been hired as State Bar Court counsel, respondent was required to do more than hint at bias. Where respondent failed to show how any bias specifically prejudiced him, and record showed no error or bias, motion for mistrial was properly denied.

[3 a, b] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
An attorney seeking review of a disciplinary decision must present all points when filing the request for review, as the State Bar Court's rules do not provide for bifurcated review. (Trans. Rules Proc. of State Bar, rules 450-455.) A respondent could not file a second brief addressing the merits of the matter after the review department rejected respondent's claims of procedural error.

[4] **125 Procedure—Post-Trial Motions**
161 Duty to Present Evidence
162.20 Proof—Respondent's Burden
Attorneys facing charges of professional misconduct must present to the hearing department all evidence favorable to themselves. A failure to do so may justify denial of a motion for rehearing to present additional evidence.

[5] **148 Evidence—Witnesses**
159 Evidence—Miscellaneous
Confidentiality for marital communications does not apply to testimony concerning matters prior to the marriage or after the couple's estrangement.

[6] **120 Procedure—Conduct of Trial**
148 Evidence—Witnesses
159 Evidence—Miscellaneous
The hearing department has wide latitude to receive all admissible evidence, especially since it sits without a jury. Where respondent's ex-spouse's testimony was properly admitted, but because there was little corroboration and due to the marital dissolution the chance of bias was great, the hearing department properly disregarded such testimony, respondent could not successfully claim prejudicial error.

[7 a, b] **213.40 State Bar Act—Section 6068(a)**
221.00 State Bar Act—Section 6106
320.00 Rule 5-200 [former 7-105(1)]
490.00 Miscellaneous Misconduct
Where respondent had asked a witness a question, knowing that the witness would testify falsely, in order to mislead the court, respondent was culpable of deceiving the court and of moral turpitude, but in the absence of evidence of an agreement between respondent and the witness, there was no proof that respondent suborned perjury. A determination of subornation of perjury requires clear and convincing proof of a corrupt agreement between the witness and the respondent for the witness to testify falsely.

[8] **106.20 Procedure—Pleadings—Notice of Charges**
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
General charges in a notice to show cause of disbursing trust funds without permission or knowledge of the beneficiary did not give adequate notice of a charge of misappropriation of such funds, without further specification as to the facts giving rise to the accompanying charge of committing acts of moral turpitude.

[9] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
430.00 Breach of Fiduciary Duty
Improper withdrawal of entrusted funds in violation of duty to maintain funds in trust, and of fiduciary duty to opposing party, does not necessarily rise to the level of an act of moral turpitude.

[10 a-c] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
541 Aggravation—Bad Faith, Dishonesty—Found
In a matter in which respondent prematurely disbursed entrusted funds to repay client for expenses later determined to have been properly reimbursable, and also withdrew funds for attorney's fees but later replaced those funds, the gravamen of the case, for the purpose of assessing the appropriate discipline, was the prolonged deceit perpetuated by respondent on opposing counsel and the courts regarding the unauthorized disbursements. Respondent's extended practice of deceit on courts and counsel made respondent's case far more serious as to discipline than the trust violations.

[11] **280.00 Rule 4-100(A) [former 8-101(A)]**
824.54 Standards—Commingling/Trust Account—Declined to Apply
Premature withdrawal of trust funds in a marital dissolution to pay community debts, without misrepresentations or financial loss to the opposing party or opposing counsel, combined with impressive character testimony, would warrant discipline in the neighborhood of 30 days actual suspension, not lengthy suspension or disbarment.

[12 a, b] **740.10 Mitigation—Good Character—Found**
765.10 Mitigation—Pro Bono Work—Found
Testimony of several highly reputable character witnesses attesting to respondent's otherwise high standing in the legal community and high ethical standards and demonstration of diligence on behalf of clients, as well as substantial community service and pro bono activities, should have been given more than a little weight in mitigation; review department found it to be significant.

[13] **802.69 Standards—Appropriate Sanction—Generally**
1091 Substantive Issues re Discipline—Proportionality
1099 Substantive Issues re Discipline—Miscellaneous
In cases involving attorney discipline for serious offenses, the Supreme Court has: (1) stated that serious offenses call for severe discipline and warrant disbarment in the absence of clear or compelling mitigation; (2) recited similar language but evaluated the type of misconduct as a lesser offense; or (3) emphasized that there is no fixed formula as to discipline, and that appropriate discipline can only be arrived at by a balanced consideration of relevant factors, on a case-by-case basis.

[14] **802.30 Standards—Purposes of Sanctions**
The Supreme Court has been consistent in measuring discipline against the purposes of attorney discipline, which are the protection of the public, courts and legal profession, maintenance of integrity of the profession and high professional standards and preservation of public confidence in the legal profession.

[15] **802.69 Standards—Appropriate Sanction—Generally**
833.90 Standards—Moral Turpitude—Suspension
1092 Substantive Issues re Discipline—Excessiveness
Disbarment will not be ordered where there is no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public.

[16] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
822.51 Standards—Misappropriation—Declined to Apply
Violations of trust account rules which do not involve a misappropriation found to constitute an act of moral turpitude are not treated, for the purpose of determining appropriate discipline, as misappropriations within the contemplation of standard 2.2(a), Standards for Attorney Sanctions for Professional Misconduct, for which disbarment is the presumed sanction.

[17] **710.53 Mitigation—No Prior Record—Declined to Find**
Where respondent had practiced for only four years prior to his misconduct, his lack of prior discipline was not mitigating.

[18] **120 Procedure—Conduct of Trial**
735.10 Mitigation—Candor—Bar—Found
Respondent's stipulation to the charges at the outset of the hearing constituted cooperation carrying mitigating weight.

[19] **204.90 Culpability—General Substantive Issues**
213.40 State Bar Act—Section 6068(d)
320.00 Rule 5-200 [former 7-105(1)]
430.00 Breach of Fiduciary Duty
541 Aggravation—Bad Faith, Dishonesty—Found
Attorneys are expected to be forceful advocates for clients' legitimate causes, but role played by attorneys in honest administration of justice is critical. Attorneys, by adherence to their high fiduciary duties and the truth, can sharply reduce or eliminate clashes and ease the way to dispute

settlement. Where parties to marital dissolution matter agreed to allow husband's counsel to hold community funds in trust pending resolution of dispute regarding property settlement, relying on counsel's duty as an attorney to honor the trust nature of the money, attorney's misconduct in improperly disbursing funds and then misrepresenting to wife's counsel and courts that funds were still held in trust account was especially regrettable.

[20 a-c] **176 Discipline—Standard 1.4(c)(ii)**
213.40 State Bar Act—Section 6068(d)
320.00 Rule 5-200 [former 7-105(1)]
802.30 Standards—Purposes of Sanctions
833.40 Standards—Moral Turpitude—Suspension
833.90 Standards—Moral Turpitude—Suspension
1092 Substantive Issues re Discipline—Excessiveness

First offense deceit has not resulted in disbarment in Supreme Court cases. No act of concealment or dishonesty is more reprehensible than attempts to mislead a court; nonetheless, disbarment for such misconduct may be too drastic and unnecessary to achieve the goals of attorney discipline. Where respondent presented evidence of general good character, discipline of five years stayed suspension, five years probation, and two years actual suspension, with standard 1.4(c)(ii) requirement, was adequate.

ADDITIONAL ANALYSIS

Culpability

Found

213.41 Section 6068(d)
221.11 Section 6106—Deliberate Dishonesty/Fraud
280.01 Rule 4-100(A) [former 8-101(A)]
320.01 Rule 5-200 [former 7-105(1)]
430.01 Breach of Fiduciary Duty

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2
221.50 Section 6106
420.55 Misappropriation—Valid Claim to Funds
490.05 Miscellaneous Misconduct

Aggravation

Found

521 Multiple Acts
531 Pattern
571 Refusal/Inability to Account
588.10 Harm—Generally
611 Lack of Candor—Bar

Mitigation

Found but Discounted

745.32 Remorse/Restitution

Declined to Find

760.52 Personal/Financial Problems

Standards

824.10 Commingling/Trust Account Violations

Discipline

1013.11 Stayed Suspension—5 Years
1015.08 Actual Suspension—2 Years
1017.11 Probation—5 Years

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1026 Trust Account Auditing
1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, J.:

Respondent, H. Ted Hertz, a member of the State Bar of California since 1977, who has no prior record of discipline, seeks review of a disbarment recommendation of a referee of the former volunteer State Bar Court. The referee rejected the lesser discipline of at least one year of actual suspension sought at trial by the examiner.

The referee found that in 1981 respondent held $15,000 in trust in a family law matter while representing the husband. Without knowledge or consent of opposing counsel or the opposing party, respondent issued $10,000 to his client to pay community debts. Respondent later took the remaining $5,000 for his attorney fees, but replaced the $5,000 during the pendency of the case on appeal. During and after the period that he took the action of disbursing the money respondent deceived opposing counsel and the superior court that he had kept the entire $15,000 in trust.

The referee found that during the superior court trial respondent did not suborn his client's perjury as charged in the notice to show cause. However, the referee found respondent knew that his client would commit perjury if asked about respondent's possession of the $15,000 and that respondent misled both the court of appeal and the State Bar investigator while continuing to mislead opposing counsel.

The referee found that respondent's improper use of the $15,000 and deceit of both opposing counsel and the trial court derived from respondent's stipulation. Before us respondent presses claims of procedural and substantive errors contending they justify a new trial.

Upon our independent review of the record we adopt in most part the referee's findings of fact. We add findings in mitigation. We look to recent opinions of the Supreme Court pertinent to this matter in characterizing respondent's misconduct and in arriving at our recommended discipline. We modify the discipline recommendation of the hearing referee; and as we describe *post*, we recommend that respondent not be disbarred, but that he be suspended from the practice of law for five years, stayed, on conditions of two years actual suspension and until proof of compliance with standard 1.4(c)(ii).

I. THE RECORD

A. The Charges and Respondent's Stipulation at Trial

On October 24, 1988, the State Bar's Office of Trial Counsel filed its notice to show cause in this matter. It alleged that in 1981, respondent represented Herbert Cook ("Herbert") in a marriage dissolution action against his wife, Mary. On October 14, 1981, with consent of Mary and her attorney, respondent received $15,000 to be held in trust for both spouses. About one month later, respondent disbursed $10,000 of that sum to Herbert. During March and April 1982, respondent withdrew the remaining $5,000 as payment of his own legal fees due from Herbert. Respondent made both disbursements without the knowledge or consent of Mary or her attorney. Meanwhile, in about December 1981, respondent misrepresented to Mary's attorney that he still held the entire $15,000 in trust and repeated that misrepresentation to the court trying the Cook dissolution in January 1983. Respondent was also charged with suborning perjury from Herbert by eliciting from him testimony that respondent still held the monies in trust.

The notice to show cause charged respondent with the following violations of the Business and Professions Code:[1] section 6068 (a) (duty to support the laws), 6068 (d) (duty to employ truthful means and not mislead a judge), 6103 (violation of duties is ground for suspension or disbarment) and 6106 (act of moral turpitude, dishonesty or corruption). It also charged that respondent violated the following Rules of Professional Conduct of the State Bar:[2] 7-105(1)

1. Unless otherwise noted, all references to "section" are to sections of the State Bar Act set forth in the Business and Professions Code.

2. Unless otherwise noted, all references to "rules" are to the Rules of Professional Conduct of the State Bar in effect from January 1, 1975, through May 26, 1989.

(obligation to employ truthful means and not to mislead a judge) and 8-101(A) (obligation to avoid commingling of trust funds).

Near the outset of the State Bar Court trial, respondent, represented by experienced counsel, stipulated to all charges of the notice to show cause except for the one charge that he suborned his client's perjury. (1 R.T. pp. 15-19.)[3]

B. Additional Stipulated Facts and Supplemental Evidence

In addition to trying the issue of whether respondent suborned the perjury of Herbert, respondent offered evidence to attempt to explain or justify his handling of the $15,000. Further, respondent offered evidence in mitigation including testimony of character witnesses. We summarize this evidence below.

1. Respondent's Receipt of $15,000 of Community Property Funds to Hold in Trust

On January 30, 1980, Herbert, in pro per, filed a petition in Superior Court, Orange County, for dissolution of his 11-year marriage to Mary.[4] Two weeks later, Mary, represented by Patricia Herzog, filed her response. (Exh. 8: A.A. pp. 1-4.)[5] After two orders to show cause initiated by Herzog which caused a financial burden on Herbert, he hired respondent to represent him. (1 R.T. pp. 105-107.) According to respondent, Herbert was not only a client but a friend and respondent discussed his personal life with Herbert. As respondent testified, "[t]here was nothing [Herbert] wouldn't do to help me, nor, really, I him under his circumstances." (1 R.T. pp. 131-132.). Respondent also testified that about half of his practice was in family law. (2 R.T. pp. 34, 111-112.)

In about June 1980, Herzog drafted a marital settlement agreement and proposed a settlement based thereon. The proposal included a recitation of $12,185 in unpaid community debts. It was stipulated at the State Bar Court hearing that this agreement was prepared without formal discovery and was never reduced to a judgment. (1 R.T. pp. 19-23.) Herbert could not agree to all of the terms of the proposed settlement; nevertheless he wished to remarry. On December 19, 1980, the superior court issued a final order of dissolution nunc pro tunc to July 24, 1980, and reserved all of the property settlement and related matters. (Exh. 8: A.A. pp. 25-26.)

By August 1981, the superior court had issued an order restraining either party from disposing of community property (exh. 8, A.A. p. 23) and respondent was aware of the order. (2 R.T. pp. 35-37.) The major community asset was the couple's Huntington Beach home. In the summer of 1981, the couple decided to sell that home; but since they could not agree on how to dispose of all of the sale proceeds,[6] Herzog and her client and respondent and his client agreed that $15,000 would be withheld from escrow and placed in respondent's trust account until, in Herzog's words, "we agreed on how it would be disbursed." (2 R.T. pp. 184; see also respondent's testimony at 1 R.T. pp. 121-122.)

On October 14, 1981, respondent received the $15,000 in community funds from the close of

3. For convenience, the reporter's transcript of the April 20, 1989 hearing will be cited as "1 R.T."; that of the April 11, 1989 hearing as "2 R.T."; that of the April 14, 1989 hearing as "3 R.T."; that of the July 12, 1989 hearing as "4 R.T." and that of the August 7, 1989 hearing as "5 R.T."

4. At the time of the State Bar hearing, Herbert was retired. Prior to 1966, he had a combined 25 years of service with the Los Angeles Police Department and Los Angeles County Sheriff's Department, rising to rank of lieutenant. Between 1966 and 1975, he was employed in the title insurance field and after that in the life insurance field. (1 R.T. pp. 55-56.)

5. The parties introduced portions of the record of *Marriage of Cook* as several different exhibits. In almost all instances, we have found it convenient to refer to that record as part of exhibit 8, copy of the file of the Court of Appeal, Fourth Appellate District, G 000418. Part of that file includes the appellant's appendix in lieu of clerk's transcript (see rule 5.1, Cal. Rules of Court), which we abbreviate "A.A." (See exh. 8: A.A. pp. 237-238.)

6. After other obligations of the Cooks were paid from the escrow of the community home sale, Mary received $18,257.50 and Herbert received $4,436.47. (Exh. 6: document labeled "Escrow Receipts" for escrow number 181304, dated 10-14-81.)

escrow. A memorandum attached to the check prepared by the escrow company stated that the check represented "[f]unds to be put in trust for account of [Herbert and Mary] FOR PROPERTY SETTLEMENT, ..." (Exh. 6.) On October 26, 1981, respondent deposited this check into his trust account at Crocker Bank. (*Id.*)

2. Respondent's Disbursement of the $15,000 Without Consent of Opposing Counsel

As already noted, respondent stipulated that on about November 11, 1981, he disbursed to his client, Herbert, $10,000 of the funds he held in trust, without consent of Herzog or her client Mary. (See also exh 6.) Respondent acted because Herbert "pleaded with [him] a number of times" that he had to have the money to repay his new wife who had advanced that amount of money for Herbert to repay creditors of his prior marriage. (1 R.T. pp. 122-123, 133.) Respondent testified that he accepted the estimate set forth in the proposed marital settlement agreement drafted by Herzog that there were $12,185 in community bills. Respondent was sure that the trust funds he distributed to Herbert at Herbert's request were going to be Herbert's as repayment to him of community debts he had paid. (*Id.* at pp. 133-135.) Respondent's decision to pay Herbert $10,000 from the trust funds was based largely on Herbert's choice of the sum he thought appropriate. (1 R.T. pp. 123-124; 2 R.T. pp. 58-59.)[7]

At the State Bar Court hearing below, respondent freely admitted the charges that he disbursed the $10,000 without knowledge or consent of Herzog, advancing various theories to support what he had done. He testified that he believed he had an "understanding" with Herzog that he could reimburse Herbert for community debts while admitting that he had no binding agreement with Herzog. (2 R.T. pp. 54-60.) He also claimed authority under Civil Code section 5113.5[8] to act as trustee to pay the parties' community debts but he admittedly had no explicit agreement to operate under that section. (1 R.T. pp. 129-130; 2 R.T. pp. 114, 141-146.) Elsewhere, respondent was equivocal in his testimony as to whether he needed Herzog's permission before paying the $10,000 to Herbert. (1 R.T. pp. 128-129.)

As respondent stipulated, during March and April 1982, without Herzog's knowledge or consent, he withdrew the remaining $5,000 as payment of his own legal fees due from Herbert. Respondent had no written fee agreement with Herbert, his fee arrangement with him was "loose" but respondent believed that if he could settle the entire matter for a total of $15,000, Herbert had authorized him to take as his fees anything over $10,000. (1 R.T. pp. 125-126.) Herbert's testimony was generally consistent with respondent's on this point. Herbert did not specifically authorize respondent to use $5,000 for his fees but gave respondent "sort of a carte blanche" as all that Herbert was concerned about was paying his bills and the $10,000 gave him enough to do that. (1 R.T. pp. 65-66.) Respondent ultimately testified, however, that his unilateral taking of the $5,000 as his fees was wrong. (2 R.T. p. 141.) In recognition of this, he put the $5,000 back into trust in 1984 before its absence was discovered by Herzog or her client.

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7. As respondent testified: "Well, as I say, [Herbert] wanted to repay his wife $10,000. There were other bills that were alleged as—or set out in my trial brief as well, as point of reference here, but he agreed that—I asked him to choose a sum that would be appropriate, based on his knowledge of the matter, because at this juncture, in October, I wasn't as completely versed on the case as I would become." (1 R.T. p. 124.) The trial court later held Cook was entitled to credit for proving community debts totalling $9,185.20. The $814.80 difference between the $10,000 prematurely taken and the $9,185.20 credit ultimately allowed was part of the judgment satisfied by Cook following his unsuccessful appeal.

8. Civil Code section 5113.5 was enacted in 1969 but repealed effective July 1, 1987, at which time it was recodified as Civil Code section 5110.150. During the time of *Marriage of Cook*, section 5113.5 applied to community property transferred by the spouses to a trust and permitted the trustee to convey any trust property in accord with trust provisions without spousal consent unless the trust required such consent. The record contains no evidence that any trust agreement was created as envisioned by the statute and even if one had been made, the statute would have allowed respondent to act only within the agreement's terms.

3. Respondent's Deceit of Opposing Counsel and Courts Concerning the $15,000 He Was to Hold in Trust

Although respondent had disbursed the $10,000 in November 1981 and had taken as his fees the remaining $5,000 about five months later, it was stipulated that not until December 1984 did Herzog learn that respondent had disbursed the $10,000. Not until March 1986 did she learn that respondent had used the remaining $5,000 for a period of two years and she learned that from the State Bar. (1 R.T. pp. 23-25.) The record shows that during most of the intervening time (between 1981 and 1985) respondent actively deceived Herzog, the superior court and the Court of Appeal that he maintained the $15,000 in his trust account throughout such period.[9] **[1 - see fn. 9]**

Respondent's first deceit about these funds was in his December 21, 1981 letter to Herzog, over a month after he had disbursed $10,000 to Herbert. (Exh. 3.) In that letter, respondent referred to "the entire sum of $15,000 we are presently holding in our trust account," urged that it be paid to Herbert and respondent proposed to do so on January 15, 1982, unless Herzog objected. On January 11, 1982, Herzog wrote to respondent that he was not authorized to disburse the funds he held in trust. (Exh. 4.)

The property issues were tried in superior court in January 1983, eight months after respondent disbursed the last of the $15,000. (Exh. 8: A.A. p. 83.) On January 3, 1983, respondent filed a trial brief in which he again referred to the $15,000, stated it was one of the major issues before the court, that it was given him by escrow and urged the court to "confirm" the entire sum to Herbert. (Exh. 8: A.A. pp. 58-62.) Respondent did not expressly state that he still had the sum in his trust account but neither did he state that he had long ago disbursed the very sum in controversy.

At the trial, in response to a question from respondent as to where the $15,000 was, Herbert testified that "it's held in trust in your [respondent's] office." (Exh. 7 [excerpt of reporter's transcript of January 3, 1983 trial, p. I-140].) At the State Bar Court hearing, Herbert testified that he did not recall the exact testimony he had given at the family law trial but that respondent told him to tell the truth. (1 R.T. pp. 57-58.) According to respondent, when he asked Herbert at the family law trial about the whereabouts of the $15,000, he was "taken aback" by Herbert's answer that it was in respondent's trust account. (3 R.T. pp. 75-76.)

In closing argument in the superior court trial, respondent falsely represented that the $15,000 had been withheld and was "in escrow or in my trust account." (3 R.T. pp. 82-83; exh. 7 [excerpt of reporter's transcript of January 3, 1983 trial, p. I-140].) Herzog's trial brief showed that she believed that respondent did then hold the $15,000 in trust. (Exh. 8: A.A. pp. 53.) Moreover both the superior court's memorandum of intended decision filed January 23, 1983, and its formal judgment stated that respondent held this sum in trust. (Exh. 8: A.A. pp. 86-87, 110.) From the $15,000, the court ordered only $5,820.12 paid to or on behalf of Herbert. (Exh. 8: A.A. pp. 112-113.)

In August 1983, respondent prepared a proposed amended judgment on reserved issues for the superior court trial judge's signature. This document purported to order that certain sums be paid from "the trust fund account of $15,000." (Exh. 8: A.A. pp. 195-196.)

On September 28, 1983, respondent filed objections to an amended decision proposed by Herzog. Therein, he referred to that proposal's payment of certain sums from the $15,000 held in trust but did not reveal that all of that money was disbursed from trust. (Exh. 8: A.A. p. 202.) Meanwhile, on Septem-

9. [1] The notice to show cause charged respondent with deceit of Herzog and the superior court at trial (January 1983). At the hearing, respondent testified freely as to his statements to the Court of Appeal and to a State Bar investigator in later years and we, like the referee, will consider this post-1983 conduct not as bearing on substantive culpability, but on the issue of discipline.

ber 1, 1983, respondent appealed from the May 1983 judgment but, due to many extensions, did not file his opening brief until February 1985. (Exh. 8.)

Because of respondent's delay in filing his appellant's opening brief, Herzog became concerned about the $15,000. In December 1984, she wrote to respondent asking to see proof that the $15,000 was being held in trust. Respondent replied with a one-page Sunwest Bank statement dated September 28, 1984, showing a prior balance of zero and a current balance of $5,135.57. Herzog phoned respondent in December 1984 and he told her for the first time that he had disbursed $10,000 to Herbert much earlier. He did not tell her however that in August 1984, he had made a deposit of $5,000 of his own money, representing a return of the legal fees he had unilaterally taken, into an account at Sunwest Bank which he had set up as a trustee for Herbert. (2 R.T. pp. 157-159; exh. 6; exh. 7: Decl. of Herzog, filed August 8, 1985, p. 3.)[10]

On January 10, 1985, respondent wrote Herzog that he had disbursed $10,000 to Herbert in 1981 but maintained that the Sunwest Bank account (which then stood at $5,207.15) was the "balance, with accrued interest, on the original $15,000." (Exh. 7: Decl. of Herzog, filed August 8, 1985, attached exh. D.)

Respondent filed his opening brief in the *Marriage of Cook* appeal on February 15, 1985. (Exh. 8.) In his brief, respondent stated that the division of community property, including the $15,000 sent him from escrow was one of the issues to be decided at trial. He also stated in his brief that the "uncontroverted testimony" was that the $15,000 was "set aside" for payment of community debts. (*Id.* at pp. 4, 9.) However, respondent did advise the court that he had "reimbursed" Herbert from the $15,000 for community debts. Petitioner did not state when he had done so nor in what amount but claimed authority to do so under Civil Code section 5113.5. (See *ante*.)

Now suspicious of respondent's handling of funds, Herzog issued a subpoena to Crocker Bank in which respondent had placed the funds in 1981. In July 1985, respondent moved to quash that subpoena. Supporting his motion with his declaration under penalty of perjury, respondent stated on page 5 thereof, that "all information concerning the funds of the parties has been made available" to Herzog and no lawful purpose would be served by the subpoena. The court refused to quash Herzog's subpoena. (Exh. 7: Declaration of H. Ted Hertz, dated July 3, 1985, p. 5.)

In her reply brief in the family law appeal, Herzog urged that respondent's appeal was untimely and in any event, because respondent had apparently disbursed much of the $15,000 well before trial, without her consent, "the trial, the motion for new trial, and the appeal . . . are exercises in futility." She urged that the Court of Appeal dismiss the appeal and impose sanctions on respondent for bringing a frivolous appeal. (Exh. 8: Respondent's Brief and Request for Sanctions, filed July 22, 1985, pp. 1-2.) In his reply brief filed on August 8, 1985, respondent accused Herzog of misleading the court concerning whether the $15,000 was to be used to satisfy community debts. He contended that the crux of problems in this matter was the decision of the parties to place $15,000 with him in trust in the first place and blamed Herzog for the "reams of paper" generated in this appeal. (Exh. 8: Appellant's Reply Brief, filed August 8, 1985, pp. 8-10.)

On January 31, 1986, respondent wrote a statement to a State Bar investigator, who had inquired into a complaint regarding respondent's handling of the $15,000. While respondent did acknowledge that he determined with Herbert that the $15,000 would be used for Herbert's benefit, he did not state that his decision was without the consent of Herzog or Mary and that Herzog had specifically objected to respondent using any part of the $15,000. Respondent's statement was also misleading in several other areas,

10. As noted *ante*, respondent had originally placed the $15,000 in his trust account at Crocker Bank. Respondent set up the Sunwest account specifically to hold the $5,000 fee portion long after respondent had taken it as his own. Respondent's testimony about his creation of the new trust account showed his apprehension at being discovered and further emphasized his unilateral decision in taking his fee from trust funds: "As time progressed in this case and as I now was at the appellate level, *I was more scared as time went by that I was going to get burned.* I knew that the bills were legit, and I knew that those could be shown. *But as to the other [$5,000], I know [sic] I was going to have to rely only on what I alone decided and that wasn't good.* And there came a time where I put the money back." (2 R.T. pp. 159-160, emphasis added.)

such as the effect of what was only a proposed marital settlement agreement and as to whether Herzog had acknowledged that Herbert had advanced money to pay community debts (Exh. 6.)

On September 29, 1986, the Court of Appeal, in an opinion not for publication, dismissed the appeal on account of respondent's untimely filing of the notice of appeal. (Exh. 7.)[11] The appellate court declined to impose sanctions. While noting that Herzog's request for them was "technically sound," the Court of Appeal determined that the trial court made errors in its judgment and the appellate court could not say that respondent brought the appeal for an improper motive.[12] (Exh. 7.)

Subsequently, respondent and Herbert satisfied the superior court judgment in Mary's favor by paying about $7,800. (1 R.T. p. 148; exh. 7: satisfaction of judgment filed March 8, 1988.)

Respondent admits he made misrepresentations to Herzog and the courts. In his words, he "dug a hole" and "didn't know how to extricate" himself from it. (1 R.T. pp. 146-147; 2 R.T. pp. 34-35.) Although respondent testified that he did not set out to deceive the superior court (3 R.T. pp. 58-69), he also testified to deliberate misrepresentations he made to that court. (3 R.T. pp. 86-92, 97.)

In January 1987, Mary, represented by new counsel, filed suit against respondent and Herbert for fraud and deceit, breach of fiduciary duty and for "violation of Business and Professions Code" based on his mishandling of the $15,000 and deceit about it. (Exh. 9: *Cook* v. *Hertz, et al.*, Municipal Court, Central Orange County Judicial District No. 202113.) In December 1987, after trial, the court ordered judgment for Mary solely against respondent for $5,600 plus costs. Respondent appealed from that judgment, abandoned the appeal in April 1988 and paid the judgment. (Exh. 9; 1 R.T. p. 152.)

C. Evidence in Mitigation

At the hearing below, respondent expressed regret at having deceived Herzog regarding his handling of trust funds. (1 R.T. pp. 134-135.) He also presented six character witnesses, three of whom were judges. The witnesses were most impressive in their opinion of respondent's character, although not every witness knew of all of the details of respondent's deceit and not every witness knew respondent for an extensive length of time. One witness, Eugene E. Dunnington, an attorney who had been president of his local bar association, testified to respondent's active involvement in local bar activities in serving as president of the local bar association and as a board member of a county bar association. (1 R.T. pp. 160-162.) Respondent has no prior record of discipline since his 1977 admission to practice law in California.

D. Findings of the Hearing Referee

The hearing referee issued a 23-page decision setting forth the procedural history of the case, the facts related to the charges, the facts relating to evidence of respondent's deceit beyond those charged and bearing on discipline, a discussion of the referee's evaluation of the credibility of witnesses at the State Bar Court hearing and an extensive discussion of considerations bearing on discipline. Consistent with respondent's stipulation, the referee found that respondent had disbursed the $15,000 of trust funds without authority and had deceived opposing counsel and the trial court about his mishandling of those funds. The referee determined that the notice to show cause charged respondent with misappropriation of funds and respondent had committed that act. However, the referee found that the evidence fell short of proving that respondent had suborned the perjury of his client Herbert. As facts bearing on discipline, the referee found that respondent continued to deceive or mislead Herzog, the trial court and Court of Appeal and

11. Although the opinion of the Court of Appeal in *Marriage of Cook* was not for publication, it may be considered by us. (Cal. Rules of Court, rule 977(b)(2).)

12. Respondent was not charged with nor found culpable of any impropriety in bringing the appeal for any improper purpose.

incurred a civil judgment when Mary sued both respondent and Herbert for fraud and breach of fiduciary duty on account of respondent's misconduct relating to the $15,000. Further, in 1986, respondent misled a State Bar investigator inquiring into respondent's conduct in handling the $15,000.

The referee considered all mitigating circumstances offered but concluded that many were of limited weight. Although respondent had no prior record of discipline, he had been licensed to practice for only four years when he started his misconduct. Some of his character witnesses had not been told of the full extent of his misconduct and others had not known him for a very long time. Respondent's remorse was superficial and shown only at the State Bar Court hearing. Respondent did not show that his marriage dissolution and other problems caused his misconduct which spanned a long period of time, "most of which saw [him] in a stable emotional and family setting." (Hearing panel's decision, filed July 16, 1990, p. 20 [hereafter "decision"].) In aggravation, the referee found that respondent's misconduct showed both multiple acts and a pattern involving wrongdoing throughout the case, it was surrounded by bad faith, dishonesty and persistent refusal to account for trust funds, it significantly harmed Mary who incurred large attorney fees and had to file a separate lawsuit to get recompense, it harmed the administration of justice and demonstrated respondent's lack of candor and cooperation.

After "long and difficult reflection," the referee came to his disbarment recommendation despite noting that the examiner had recommended a one-year actual suspension. (Decision, p. 22.) The referee offered several bases for his disbarment recommendation: that respondent committed severe ethical violations "at every opportunity presented to him," that respondent's misconduct destroyed the trust that is the foundation of the legal profession and judicial system; his disbarment was necessary to prevent further erosion of public confidence in the legal profession; and that while respondent may be rehabilitated in the future, he had not yet established that quality. (Decision, p. 23.)[13]

II. DISCUSSION

A. Respondent's Procedural Contentions

At the outset, we resolve respondent's procedural contentions.

[2a] Respondent contends first that the referee erred in denying his motion for mistrial. Respondent made his motion when then-examiner George Scott stated at the outset of the third trial day that he had learned two days earlier that his application to serve as an attorney for the State Bar Court had been successful and he had been offered such a position but would not start his new duties for three weeks. Scott revealed his imminent change in employment as he thought that it could create a potential conflict should he continue to act as examiner even before the start of his new duties. (3 R.T. pp. 4-5, 14.) Respondent's counsel articulated the conflict as affecting how the hearing referee might view Scott's work since he would soon become part of the office advising the referee and expressed concern for the objectivity of any review before the review department which would also be advised by the court counsel attorneys whom Scott would be joining. Respondent's counsel believed that Scott's new position tainted everything in the trial record to date and called for a new trial. (3 R.T. pp. 4-14.) After extended colloquy and very careful consideration of respondent's motion, the referee denied it, concluding that there was no proof of any current conflict and the chance of any potential conflict was too remote to justify relief. (3 R.T. pp. 18-21.) During this colloquy, Scott stated that he would be recused from

13. The referee stated as follows concerning his assessment of respondent's rehabilitation: "Rehabilitation may be possible, but in the context of the multiple acts of misconduct it is recommended that the burden be placed on Respondent to show such rehabilitation once the statutory [sic] period after disbarment has passed. It is hard to conceive of a bar-monitored rehabilitation program that would cure the fundamental ethical shortcomings Respondent has demonstrated in his commission of both the quality and quantity of violations described herein. The panel feels he may be able to successfully demonstrate rehabilitation in the future, but this has yet to be proven." (Decision, p. 22.)

further participation in the matter and the referee directed Scott not to discuss the case with anyone. Scott completed the third day of hearing as examiner. On May 8, 1989, the Office of Trial Counsel filed a substitution replacing Scott with examiner Harriet Cohen. The record shows that after May 8, Scott participated no further in this matter.

[2b] We reject respondent's claim. To prevail on his claim of error, respondent must do more than hint at bias. He must show clearly how any bias specifically prejudiced him. (See *Weber* v. *State Bar* (1988) 47 Cal.3d 492, 504; *Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612.) He has failed to do so either at hearing or on review and on review he has neither set forth any evidence of error or bias whatever on the part of the referee nor has he cited any authority supporting his claim. Our review of the record shows no error or bias. At the start of the first trial day, respondent stipulated to all charges against him but one and contrary to respondent's assertion, the referee resolved in respondent's favor the one remaining charge of suborning Herbert's perjury. Similarly, the referee's analysis of the case to reach his discipline recommendation was objective and there is no evidence that the referee either spoke with Scott about the case after his substitution or that he was affected in any way by Scott's new role for the court.[14]

[3a] We similarly deny respondent's request to be allowed a further opportunity to file his brief "in chief" upon our denial of his foregoing request for relief. **[4]** The Supreme Court has long required attorneys facing charges of professional misconduct to present to the hearing referee all evidence favorable to themselves. As the Court observed in *Warner* v. *State Bar* (1983) 34 Cal.3d 36, 42-43, a member of the bar has a duty to present at the hearing all evidence he deems favorable to himself and a failure to do so may justify a denial of a motion for rehearing for the purpose of presenting additional evidence. (See also *Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 447, and cases cited.) We believe that the analogous principle should apply equally to our review of the hearing referee's decision. **[3b]** A member seeking review must present all points when filing the request for review and our rules provide for no bifurcated review. (Rules 450-455, Trans. Rules Proc. of State Bar.)

Respondent next urges that the referee erred by allowing testimony of Sandra Hertz, respondent's former secretary and ex-spouse. Again, citing no authority, respondent suggests this testimony was privileged and asserts it was prejudicial and inflammatory. We hold that the referee did not err and that no prejudice has occurred. **[5]** The referee admitted the testimony of Ms. Hertz after concluding that the testimony concerned matters either before her marriage to respondent or after the couple became estranged. Under those circumstances, the confidentiality for marital communications (Evid. Code, § 980) did not apply. (Cf. *Tracy* v. *Tracy* (1963) 213 Cal.App.2d 359, 363.) **[6]** The referee had a wide latitude to receive all admissible evidence (see Evid. Code, § 351; rule 556, Trans. Rules Proc. of State Bar), especially sitting without a jury. Ms. Hertz's testimony was relevant on the issue of discipline. Nevertheless, the referee recognized that there was little corroboration for Ms. Hertz's testimony, the chance of bias was too great in view of the marriage dissolution and related matters and the referee disregarded her testimony and refused to weigh any of its revelations against respondent. (Referee's decision, pp. 17-18; see also Evid. Code, § 352.) Under these circumstances, respondent has no cause for complaint. As did the hearing referee, we disregard Ms. Hertz's testimony as well.

B. Respondent's Culpability

There can be no doubt as to respondent's culpability of improper disbursement of the $15,000 in Cook trust funds without Herzog's or Mary's knowledge or consent in violation of former rule 8-101, and his subsequent deceit of Herzog and the trial court

14. Respondent complains that Scott discussed some aspects of the case with his successor examiner Cohen and thus failed to adhere to the referee's admonition not to discuss the case with anyone. However, respondent's argument shows nothing more than that Scott conveyed to Cohen formalistic information which was ultimately contained in the reporter's transcript as to who had testified. There is no evidence that Scott discussed with Cohen the substance of the witnesses' testimony or the merits of the case itself.

until 1983 in violation of section 6106 that the funds remained intact. [7a] Respondent's deceit of the superior court violated rule 7-105 as well as sections 6068 (d) and 6106. In addition to respondent's stipulation to those charges, they were established conclusively at trial, including by respondent's own testimony.

On the authority of *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 617 and *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815-816, we decline to adopt the referee's conclusion that respondent's conduct violated sections 6068 (a) and 6103.

[7b] We uphold the referee's findings that the evidence was not clear and convincing to find that respondent suborned Herbert's perjury. On review, the examiner does not dispute this finding. As the referee correctly observed, a determination of subornation of perjury would require proof of a corrupt agreement between Herbert and respondent for Herbert to testify falsely. (*People* v. *Jones* (1967) 254 Cal.App.2d 200, 217, cert. den. (1968) 390 U.S. 980.) Like the referee, we do not find the proof of any such agreement clear and convincing. At the same time, we adopt the referee's finding, as amply supported by the record, that, in order to mislead the court, respondent asked Herbert at trial about the location of the trust funds knowing that Herbert would testify falsely. Respondent on his own had decided much earlier than trial to conceal from Herzog, Mary and the superior court his misuse of the trust funds and respondent's examination of his own client on the witness stand at the family law trial was entirely consistent with his deceptive aims.

[8] The only finding of culpability made by the referee which is disputed by respondent is that he was culpable of misappropriation of funds in violation of section 6106. We agree with respondent. The notice did not use the term misappropriation of funds, it charged respondent with disbursing trust funds without the permission or knowledge of Mary, a trust beneficiary or her counsel, Herzog. The notice cited respondent to rule 8-101(A), prohibiting improper commingling of trust funds with personal funds and requiring trust funds to remain in a proper trust account. It also cited respondent to section 6106 (making acts of dishonesty, moral turpitude or corruption subject to suspension or disbarment) but did not indicate what facts gave rise to that charge which could have been based solely on the alleged misrepresentations and allegations of subornation of perjury.

[9] There is no question that respondent improperly withdrew funds in violation of rule 8-101(A) and his fiduciary obligation to the opposing party and her counsel. (See *Crooks* v. *State Bar* (1970) 3 Cal.3d 346, 355; *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 978-979.) But this does not necessarily rise to the level of an act of moral turpitude in and of itself. In neither *Crooks, supra*, nor *Guzzetta, supra*, was a violation of section 6106 found to have occurred in the trust account violations which breached the member's fiduciary duty. The Supreme Court recently readdressed this very issue in *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317. There, an attorney was charged with violation of section 6106 solely on the basis of alleged misappropriation of trust account funds and the review department recommended a finding that section 6106 was violated as well as former rules 8-101(B)(3) and 8-101(B)(4). The Supreme Court disagreed.

There, as here, the attorney was found to have improperly withdrawn several thousand dollars for fees from her trust account without reasonable belief that she had received authorization to use the funds. The Court found that the mismanagement was not dishonest and therefore found 8-101 rule violations but not a violation of Business and Professions Code section 6106. Earlier in *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, the Court found numerous trust account violations in the removal of client funds from a trust account and delayed payment to the client which it described as "technically wilful" misappropriation but characterized for purposes of determining the degree of discipline as "falling between wilful misappropriation and simple commingling." (*Id.* at pp. 1367-1368.) No section 6106 violation was found in *Lawhorn* either.[15]

15. However, in *Lawhorn*, other aggravating circumstances including deceit of the client were found. (See discussion in *Hipolito* v. *State Bar* (1989) 48 Cal.3d 621, at p. 627.)

In light of the unclear basis for the charged violation of section 6106 in the notice to show cause and the relevant case law making such a violation questionable on these facts, we decline to adopt the conclusion that respondent was culpable of violating section 6106 by his trust account violations although he was properly found culpable of violating section 6106 by his extensive misrepresentations.

C. Discipline

We now discuss the prime issue in this case, appropriate discipline.

[10a] For purposes of assessing the appropriate discipline we believe that the gravamen of the case is the prolonged deceit perpetuated by respondent on opposing counsel and the courts. **[11]** Had the only charge been the premature withdrawal of trust funds to pay community debts, and had respondent been honest with Herzog from the outset about his premature withdrawal of funds to accede to his client's wishes, in light of his character witnesses' testimony, it is doubtful that a discipline recommendation much different from the 30 days actual suspension ordered in *Sternlieb* v. *State Bar, supra,* would have been appropriate. Community debts in that approximate amount were in fact paid and no harm occurred to Mary Cook by the extinguishment of that debt on her behalf. Indeed, she received at the time of judgment the exact amount ordered by the court and thus never suffered any pecuniary harm from the premature withdrawal of funds from the trust account to pay community debts. While the unauthorized withdrawal of attorneys fees was more serious, no pecuniary harm resulted to Herzog or her client because respondent made the trust account whole before any funds were required to be released.[16] This does not excuse respondent's misconduct, just as Sternlieb was found culpable of similar unauthorized withdrawals of attorneys fees albeit for a shorter period of time. But lengthy suspension or disbarment would likely not have been the recommended sanction, any more than it was in *Sternlieb* or other cases involving similar misconduct. (See, e.g., *Crooks* v. *State Bar, supra,* 3 Cal.3d at p. 355.) However, unlike *Sternlieb*, what was of grave concern to the referee and is of grave concern to us is respondent's conduct after his improper withdrawal of funds from his trust account.

The referee adopted extensive findings bearing on discipline. (Referee's decision, page 8, line 5 to page 14, line 19 and page 15, line 23 to page 20 line 17.) On our independent review of the record, we adopt those findings except as expressly modified herein. **[10b]** The findings show that respondent's trust account violations were aggravated by a pattern of nine acts of deceit to forestall discovery of his breach of trust. His victims included opposing counsel and her client and, as to six of the acts, a superior court. He extended his deceit to the Court of Appeal and a State Bar investigator. Respondent went to extraordinary lengths over nearly five years to keep Herzog and the courts from learning that he had abused his trust responsibilities, exposing himself and his client to perjury and opening a bank account to perpetuate his deceit. Respondent's deception resulted in separate civil proceedings which burdened the administration of justice.

[12a] We modify the findings in mitigation to note that although respondent showed extremely poor judgment in this instance, he had several highly reputable character witnesses who attested to his otherwise high standing in the legal community and high ethical standards and demonstration of diligence on behalf of clients. Evidence of substantial community service and pro bono activities was also introduced. Although the referee considered these as mitigating factors, he apparently gave them little weight in recommending disbarment. We have concluded, however, that the mitigation produced below was similar to that offered in *Sternlieb* v. *State Bar, supra,* 52 Cal.3d at p. 331, and is entitled to more weight than recommended below.

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16. We thus disagree with the referee and find no basis in the record for concluding the appeal was frivolous or that the deception caused any delay in the collection of the judgment. We note that the Court of Appeal expressly denied a motion for sanctions on this issue.

[13] Different cases discussing attorney discipline for serious offenses often display one or the other of several different threads of Supreme Court expressions. First, in what may be called the "serious offense" thread, the Supreme Court has emphasized the seriousness of the attorney's offense(s) as calling for severe discipline and has sometimes stated that such offenses warrant disbarment in the absence of clear or compelling mitigation. (*Chang* v. *State Bar* (1989) 49 Cal.3d 114, 128; *In re Basinger* (1988) 45 Cal.3d 1348, 1358.) Other cases recite similar language but clearly evaluate the type of misconduct as a lesser offense. (See, e.g., *In re Vaughn* (1985) 38 Cal.3d 614, 618-619 [public reproval for trust account violations including misappropriation].) In another thread which might be referred to as the "individualized balancing" thread, the Supreme Court has emphasized that there is no fixed formula as to discipline and that discipline in such matters arises from a balanced consideration of relevant factors, on a case-by-case basis. (*Stevens* v. *State Bar* (1990) 51 Cal.3d 283, 288-289; *Stanley* v. *State Bar* (1990) 50 Cal.3d 555, 565, and cases cited; *In re Billings* (1990) 50 Cal.3d 358, 366.)

[14] Despite these seemingly different threads, the Supreme Court has used consistent cloth in defining the purposes of attorney discipline and in measuring discipline against those purposes. The Court's paramount concern, as ours must be, has been stated over many years to be the protection of the public, courts and legal profession, the maintenance of integrity of the profession and high professional standards and preservation of public confidence in the legal profession. (See *In re Billings*, *supra*, 50 Cal.3d at pp. 365-366; *Twohy* v. *State Bar* (1989) 48 Cal.3d 502, 512; *Gary* v. *State Bar* (1988) 44 Cal.3d 820, 827; *Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 198; *Tomlinson* v. *State Bar* (1975) 13 Cal.3d 567, 576.)

[15] The Court has often stated that disbarment will not be ordered where it has no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public. (*Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 958; cf. *Rimel* v. *State Bar* (1983) 34 Cal.3d 128, 131-132; see also *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 244-245; and *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 316-318.)

As discussed more fully below, we conclude that the appropriate sanction here is lengthy suspension with a requirement of a standard 1.4(c)(ii) hearing prior to resumption of practice. We start with the Standards for Attorney Sanctions for Professional Misconduct ("stds.") (Trans. Rules Proc. of State Bar, div. V) as guidelines which are commended to us to aid in achieving consistency in discipline for similar offenses. (*In re Naney* (1990) 51 Cal.3d 186, 190.)

[16] As in *Sternlieb*, *supra*, and *Lawhorn*, *supra*, we do not treat the violations as misappropriations within the contemplation of standard 2.2(a), for which disbarment is the presumed sanction, but construe standard 2.2(a) to refer to those misappropriations to which moral turpitude attaches in violation of section 6106. We note that the examiner either came to a similar conclusion in recommending to the hearing referee a one-year suspension rather than disbarment or concluded that compelling mitigating circumstances justified a suspension recommendation based on recent decisions of the Supreme Court imposing suspension, rather than disbarment in certain misappropriation of funds cases. (See, e.g., *Friedman* v. *State Bar*, *supra*, 50 Cal.3d at pp. 239-241, 244; *Weller* v. *State Bar* (1989) 49 Cal.3d 670, 677; *Hipolito* v. *State Bar* (1989) 48 Cal.3d 621, 628, fn. 4.)

We note that if, consistent with *Lawhorn*, we treat respondent's trust account violations for purposes of discipline as not being classified as a true misappropriation case, the misconduct warrants a minimum of three months suspension under standard 2.2(b). Respondent's deceit to Herzog and the courts warrants disbarment or suspension depending on the extent to which the victim is harmed or misled and depending on the magnitude of the deceit and degree to which it related to respondent's acts within the practice of law. (Std. 2.3.) [10c] Here, respondent's deceit while representing a client in a contested family law matter actually misled Herzog, her client and the trial court for several years. We believe that his extended practice of deceit on courts and counsel makes his case far more serious as to appropriate discipline than the trust account violations. (See *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300; std. 1.2(b)(iii).)

When we compare this case to other similar cases we cannot agree with the referee's assessment that respondent's offenses, taking into account both mitigating and aggravating circumstances, require disbarment. **[17]** We do agree that respondent had been practicing for only four years when he started committing his misconduct. His lack of a prior record therefore cannot be mitigating. (*In re Naney, supra,* 51 Cal.3d at p. 196.)

Although respondent did suffer from some office and marital problems, they did not underlie his misconduct to serve as mitigating. (See *In re Naney, supra,* 51 Cal.3d at pp. 196-197.) **[12b]** However, we do find his character evidence to be significant mitigating evidence. (*Sternlieb* v. *State Bar, supra,* 52 Cal.3d at pp. 331-332.)

[18] We also note that respondent did stipulate to the charges at the outset of the hearing before the referee, and that cooperation carries mitigating weight.

The referee did not cite any cases in support of his recommendation of disbarment but relied solely on the standards, particularly standards 2.2(a) and 2.3. We understand the referee's concern which prompted the recommendation of disbarment. **[19]** While an attorney is expected to be a forceful advocate for a client's legitimate causes (see *Ramirez* v. *State Bar* (1980) 28 Cal.3d 402, 414; *Gallagher* v. *Municipal Court* (1948) 31 Cal.2d 784, 795-796), in this society of limited court resources challenged by growing volumes of litigation, the role played by attorneys in the honest administration of justice is more critical than ever. Contested family law matters can be especially acrimonious and trying to the litigants, their attorneys and the courts, even without fault and wrong as grounds for relief. (See *In re Marriage of McKim* (1972) 6 Cal.3d 673, 679.) Attorneys, by adherence to their high fiduciary duties and the truth, can sharply reduce or eliminate clashes and ease the way to dispute settlement. Mary agreed that although she and Herbert disputed the amount of the property settlement, the community home could be sold and the disputed $15,000 of after-sale proceeds could rest in respondent's trust account until resolution, relying on respondent's duties as an attorney to honor the trust nature of that money. Thus, it is especially regrettable that respondent's actions in this marriage dissolution matter exacerbated conflict and burdened the litigants and courts. Respondent's disregard of his duties was serious and prolonged.

[20a] Nonetheless, first offense deceit of this nature has not resulted in disbarment in other cases. (See, e.g., *In re Kristovich* (1976) 18 Cal.3d 468, 476-477 [three months actual suspension for perjury after otherwise lengthy, unblemished practice]; *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1149-1150 [six months actual suspension for numerous dishonest acts and careless handling of client's affairs].) Most closely analogous is *Rodgers* v. *State Bar, supra,* 48 Cal.3d 300, in which the volunteer review department recommended disbarment of an attorney who, among other things, repeatedly deceived opposing counsel and the probate court. The Supreme Court noted that: "No act of concealment or dishonesty is more reprehensible than Rodgers's attempts to mislead the probate court." (*Id.* at p. 315.) It also noted that Rodgers had a lengthy period of otherwise unblemished practice but that there were also a host of aggravating circumstances, most significantly the fact that he consistently attempted to conceal his wrongful acts. (*Id.* at p. 317.)

[20b] Nonetheless, the Supreme Court held that disbarment of Rodgers was too drastic and unnecessary to achieve the goals of protecting the public, the profession and the courts. (*Id.* at p. 318.) In so ruling, it noted that disbarment was far greater than the discipline imposed by the Court under similar circumstances in the past, reviewing a number of cases with discipline ranging from 30 days actual suspension to two years actual suspension depending on the circumstances. It concluded that five years stayed suspension conditioned on two years actual suspension and probation for the remainder of the five-year period "is proportional to the harm Rodgers caused, comports with the discipline we have imposed in similar cases, and recognizes that Rodgers has no prior record of discipline." (*Id.* at pp. 318-319.) The harm caused by respondent is similar here. While his lack of a prior record of discipline carries no weight because of the shortness of his length of practice prior to the misconduct, he has demonstrated far more evidence of his general good character through testimony in mitigation than Rodgers demonstrated.

[20c] From the facts of this case, we believe that the referee did appropriately require proof of rehabilitation prior to respondent being allowed to resume practice. We therefore conclude that fulfilling the purposes of attorney discipline—protection of the public, courts and legal profession and the maintenance of integrity of and public confidence in that profession—calls on us to require that respondent show by a preponderance of the evidence in a standard 1.4(c)(ii) proceeding after two years of actual suspension that he has been rehabilitated and is fit to practice law before being allowed to do so again.

III. RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law for five years; that execution of such order be stayed; and that respondent be placed on probation for five years on the following conditions:

1. That during the first two years of said period of probation and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, he shall be suspended from the practice of law in the State of California;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date:)

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

4. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) that respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) money received for the account of a client and money received for the attorney's own account;

(2) money paid to or on behalf of a client and money paid for the attorney's own account;

(3) the amount of money held in trust for each client;

(b) that respondent has maintained a bank account in a bank authorized to do business in the State of California at a branch within the State of California and that such account is designated as a "trust account" or "client's funds account";

(c) that respondent has maintained a permanent record showing:

(1) a statement of all trust account transactions sufficient to identify the client in whose behalf

the transaction occurred and the date and amount thereof;

(2) monthly total balances held in a bank or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(3) monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) that respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

5. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

6. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

7. That, except to the extent prohibited by the attorney client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge, designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

8. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective; and

9. That at the expiration of said probation period, if he has complied with terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of five years shall be satisfied and the suspension shall be terminated.

We further recommend that respondent be directed to comply with the requirements of rule 955 of the California Rules of Court within thirty (30) calendar days of the effective date of the Supreme Court order herein, and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the order showing his compliance with said order.

Finally, we recommend that respondent be required to take and pass the California Professional Responsibility Examination prior to the expiration of his actual suspension.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JUDSON D. LILLEY

A Member of the State Bar

[No. 87-O-16728]

Filed May 1, 1991

SUMMARY

Respondent was found culpable by the hearing department of the former, volunteer State Bar Court of abandoning a client, failing to notify the State Bar of his change of office address, and failing to cooperate in the State Bar's investigation of his misconduct. Based on these findings, the hearing department concluded that respondent had violated sections 6002.1, 6068(a), 6068(i), 6068(m), and 6103 of the Business and Professions Code and former Rules of Professional Conduct 2-111(A)(2) and 6-101(A)(2). (Herbert Steinberg, Hearing Referee.)

On review, the review department adopted the hearing department's factual findings and most of its legal conclusions with minor modifications, but rejected, on the basis of recent Supreme Court precedent, the conclusions that respondent had violated sections 6068(a) and 6103. The review department interpreted section 6103 as not providing a basis for culpability except with regard to violations of court orders. The review department also rejected the State Bar's contention that section 6068(a) is automatically violated by virtue of a violation of any of the Rules of Professional Conduct or of any disciplinary provision of the State Bar Act. The review department concluded that section 6068(a) only provides a basis for culpability when an attorney violates: (1) a statute not specifically relating to the duties of attorneys; (2) a section of the State Bar Act which is not, by its terms, a disciplinable offense, or (3) an established common law doctrine which governs the conduct of attorneys and which is not governed by any other statute.

Based on respondent's misconduct, which was aggravated by harm to the client and a third party, but mitigated by respondent's 13 years in practice without a prior disciplinary record, the review department recommended a one-year stayed suspension, thirty days actual suspension, and one year of probation. The review department also recommended that respondent be required to complete a law office management course and to take and pass the California Professional Responsibility Examination.

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: No appearance (default)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **220.00 State Bar Act—Section 6013, clause 1**
220.10 State Bar Act—Section 6103, clause 2
Prior to 1989, the Supreme Court customarily upheld charges that an attorney had violated the "oath and duties" provision of section 6103, but in 1989, the Supreme Court determined that an attorney charged with other statute and rule violations does not violate section 6103 because that section "defines no duties," except with regard to violation of court orders.

[2] **213.10 State Bar Act—Section 6068(a)**
The Supreme Court has rejected the contention that the duty to uphold the laws of this state, as set forth in section 6068(a), is violated by an attorney's violation of the Rules of Professional Conduct.

[3 a, b] **106.30 Procedure—Pleadings—Duplicative Charges**
213.10 State Bar Act—Section 6068(a)
220.10 State Bar Act—Section 6103, clause 2
Duplicative allegations of misconduct serve little purpose; if misconduct violates a specific disciplinary provision of the State Bar Act or a Rule of Professional Conduct, there is no need to charge the same misconduct as a violation of sections 6068(a) and 6103.

[4] **199 General Issues—Miscellaneous**
204.90 Culpability—General Substantive Issues
The Rules of Professional Conduct are binding on attorneys, but are not the equivalent of statutes; they merely supplement the statutory provisions.

[5] **213.10 State Bar Act—Section 6068(a)**
220.10 State Bar Act—Section 6103, clause 2
802.40 Standards—Sanctions Available
1099 Substantive Issues re Discipline—Miscellaneous
Sections 6068(a) and 6103 were not intended to refer to the Rules of Professional Conduct or to make disbarment available for violations of such rules.

[6] **802.40 Standards—Sanctions Available**
1099 Substantive Issues re Discipline—Miscellaneous
Under section 6077, the discipline which may be recommended by the State Bar for a wilful violation of the Rules of Professional Conduct is limited to a maximum of three years suspension.

[7 a, b] **193 Constitutional Issues**
802.40 Standards—Sanctions Available
1099 Substantive Issues re Discipline—Miscellaneous
Section 6077 does not bind the Supreme Court, in the exercise of its inherent power, should it decide that greater discipline than three years suspension for violation of a Rule of Professional Conduct is needed to protect the public in a particular case; the Supreme Court is not limited by the Legislature in exercising its disciplinary authority.

[8] **101 Procedure—Jurisdiction**
802.40 Standards—Sanctions Available
1099 Substantive Issues re Discipline—Miscellaneous
Section 6078 authorizes the State Bar Court to hold a hearing on charged violations of law and to recommend disbarment in those cases warranting disbarment, but section 6077 declares that a Rule of Professional Conduct violation does not warrant discipline in excess of three years suspension.

[9] **101 Procedure—Jurisdiction**
220.00 State Bar Act—Section 6013, clause 1
220.10 State Bar Act—Section 6103, clause 2
802.40 Standards—Sanctions Available
1099 Substantive Issues re Discipline—Miscellaneous
Section 6103's authorization of discipline, including disbarment, is limited by its terms to occasions when an attorney violates the oath and duties defined in the Business and Professions Code or violates a court order.

[10] **199 General Issues—Miscellaneous**
802.30 Standards—Purposes of Sanctions
Protection of the public, its confidence in the legal profession, and the maintenance of high professional standards are the greatest concerns of the State Bar Court.

[11] **176 Discipline—Standard 1.4(c)(ii)**
802.40 Standards—Sanctions Available
1099 Substantive Issues re Discipline—Miscellaneous
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
For an egregious rule violation, the State Bar may seek suspension of at least two years and application of standard 1.4(c)(ii); an attorney who can satisfy the showing required by standards 1.4(c)(ii) poses no continuing threat to the public warranting disbarment.

[12] **211.00 State Bar Act—Section 6002.1**
213.10 State Bar Act—Section 6068(a)
214.00 State Bar Act—Section 6068(j)
Section 6068(a) is not a proper basis for charging a violation of 6002.1, because section 6068(j) specifically makes it a duty of each State Bar member to comply with section 6002.1, and makes such compliance the subject of discipline.

[13] **106.20 Procedure—Pleadings—Notice of Charges**
211.00 State Bar Act—Section 6002.1
214.00 State Bar Act—Section 6068(j)
The failure to charge a violation of section 6068(j) in the notice to show cause was harmless error, where the notice clearly charged an alleged violation of section 6002.1.

[14] **106.20 Procedure—Pleadings—Notice of Charges**
169 Standard of Proof or Review—Miscellaneous
213.10 State Bar Act—Section 6068(a)
Charging a violation of section 6068(a) without specifically identifying the underlying provision of law allegedly violated not only fails to put the attorney on sufficient notice of the alleged violation, but also undermines meaningful review of any decision based on such general charging allegation.

[15] **194 Statutes Outside State Bar Act**
213.10 State Bar Act—Section 6068(a)
401 Common Law/Other Violations in General
Section 6068(a) is a conduit by which attorneys may be charged and disciplined for violations of other specific laws which are not otherwise made disciplinable under the State Bar Act, including a violation of: (1) a statute not specifically relating to the duties of attorneys; (2) a section of the State Act which is not, by its terms, a disciplinable offense, and (3) an established common law doctrine which is not governed by any other statute.

[16] **213.10 State Bar Act—Section 6068(a)**
230.00 State Bar Act—Section 6125
231.00 State Bar Act—Section 6126
Discipline may appropriately be imposed based on an attorney's unauthorized practice of law when the attorney is charged with violating sections 6068(a) and sections 6125 or 6126.

[17] **213.10 State Bar Act—Section 6068(a)**
214.30 State Bar Act—Section 6068(m)
410.00 Failure to Communicate
An attorney who failed to communicate adequately with a client prior to 1987 cannot be charged with a violation of section 6068(m), but can be charged with a violation of section 6068(a).

[18] **582.10 Aggravation—Harm to Client—Found**
588.10 Aggravation—Harm—Generally—Found
Attorney who represented the administrator of a decedent's estate owed a duty of care both to the client and to the estate's beneficiary; harm caused to these parties by the attorney's misconduct was an aggravating factor.

[19] **174 Discipline—Office Management/Trust Account Auditing**
Where respondent had abruptly abandoned both his client and his office, a requirement that respondent complete a course in law office management was an appropriate probation condition.

ADDITIONAL ANALYSIS

Culpability
Found
211.01 Section 6002.1
213.91 Section 6068(i)
214.31 Section 6068(m)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
280.25 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
Aggravation
Declined to Find
515 Prior Record
525 Multiple Acts
Mitigation
Found
710.10 No Prior Record
Standards
802.21 Definitions—Prior Record
Discipline
1013.06 Stayed Suspension—1 Year
1015.01 Actual Suspension—1 Month
1017.06 Probation—1 Year

Probation Conditions

1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management

OPINION

PEARLMAN, P.J.:

This is a default proceeding on a notice to show cause charging one count of client abandonment and separate counts of failure to cooperate and failure to submit a change of address in violation of Business and Professions Code section 6002.1 (a)(1). Respondent Lilley was admitted to the State Bar in 1974 and has no prior record of discipline. The referee recommended imposition of a one-year suspension, stayed, with a thirty-day actual suspension and probation for one year, coupled with a requirement that respondent take and pass the Professional Responsibility Examination (PREX) within one year. The examiner did not seek review of that decision.

Upon mandatory ex parte review of the referee's decision, this department issued a notice of its intent to adopt the decision with modifications not affecting the degree of discipline recommended, and extended the opportunity to the Office of Trial Counsel to object to our proposed modifications, if it so desired, by filing a request for review under rule 450(a) of the Rules of Procedure of the State Bar.[1] The Office of Trial Counsel requested review solely to challenge our proposed deletion of the findings that respondent violated Business and Professions Code sections 6068 (a) and 6103. The case then was scheduled for briefing and oral argument on those issues.

After full consideration of the Office of Trial Counsel's objections, we adhere to our prior conclusion set forth in the intended decision that the record does not support a finding that respondent violated Business and Professions Code sections 6068 (a) and 6103. We therefore adopt the recommendation of the referee with the modifications set forth in this opinion, and recommend that the respondent be suspended for one year, stayed, with one year of probation and thirty days of actual suspension.

I. FACTS AND PROCEEDINGS BELOW

The respondent failed to file an answer to the notice to show cause which was served on him at his address of record, and his default was entered. (Bus. & Prof. Code, §§ 6002.1, 6088; rules 552 et seq., Rules Proc. of State Bar.) A default hearing was held before a referee of the former, volunteer State Bar Court who filed the amended decision we review on October 16, 1989.

We adopt the referee's findings of fact and law except as expressly modified herein. Respondent practiced law at an address in Long Beach, apparently without incident, from late 1982 until sometime just prior to May 1, 1987. In February 1983, respondent was hired by David Reed to handle the legal work for a decedent's estate of which Reed was the administrator. Until April 1987, respondent performed necessary legal services for the estate. In late April 1987, at a meeting between Reed, respondent, and representatives of one of the estate's beneficiaries (a church), it was brought to respondent's attention that closing the estate was a matter of some urgency because the church needed the money for already-scheduled renovation work. Respondent agreed to complete the final report and account within two weeks. Respondent had also agreed to prepare a satisfaction of a mortgage which had secured a debt he had collected for the estate.

Beginning around May 1, 1987, Reed's attempts to contact respondent at his Long Beach address, both by telephone and by personal visit, began to be unsuccessful. The telephone was disconnected, with a referral to a new telephone number, which turned out to belong to an attorney who shared office space with respondent; this attorney's staff disclaimed any knowledge of respondent's new address or telephone number. An Orange County telephone number of respondent's, and his residence telephone number, were also disconnected, with no referrals. Respondent had not filed a change of address with the post office.

1. As part of the transition to the new State Bar Court system, and under rules adopted by the State Bar Board of Governors, effective September 1, 1989, this review department must independently review the record of the State Bar proceedings in matters such as this which were tried before September 1, 1989, before former referees of the State Bar Court, but assigned to this department after September 1. (Trans. Rules Proc. of State Bar, rules 109 and 452(a).)

Reed was forced to hire another attorney, William Hayter, to complete work on the estate, and the ensuing delay imposed a financial burden on the church beneficiary. Respondent failed to respond to Hayter's efforts to contact him and to obtain a signed substitution of attorney. Respondent did no further work on the estate, and had no further contact with Reed.

In June 1988, the State Bar investigator assigned to this matter began trying to contact respondent about it. After unsuccessful attempts to reach respondent by mail at his official address in Long Beach, the investigator managed to obtain respondent's residence address in Anaheim. Letters were thereafter sent to respondent at that address, but no response to them was received.

On August 31, 1987, four months after vacating his Long Beach address and abandoning Reed, and before the bar's investigation in this matter began, respondent had been suspended for nonpayment of dues. A year and two months later, on October 27, 1988, respondent paid his dues and was reinstated. Along with his delinquent dues, he submitted a change of address to the State Bar, using the Anaheim address which had previously been reported to the State Bar investigator as being respondent's home address. The notice to show cause in this matter was properly served on respondent at the Anaheim address on March 3, 1989 (less than five months later).[2]

The referee found that the facts as charged in count one supported the conclusion that respondent failed to perform the work for which he was hired, failed to turn over the file to his client, and abandoned his client in violation of Business and Professions Code sections 6068 (a), 6068 (m) and 6103 and former Rules of Professional Conduct 2-111(A)(2) and 6-101(A)(2).[3] As charged in count two, the referee found that respondent's failure to respond to the State Bar's written inquiry and failure to cooperate in the State Bar's investigation supported a finding that respondent violated Business and Professions Code sections 6068 (a), 6068 (i) and 6103. The referee also found that, as charged in count three of the notice to show cause, respondent vacated his law office and abandoned his official address and failed to submit a change of address to the State Bar for approximately a year and a half thereafter in violation of Business and Professions Code section 6002.1 (a)(i).[4] The referee rejected as an aggravating factor respondent's prior suspension for nonpayment of dues and further found that the offenses in all three counts were interrelated and did not constitute a multiplicity of offenses which might otherwise be a basis for additional discipline. As indicated above, the referee recommended one year suspension stayed, conditioned on one year's probation and one month's actual suspension. He also recommended a requirement that respondent take and pass the Professional Responsibility Examination.

II. ISSUES ON REVIEW

The examiner's sole reason for requesting review in this matter was to object to this department's stated intention to strike the referee's conclusion that the respondent, by virtue of the misconduct he was found to have committed in counts one and two of the notice to show cause, also violated Business and Professions Code sections 6068 (a) and 6103.

At the time that the notice to show cause was issued in this case it was customary for the Office of Trial Counsel routinely to charge members with violating their oath and duties under sections 6068 (a) and 6103 in addition to any other specific charges made. The examiner contends that Business and

2. The notice to show cause, notice of application to enter default, and notice of entry of default were served on respondent by certified mail, return receipt requested. None of these mailings was returned as undeliverable, but only one return receipt was received by the bar, showing delivery on June 16, 1989.

3. Charged violations of rule 8-101(B)(1) and 8-101(B)(4) were dismissed by the examiner.

4. The notice to show cause inexplicably did not charge respondent with violating Business and Professions Code section 6068 (j), which expressly makes it a duty of an attorney "to comply with the requirements of section 6002.1."

Professions Code sections 6068 (a)[5] and 6103[6] contemplate that an attorney violates those sections by committing a violation of any state or federal law, including any violation of the Business and Professions Code or the Rules of Professional Conduct.[7] Consistent with his reasoning, and relying on asserted ambiguity in the controlling case law, the examiner contends that a Rule of Professional Conduct violation could, under Business and Professions Code section 6068 (a) or 6103, result in the imposition of discipline ranging from suspension to disbarment, although he seeks no independent discipline based on these alleged statutory violations in this case. We have rejected such arguments in prior cases on the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815. The Supreme Court has since reaffirmed its ruling in *Baker* and we therefore reaffirm our intended decision and set forth at length herein our reasons for doing so.

A. The Impact of *Baker* v. *State Bar*

[1a] As the examiner points out, prior to 1989, the routine charge of a section 6103 "oath and duties" violation was customarily upheld by the Supreme Court.[8] (See, e.g., *McMorris* v. *State Bar* (1983) 35 Cal.3d 77, 80; *Carter* v. *State Bar* (1988) 44 Cal.3d 1091, 1096; *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 654.) In 1989, the Supreme Court reexamined this charging practice and determined that an attorney charged with numerous rule and statutory violations had not violated section 6103 because that section "defines no duties." (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815; *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931.) It has since reiterated that ruling numerous times in cases involving the "oath and duties" provision of section 6103. (See, e.g., *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561; *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 618.)

[1b] As the Supreme Court most recently stated in *Read* v. *State Bar* (1991) 53 Cal.3d 394, "With the exception of a wilful violation of a court order, 'this section does not define a duty or obligation of an attorney but provides only that a violation of [an attorney's] oath and duties defined elsewhere is a ground for discipline.'" (*Id.* at p. 406.) Apart from violation of court orders, section 6103 merely sets forth the discipline available for the violations of other statutes. (*Id.* at p. 407, fn. 2.) **[2]** The Supreme Court has expressly and specifically rejected the argument made here that the duty to uphold the laws of this state, as set out in section 6068 (a), is violated by a respondent's violations of rules 2-111 and 6-101 of the Rules of Professional Conduct. (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at pp. 814-816; *Sands* v. *State Bar*, *supra*, 49 Cal.3d at p. 931.)

The examiner points to a few recent opinions the Court has issued which the examiner interprets as a retreat from *Baker*, *supra*, and *Sands*, *supra*, and reimposition of prior law regarding routinely charged violations of "oath and duties." We disagree.

In *Layton* v. *State Bar* (1990) 50 Cal.3d 889, the Supreme Court upheld a finding that an attorney violated sections 6068 (a) and 6103 without reference to *Baker* v. *State Bar*, *supra*.[9] General Counsel of the State Bar, acting on behalf of the Office of Trial Counsel, requested reconsideration, asking that the Court expressly disavow *Baker* decided only seven months before *Layton*. The Court declined to do so.

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5. Section 6068 provides, in pertinent part: "It is the duty of an attorney to do all of the following: [¶] (a) To support the Constitution and laws of the United States and of this state."

6. Section 6103 provides as follows: "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

7. Unless noted, all references to the Rules of Professional Conduct are to the former rules in effect between January 1, 1975, and May 26, 1989, which apply to respondent's conduct.

8. Unless otherwise noted, all references to sections are to the Business and Professions Code.

9. In one count charging a violation of section 6068 (a), the Supreme Court held that the attorney's pre-1987 failure to communicate with and attend to the needs of his client constituted the basis for discipline under section 6068 (a). (*Layton* v. *State Bar*, *supra*, 50 Cal.3d at pp. 903-904.) We believe that ruling is consistent with *Baker* and *Sands*. See discussion, *post*.

As the Court subsequently explained in *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060, cases decided by the Court after *Baker* which have found culpability for "oath and duties" violations based on section 6103 have either involved charges that were stipulated to or culpability findings which were in addition to a more specific charge on which the discipline order rested. Thus, the section 6103 finding had no impact on the degree of discipline imposed. (See, e.g., *Phillips* v. *State Bar* (1989) 49 Cal.3d 944; *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071.) In contrast, where the Supreme Court has expressly addressed the impact of *Baker*, *supra*, it has repeatedly reaffirmed its holding that section 6103 defines no general duties and section 6068 (a) has limited application not including a basis for recharging rule violations. (See, e.g., *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245; *Middleton* v. *State Bar*, *supra*, 51 Cal.3d at pp. 561-562; *Sugarman* v. *State Bar*, *supra*, 51 Cal.3d at pp. 617-618; *Bates* v. *State Bar*, *supra*; *Lister* v. *State Bar* (1990) 51 Cal.3d 1117, 1123; *In re Kelley* (1990) 52 Cal.3d 487, 494.) [3a] Additionally, the Court in *Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1060, stated that "little, if any, purpose is served by duplicative allegations of misconduct. If . . . misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of sections 6068, subdivision (a), and 6103."[10]

The examiner argues that removal of sections 6103 and 6068 (a) as an automatically chargeable offense for any act of attorney misconduct makes no sense because "the case law, the statutes and the logical reasoning process both before and after *Baker* and *Sands* support the conclusion that a wilful violation of the Rules of Professional Conduct or for that matter any wilful conduct that is found to be unprofessional on the part of an attorney . . . constitute violations of the attorney's oath and duties and are both a failure to support the laws of the State of California (section 6068 (a)) and a violation of the attorney's duties (section 6103)."

[4] The examiner's argument is that since the Rules of Professional Conduct are authorized by statute and are declared by statute to be binding on all members of the bar "the fact that the rules do not emanate directly from the Legislature does not mean that they are relegated to some lesser status than that of law." Indeed, he asks "if the rules of Professional Conduct are not laws then how can they be binding on an attorney whether or not the attorney is acting in the capacity of an attorney?" This argument is misconceived. The rules are clearly binding on attorneys. The rules are clearly also not the equivalent of statutes, but "merely supplement the statutory provisions." (1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, § 309, p. 343.) The issue therefore is not properly framed as whether the Legislature intended the rules to be binding or whether and to what extent the rules may properly be applied to conduct unrelated to an attorney's practice. (See *In re Kelley*, *supra*, 52 Cal.3d 487.) The precise issue before us is whether, by enacting sections 6068 (a) and 6103 of the State Bar Act, the Legislature intended to make disbarment available for rule violations.

[5] There is absolutely no evidence that either section 6103 or section 6068 (a) was intended to refer to the Rules of Professional Conduct or to make disbarment available for violations of such rules. To the contrary, the duties referred to in both sections appear to be terms of art referring to statutorily defined duties. [6] Indeed, the Legislature has specifically provided, in Business and Professions Code section 6077, that the discipline which may be imposed for a wilful violation of the Rules of Professional Conduct is limited to, at the most, three years of suspension. Section 6077 provides, "The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar. For a willful breach of any of these rules, the board has power to discipline members of the State Bar by reproval, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar." Thus, the

10. This department has applied the rationale of *Bates*, *supra*, to duplicative charges of violating a court order as well as other types of duplicative charges. (See *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 237.)

Legislature, by virtue of Business and Professions Code section 6077, has not provided the State Bar with the ability to recommend any sanction greater than three years for a wilful violation of the Rules of Professional Conduct unaccompanied by any statutory violations. That is the plain and unavoidable meaning of section 6077.[11] **[7a - see fn. 11]** The contrary interpretation offered by the Office of Trial Counsel would violate basic principles of statutory construction. (See *Zorro Investment Co.* v. *Great Pacific Security Corp.* (1977) 69 Cal.App.3d 907; *Bergin* v. *Portman* (1983) 141 Cal.App.3d 23.)

The examiner next contends that section 6077's limitations on the discipline that may be imposed for rule violations are ineffectual when read in light of section 6078. Section 6078 provides in pertinent part, "After a hearing for any of the causes set forth in the laws of the State of California warranting disbarment, suspension or other discipline, the board has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or to discipline them by reproval, public or private, without such recommendation." The examiner interprets section 6078 to mean that section 6077 does not limit this court's discretion in recommending discipline for a rule violation. We disagree. **[8]** Section 6078 authorizes the State Bar Court to hold a hearing on charged violations of law and to recommend disbarment in those cases *warranting* disbarment. Statutory violations may warrant disbarment. However, by virtue of section 6077, the Legislature has declared that a rule violation does not *warrant* discipline in excess of three years of suspension. The inclusion of the word "warranting" is a clear limitation of the power to recommend disbarment which excludes rule violations for which disbarment is not available.

In short, sections 6077, 6078, and 6103 must be read together. Section 6078 authorizes the State Bar to hold hearings and to impose reprovals or to recommend suspension or disbarment, where warranted, in the event of a violation of law for which discipline may be imposed. Section 6077 is the Legislature's clear mandate that discipline greater than three years of suspension is unwarranted for a violation of the Rules of Professional Conduct. **[9]** Section 6103's authorization of discipline, including disbarment, is limited by its terms to occasions where an attorney violates his oath and duties as defined in the Business and Professions Code or where violation of an order of court is involved. We therefore reject culpability under section 6103 for respondent's violations of rules 2-111(A)(2) and 6-101(A)(2) of the Rules of Professional Conduct herein, just as the Supreme Court rejected culpability for these very same rule violations charged under sections 6103 and 6068 (a) in *Baker*. (See *Baker* v. *State Bar, supra,* 49 Cal.3d at pp. 814-816.)

The examiner argues that, absent the ability to pursue disbarment for rule violations, the State Bar will be unable adequately to protect the public. **[10]** Protection of the public, its confidence in the legal profession, and the maintenance of high professional standards are this court's greatest concerns. (See standard 1.3, Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V) ("standard(s)"); *Walker* v. *State Bar* (1989) 49 Cal.3d 1107, 1117.) Nonetheless, the examiner's policy argument is best addressed to the Legislature. We do note, however, that the examiner was unable to cite a single example of a case exclusively involving a charged rule violation, or even multiple rule violations, in which his office considered disbarment essential to protect the public. Here, for example, the examiner is satisfied with one month's actual suspension despite the fact that, in addition to the rule violations, respondent violated three statutes (section 6068 (i), section 6068 (j) [section 6002.1] and section 6068 (m)), for which disbarment *is* available on appropriate facts.

It is difficult to conceive of a set of circumstances in which an attorney's misconduct, egregious enough to warrant disbarment, would not involve one or more statutory violations for which disbarment is

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11. **[7a]** Section 6077 does not bind the Supreme Court in the exercise of its inherent power should it decide in a particular case that more discipline is needed to protect the public. (See, e.g., *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300; *Stratmore* v. *State Bar* (1975) 14 Cal.3d 887, 889-890.)

expressly available upon an appropriate showing, such as misconduct involving moral turpitude, dishonesty or corruption (section 6106); failure to communicate with clients (section 6068 (m)); disrespect for the courts (section 6068 (b)); misrepresentation to the courts (section 6068 (d)), etc.[12] [11] Moreover, for an egregious rule violation the Office of Trial Counsel can always seek suspension of at least two years and further seek to protect the public by requesting the court to apply standard 1.4(c)(ii), which requires a showing of rehabilitation and fitness to practice of an attorney who has been actually suspended for two years or more before he or she can resume the practice of law. By definition, the attorney who can satisfy that requirement poses no continued threat to the public warranting disbarment. [7b] If for some reason disbarment were still considered necessary, the State Bar could request that the Supreme Court invoke its inherent power to disbar since the Supreme Court is not limited by the Legislature in exercising its disciplinary authority. (*Brotsky* v. *State Bar*, *supra*, 57 Cal.2d 287, 300 ["Historically, the courts, alone, have controlled admission, discipline and disbarment of persons entitled to practice before them"]; see also rule 951(g), Cal. Rules of Court.)

B. The Scope of Section 6068 (a)

Section 6068 (a) of the Business and Professions Code provides that "It is the duty of an attorney: [¶] (a) To support the Constitution and laws of the United States and of this State." The examiner contends that the violation of any section of the Business and Professions Code constitutes a violation of state law as well as any rule of the Rules of Professional Conduct and is therefore a failure to support the laws of this state as prescribed by section 6068 (a). In *Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815 and *Sands* v. *State Bar*, *supra*, 49 Cal.3d at p. 931, the Supreme Court expressly rejected culpability under section 6068 (a) for violation of section 6106. This is because a section 6106 violation is directly chargeable as an offense and disciplinable as such. [3b] Therefore we find no reason to assume the Legislature, in enacting section 6068 (a), contemplated making section 6068 (a) a vehicle for charging violations of section 6106, nor is there any need for duplicative allegations charging the same misconduct. (See *Bates* v. *State Bar*, *supra*, 51 Cal.3d at p. 1060.) Similarly, there is no reason to conclude that the Legislature intended that a violation of section 6068 (b) violates section 6068 (a), and so forth.

We therefore reject culpability under section 6068 (a) by virtue of respondent's culpability in this case for violation of sections 6068 (i) and 6068 (m) which are disciplinable offenses in and of themselves. Violations of sections 6068 (a) and 6103 were also originally found by the referee in count three, but deleted from his amended decision. [12] We also conclude that section 6068 (a) is not a proper basis for charging a violation of section 6002.1. While section 6002.1 does not itself define a duty, section 6068 (j) was added in 1986 specifically to make it a duty of each member to comply with section 6002.1. [13] No indication appears as to why a violation of section 6068 (j) was not charged here since it became effective in January of 1987 and the charged offense occurred later that spring. However, the failure to charge violation of section 6068 (j) is harmless error since the notice to show cause sets forth in its text clear notice of the alleged violation of section 6002.1. (Cf. *Brockway* v. *State Bar* (1991) 53 Cal.3d 51 [similarly upholding culpability under rule 5-101 when the charging allegations included the language of the rule but did not cite the rule by name].)

[14] The Supreme Court has decisively rejected the past prosecutorial practice of routinely charging an attorney with a violation of the duty under section 6068 (a) to support the "Coustitution and laws of the United States and of this state" without specifically identifying the underlying provision of law allegedly violated. The Court held that such practice not only failed to put the attorney on sufficient notice of the alleged violation, it undermined meaningful review of any decision based on such general charging allegation. (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at pp. 814, 815; *Sands* v. *State Bar*, *supra*, 49 Cal.3d at

12. See generally Business and Professions Code sections 6068 (b)-(m), 6101, 6104, 6105 and 6106.

p. 931; *Middleton* v. *State Bar*, *supra*, 51 Cal.3d at pp. 561, 562; *Sugarman* v. *State Bar*, *supra*, 51 Cal.3d at p. 618.)

[15] The requirement of specification of the underlying provision of law allegedly violated means that the Supreme Court interprets section 6068 (a) as a conduit by which attorneys may be charged and disciplined for violations of other specific laws which are not otherwise made disciplinable under the State Bar Act. While section 6068 (a) clearly does not apply to the statutory and rule violations involved herein, there are a number of circumstances which will support a finding of a violation of section 6068 (a), if properly charged in the notice to show cause.

1. Where there is a violation of a statute not specifically relating to the duties of attorneys. (See, e.g., *Sands* v. *State Bar*, *supra*, 49 Cal.3d at p. 931 [upholding a finding that an attorney who pled guilty to bribing a DMV official violated section 6068 (a)]; *Slavkin* v. *State Bar* (1989) 49 Cal.3d 894, 902 [holding that an attorney who was guilty of violations of Health and Safety Code sections 11350 and 11550 thereby violated section 6068 (a)].)

2. Where there is a violation of a section of the State Bar Act which is not, by its terms, a disciplinable offense. For example, State Bar Act sections 6125 and 6126, dealing with an attorney's unauthorized practice of law, do not state that an attorney may be disciplined for a violation of either of the sections. **[16]** We have therefore held that discipline may appropriately be imposed where an attorney is charged with violating sections 6068 (a) and sections 6125 or 6126 of the State Bar Act. (*In the Matter of Trousil*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 236.)

3. Where there is a violation of an established common law doctrine which governs the conduct of attorneys, which is not governed by any other statute. For example, subdivision (m) of section 6068 was not added until 1986. **[17]** If an attorney failed to communicate adequately with a client before 1987, the attorney could not be charged with violating that subdivision. (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at pp. 814, 815.) Instead, the attorney could be charged with violation of section 6068 (a). (*Layton* v. *State Bar*, *supra*, 50 Cal.3d at pp. 903-904 [holding that an attorney's pre-1987 failure to communicate with and attend to the needs of his client could constitute the basis for discipline under section 6068 (a)].)

None of these situations was involved in this case. For the foregoing reasons, consistent with *Baker*, *supra*, and its progeny, we determine that the statutory and rule violations charged herein are not the proper basis for a finding of a section 6068 (a) violation.

III. OTHER MODIFICATIONS TO DECISION

Our notice to the examiner following our initial review of the decision in this matter mentioned minor modifications which we intended to make. The examiner raised no objection to these modifications. Accordingly, we make the following findings of fact and modify the referee's decision to reflect the changes.

[18] The record in this matter with respect to count one of the notice to show cause demonstrated that respondent's misconduct caused harm both to his client, the administrator of a decedent's estate, and to the estate's beneficiary. Respondent owed a duty of care to both of these parties. As a result of his actions, respondent's client was forced to hire another attorney to complete the probate. In addition, respondent knew that the church was relying on receiving its portion of the estate by a certain time in order to pay for planned renovations to the church's property. Respondent's delay and failure to complete the probate caused the church to incur a financial burden in connection with the renovation due to the delay in the availability of the funds. These facts are adopted as findings in aggravation. (Std. 1.2(b)(iv).)

Prior to the occurrence of the misconduct charged in this proceeding, respondent had been a member of the California Bar for 13 years with no prior record of discipline. This fact is adopted as a finding in mitigation. (Std. 1.2(e)(i); see *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1148.)

Taking into account both additional aggravating and mitigating factors, the examiner is of the view

that the referee's recommendation as to discipline is still within the appropriate range of discipline for the offenses committed here. The examiner cites *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921 in which six months stayed suspension and no actual suspension was imposed for a one-count abandonment and *Smith* v. *State Bar* (1985) 38 Cal.3d 525 in which the respondent also received six months stayed suspension and thirty days actual suspension with one year probation. Neither of these cases involved additional charges of failure to cooperate with the investigation and failure to comply with section 6002.1. We therefore examine the impact of culpability on these two additional charges.

Section 6068 (i) makes failure to cooperate with the investigation independent grounds for discipline. Section 6068 (j) specifically makes compliance with section 6002.1 the subject of independent discipline. (See *Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 108 ["a disregard of the statutory duty [imposed by section 6002.1], particularly in combination with professional indifference, is [not] undeserving of discipline"].) While the three counts are interrelated, the failure to maintain a current address for a year and a half in and of itself demonstrates an indifference to one of respondent's essential duties apart from his abandonment of a client and failure to cooperate in investigating the bar matter. It also made the consequences of his abandonment more severe because neither the client nor the new counsel was able to contact him. Nonetheless, *Wren* v. *State Bar* (1983) 34 Cal.3d 81 involved a one-count abandonment based on 22 months' inaction in a case aggravated by culpability on the serious charge of misrepresentations to the client in violation of sections 6106 and 6128 of the Business and Professions Code, and harm to the client from delay in returning the file and advanced fee. The attorney was also found to have attempted to mislead the State Bar by giving false and misleading testimony before the hearing panel. However, in mitigation, the attorney had no prior record of discipline in 17 years of practice preceding the abandonment. He received a two-year stayed suspension with two years probation and a forty-five day actual suspension. *Wren* was more egregious than the present case. We therefore agree with the Office of Trial Counsel that the referee's recommendation of one year suspension stayed and thirty days actual suspension is within the appropriate range of discipline. **[19]** However, in light of concern regarding the abrupt manner in which respondent abandoned his client and abandoned his office, we add as an additional condition that respondent take and complete a course in law office management within one year of the effective date of the Supreme Court order. We also recommend that respondent take the newly established California Professional Responsibility Examination tailored for members of the California State Bar in lieu of the national Professional Responsibility Examination.

IV. FORMAL RECOMMENDATION

It is therefore recommended to the Supreme Court:

1. That respondent be suspended from the practice of law for one (1) year.

2. That execution of respondent's suspension be stayed, and that he be placed on probation for one (1) year subject to the following conditions:

a. That during the first thirty (30) days of said period of probation, he shall be suspended from the practice of law in the State of California;

b. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

c. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(1) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of

Professional Conduct since the effective date of said probation;

(2) in each subsequent report, that he has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(3) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (2) thereof;

d. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar;

e. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

f. That respondent shall promptly report, and in no event in more than 10 days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

g. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective; and

h. That at the expiration of the period of this probation, if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of one (1) year shall be satisfied and the suspension shall be terminated.

i. That respondent provide satisfactory evidence of completion of a course on law office management which meets with the approval of his probation monitor within one (1) year from the date on which the order of the Supreme Court becomes effective.

3. That respondent be ordered to take and pass the California Professional Responsibility Examination administered by the Committee of Bar Examiners of the State Bar of California within one (1) year from the effective date of the Supreme Court's Order.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN F. FARRELL

A Member of the State Bar

[No. 88-O-11261]

Filed May 20, 1991

SUMMARY

Respondent was found culpable by a referee of the former, volunteer State Bar Court of making misrepresentations to the judge during a municipal court trial, and of failing to cooperate with the State Bar's investigation of this misconduct. Respondent's culpability was based solely on documentary evidence, which included requests for admissions that were deemed admitted by the referee because respondent failed to respond to them. Respondent appeared at the hearing and testified in mitigation. The referee concluded that respondent had committed an act of moral turpitude and dishonesty, but did not specify which rules or statutes he had violated. The referee recommended a two-year stayed suspension, three years probation, and three months actual suspension, plus passage of the Professional Responsibility Examination. (Willard E. Stone, Hearing Referee.)

The examiner requested review, seeking modifications of the referee's decision and an increase in the recommended discipline. The review department concluded that respondent was culpable of violating section 6068(d) of the Business and Professions Code and its parallel provision in former Rule of Professional Conduct 7-105(1) (now Rule of Professional Conduct 5-200(B)), and of committing an act of dishonesty (section 6106), because the facts deemed admitted showed that the misrepresentations had been made intentionally and were material. The review department also agreed that the failure to cooperate with the State Bar constituted an independent charge of which respondent was culpable, not merely a factor in aggravation.

Notwithstanding the facts deemed admitted, the review department accepted as mitigation respondent's testimony that he had not known that the facts he stated to the municipal court judge were untrue. Nonetheless, based on respondent's misconduct, the review department saw no reason in the record to depart from the Standards for Attorney Sanctions for Professional Misconduct, which called for greater discipline in this proceeding than the three-month actual suspension which had been imposed on respondent in his prior disciplinary proceeding. The review department therefore recommended a two-year stayed suspension, a six-month actual suspension, and three years probation. The review department also recommended that respondent be ordered to complete a law office management course and attend the State Bar's Ethics School program, in lieu of requiring passage of the Professional Responsibility Examination, which had already been ordered in respondent's prior disciplinary proceeding.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

COUNSEL FOR PARTIES

For Office of Trials: Gregory B. Sloan

For Respondent: No appearance

HEADNOTES

[1] **130 Procedure—Procedure on Review**
Where respondent's counsel withdrew after the hearing, and respondent did not file a brief on review, the Presiding Judge ordered respondent precluded from presenting oral argument on review.

[2 a-d] **113 Procedure—Discovery**
141 Evidence—Relevance
159 Evidence—Miscellaneous
715.10 Mitigation—Good Faith—Found
Where facts deemed conclusively established by court order, following respondent's failure to respond to examiner's requests for admissions, showed that respondent had wilfully misled judge, but respondent was permitted to testify that representations made to judge, though false, were true to the best of respondent's knowledge at the time they were made, respondent's testimony on this point was properly received, but only in mitigation, and not to contradict deemed admissions on which culpability findings were based. Deemed admissions, while conclusive as to literal truth of facts clearly set forth in request for admissions, did not preclude referee from admitting and considering other evidence that tended to explain or helped to interpret admitted facts.

[3 a, b] **113 Procedure—Discovery**
159 Evidence—Miscellaneous
Where respondent failed to respond to examiner's requests for admissions, those facts deemed admitted were properly considered as conclusive where there had been no timely motion for relief.

[4] **191 Effect/Relationship of Other Proceedings**
204.90 Culpability—General Substantive Issues
213.40 State Bar Act—Section 6068(d)
220.00 State Bar Act—Section 6013, clause 1
320.00 Rule 5-200 [former 7-105(1)]
1518 Conviction Matters—Nature of Conviction—Justice Offenses
The mere fact that an attorney has been held in contempt of court is not grounds for discipline. The State Bar must establish that the contempt resulted from bad faith noncompliance with a court order, or that the underlying facts present other independent grounds for discipline.

[5 a, b] **204.20 Culpability—Intent Requirement**
213.40 State Bar Act—Section 6068(d)
320.00 Rule 5-200 [former 7-105(1)]
In order to violate the statute prohibiting seeking to mislead a judge, or its parallel Rule of Professional Conduct, an attorney must knowingly make a false, material statement of fact or law to a court, with the intent to mislead.

[6] **213.40 State Bar Act—Section 6068(d)**
320.00 Rule 5-200 [former 7-105(1)]
Where respondent falsely stated to the judge, during a trial, that one of his witnesses who had not yet arrived at court was under subpoena, such false statement was material, because it affected the court's scheduling of its daily calendar to accommodate the late witness and because it wrongfully caused the court to treat the witness initially as being in disobedience of a subpoena when he did arrive.

[7] **221.00 State Bar Act—Section 6106**
The commission of any act of dishonesty constitutes a violation of section 6106.

[8 a, b] **113 Procedure—Discovery**
141 Evidence—Relevance
159 Evidence—Miscellaneous
735.50 Mitigation—Candor—Bar—Declined to Find
Respondent's testimony that he unsuccessfully tried to telephone a State Bar investigator in response to a letter the investigator sent him regarding his possible misconduct was admissible only in mitigation, not in defense to his culpability of failing to cooperate in the investigation, which was conclusively established by his deemed admissions resulting from his failure to respond to discovery. Such testimony was not a sufficient basis for a finding in mitigation.

[9] **213.90 State Bar Act—Section 6068(i)**
613.10 Aggravation—Lack of Candor—Bar—Found but Discounted
Respondent's failure to cooperate with the State Bar's investigation of his misconduct was a substantive violation of the statute requiring such cooperation, not just an aggravating factor.

[10] **543.10 Aggravation—Bad Faith, Dishonesty—Found but Discounted**
613.10 Aggravation—Lack of Candor—Bar—Found but Discounted
Respondent's having willfully misled a court during trial and failed to cooperate with the State Bar's investigation of his misconduct were not properly considered as aggravating factors because they were part of the basis for finding respondent culpable of substantive violations.

[11] **130 Procedure—Procedure on Review**
146 Evidence—Judicial Notice
511 Aggravation—Prior Record—Found
802.21 Standards—Definitions—Prior Record
Where, at the time of the hearing, respondent's prior discipline record consisted only of another hearing department decision, and the examiner moved to augment the record on review with the review department minutes in the prior matter, the motion was construed by the review department as a motion to take judicial notice and was granted. Thereafter, the review department took judicial notice on its own motion of the Supreme Court's order in the prior matter.

[12] **515 Aggravation—Prior Record—Declined to Find**
802.21 Standards—Definitions—Prior Record
An attorney's suspension from the practice of law for nonpayment of State Bar fees is not a disciplinary suspension and is not considered a prior disciplinary record.

[13] **159 Evidence—Miscellaneous**
Where respondent's testimony was admitted subject to a motion to strike, and examiner thereafter moved to strike only as to culpability, not as to mitigation, and then proceeded to elicit testimony from respondent on cross-examination on same subject matter, examiner thereby waived any objection to such testimony.

[14] **141 Evidence—Relevance**
159 Evidence—Miscellaneous
The hearing department has broad discretion in determining the admissibility and relevance of evidence.

[15] **765.51 Mitigation—Pro Bono Work—Declined to Find**
A record of extensive representation of pro bono clients is a proper factor in mitigation, but where respondent testified that he represented primarily lower income and middle income clients, and that over half his clients were served either on a pro bono or reduced fee basis, such evidence was too sketchy to support a finding in mitigation based on pro bono work.

[16] **795 Mitigation—Other—Declined to Find**
An attorney's inability to arrange for service of a subpoena, due to insufficient and inexperienced office staff, was not a mitigating factor, because attorneys are held responsible for the proper supervision of their staff.

[17] **801.30 Standards—Effect as Guidelines**
805.10 Standards—Effect of Prior Discipline
In determining appropriate discipline where the respondent had one prior imposition of discipline, the review department first considered the discipline that would normally be appropriate for the current misconduct, and then considered the prior discipline as a factor in aggravation, using as a guide the standard that the discipline in the second matter should exceed that imposed in the prior matter. The level of discipline was based on a balancing of all factors involved.

[18] **213.20 State Bar Act—Section 6068(b)**
213.40 State Bar Act—Section 6068(d)
220.00 State Bar Act—Section 6013, clause 1
320.00 Rule 5-200 [former 7-105(1)]
1099 Substantive Issues re Discipline—Miscellaneous
1518 Conviction Matters—Nature of Conviction—Justice Offenses
Depending upon the circumstances, a finding of contempt against an attorney may result in no discipline at all or substantial discipline.

[19] **165 Adequacy of Hearing Decision**
801.47 Standards—Deviation From—Necessity to Explain
The hearing department should have made clear its reasons for recommending a lower level of discipline than that called for by an applicable standard.

[20] **173 Discipline—Ethics Exam/Ethics School**
There was no reason to recommend that respondent be ordered to take and pass the professional responsibility examination when he had recently been ordered to do so in a prior disciplinary matter; instead, the review department recommended that respondent be required to attend the State Bar's Ethics School program.

ADDITIONAL ANALYSIS

Culpability
Found
213.41 Section 6068(d)
213.91 Section 6068(i)
221.11 Section 6106—Deliberate Dishonesty/Fraud
320.01 Rule 5-200 [former 7-105(1)]
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
Discipline
1013.08 Stayed Suspension—2 Years
1015.04 Actual Suspension—6 Months
1017.09 Probation—3 Years
Probation Conditions
1022.50 Probation Monitor Not Appointed
1024 Ethics Exam/School
1025 Office Management
Other
172.15 Discipline—Probation Monitor—Not Appointed
175 Discipline—Rule 955

OPINION

PEARLMAN, P.J.:

Respondent John F. Farrell was admitted to the bar in January 1972. Effective April 20, 1990, he was disciplined in one matter in which he received two years probation on conditions including ninety days actual suspension.

The instant matter arose from an incident in 1988, in which respondent made a misrepresentation to the Stanislaus County Municipal Court in the course of a civil trial, for which he was subsequently held in civil contempt. The first count of the two-count notice to show cause charged respondent with making a false statement to the Municipal Court for the purpose of misleading the judge, in violation of sections 6068 (a), 6068 (d), 6103, and 6106 of the Business and Professions Code and former rule 7-105(1) (now rule 5-200) of the Rules of Professional Conduct.[1] The second count charged respondent with failing to cooperate with the State Bar's investigation of this matter in violation of sections 6068 (a), 6068 (i), and 6103 of the Business and Professions Code.

Respondent appeared and was represented by counsel at the disciplinary hearing. The examiner presented his case solely by way of documentary evidence including requests for admissions which were ordered admitted by virtue of respondent's failure to respond to them. (R.T. pp. 6-7; exh. 1-4.) Respondent testified in his defense and in mitigation.

The referee concluded that respondent had committed an act of moral turpitude and dishonesty. He did not specify what statutes or rules respondent had violated. He recommended a two-year stayed suspension, three years probation, three months actual suspension, compliance with rule 955 of the California Rules of Court, and a requirement that respondent take and pass the Professional Responsibility Examination ("PREX").

The examiner requested review, seeking to modify the decision in the following respects: (1) that the finding of failure to cooperate with the State Bar investigation be treated as a substantive finding of culpability rather than just an aggravating circumstance; (2) that the recommended discipline be increased and, in particular, the length of the actual suspension; (3) that standard conditions of probation be included; and (4) that the PREX and rule 955 requirements be deleted since those were imposed in respondent's prior discipline. [1] Respondent's counsel withdrew after the hearing, and respondent did not file a brief on review. Pursuant to order of the Presiding Judge, respondent was accordingly precluded from presenting oral argument and did not appear.

Upon our independent review of the record, we adopt most of the modifications requested by the examiner, including increasing the discipline by including six months actual suspension. However, we do not recommend waiver of the rule 955 requirement as suggested by the examiner. We also add a requirement that respondent attend ethics school and a law office management course as well as adding the standard conditions of probation as requested by the examiner.

I. THE FACTS

[2a, 3a] The facts regarding respondent's misconduct are not in dispute; most of them were conclusively established by State Bar Court order following respondent's failure to respond to the examiner's requests for admissions. On the morning of March 14, 1988, respondent appeared on behalf of the defendants in a civil suit in Stanislaus County Municipal Court. (Decision, findings of fact ¶¶ 2-3.) It was an unlawful detainer matter, and the defense was that the plaintiff property owner was evicting the defendant tenants in retaliation for their complaint to the county health department about the conditions in the building. (R.T. pp. 9-10.) In response to questions from the trial judge, respondent stated that he

1. Respondent's misconduct occurred in March 1988; the matter is therefore governed by the former Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989. All references here, unless otherwise noted, will be to these former rules. All statutory references herein are to the Business and Professions Code unless otherwise specified.

had a witness who had not yet arrived at court who was under subpoena. The witness referred to was Dennis Chastain. (Decision, findings of fact ¶¶ 5-6; see also exh. 3 [transcript re contempt].) Chastain was a fellow tenant of the defendants, who was willing to testify for them, but wanted to be subpoenaed in order to protect himself from any possible retaliation by the property owner. (See R.T. p. 17; exh. 3, pp. 13-14.)

At the time of respondent's colloquy with the judge, Chastain had not in fact yet been served with a subpoena. (Decision, findings of fact ¶ 7.) The case was put at the end of the court's calendar and several short recesses were taken so that respondent could check on the whereabouts of his witness. (Exh. 3, p. 6.) Chastain arrived at the courthouse later in the day while the trial was in progress. (Exh. 3, pp. 3, 14; R.T. pp. 10-12.) At that time, respondent served Chastain with a subpoena which respondent had hastily prepared by scratching out the name of another witness and substituting Chastain's name. (Decision, findings of fact ¶¶ 4, 7.) Chastain proceeded to testify. (Exh. 3, pp. 3-5.) The judge questioned Chastain to determine if his delayed arrival was in disobedience of a duly served subpoena as respondent had led the judge to believe. (Exh. 3, p. 6.)

Upon discovering that Chastain had not actually been served with the subpoena until he arrived at court, the trial judge initiated contempt proceedings against respondent. After holding a hearing, he found respondent in civil contempt. Respondent paid a $500 fine for the contempt, and was not required to serve any jail time. (R.T. pp. 15-16; exh. 2.)

[2b] The referee found, based on respondent's deemed admissions, that respondent wilfully misled the judge in stating that Chastain had already been subpoenaed to appear. (Decision, findings of fact ¶¶ 8, 10; requests for admissions, nos. 19, 24, 29.)[2] However, at the disciplinary hearing, respondent was permitted to testify that his representations to the court, though later shown to be false, were truthful to the best of his knowledge at the time he said them. (R.T. pp. 10-11, 16-17, 25-26.) The referee received respondent's testimony on this point only in mitigation, and not to contradict the deemed admissions on which the findings of culpability were based. (R.T. p. 29; see discussion of mitigation, *post*.)

II. DISCUSSION

A. Culpability.

[4] The mere fact that an attorney has been held in contempt is not grounds for discipline. (*Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 953.) The State Bar must establish that the contempt resulted from bad faith noncompliance with a court order, or that the underlying facts present other independent grounds for discipline. In this case, we have no evidence of failure to comply with a court order. The issues of respondent's culpability on the various violations charged in the notice to show cause are discussed below.

1. Sections 6068 (a) and 6103 (Counts One and Two).

Both counts of the notice to show cause charged respondent with violating sections 6068 (a) and 6103 as well as other statutes and rules. On review, the examiner did not request the review department to find these violations of sections 6103 or 6068 (a). We follow the Supreme Court's holding in *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815 that with respect to a member's oath and duties, section 6103 "provides only that violation of his oath or duties defined elsewhere is a ground for discipline," and therefore respondent cannot be said to have violated this section. We also find that section 6068 (a) does not form a separate basis for culpability on the charges here. (See *Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060.)

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2. The record also shows, although the referee did not make any findings directly on this point, that in response to the trial judge's question regarding whether respondent had received a return on the subpoena, respondent stated that he did not "have it with [him]." This response contradicted his admission through failure to respond to requests for admissions that he had never received a return of subpoena at all. (Exh. 3 pp. 2-3; requests for admissions, nos. 8-9, 20-23.)

2. Count One.

[3b] Based on respondent's deemed admissions, and properly considering those as conclusive where there has been no timely motion for relief therefrom (see, e.g., *Gribin Von Dyl & Assocs., Inc.* v. *Kovalsky* (1986) 185 Cal.App.3d 653, 662-663), the referee found respondent culpable of violating section 6068 (d) of the Business and Professions Code making it a duty "To employ, for the purpose of maintaining the causes confided to him . . . such means only as are consistent with truth, and never to seek to mislead the judge . . . by an artifice or false statement of fact or law." Respondent was also properly found culpable of violating the parallel provisions of rule 7-105(1) of the Rules of Professional Conduct.

[5a] In our previous decision in *In the Matter of Conroy*,* modified in other respects in *Conroy* v. *State Bar* (1991) 53 Cal.3d 495, we accepted the examiner's concession that in order to violate section 6068 (d), a misrepresentation made to a tribunal must be material to the issues before the tribunal. We also held that the misrepresentation must be made with the intent to mislead the tribunal. Both of these conclusions were adopted by the Supreme Court. (*Conroy* v. *State Bar*, *supra*, 53 Cal.3d at pp. 501-502, 508.)

[5b] Recently in *In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, this review department construed rule 7-105(1) to require that, for a violation, the attorney must have knowingly presented a false statement intending to mislead the court. [6] Respondent's deemed admissions establish that he knowingly made a false statement to the judge (requests for admissions, nos. 13-16), and intentionally misled the judge (*id.*, nos. 19, 24, 29, 30), but do not address the question whether the misrepresentation was material. We find that it was material both because it affected the court's scheduling of the daily calendar to accommodate the witness and because it wrongfully caused the witness, Chastain, to be initially considered by the court in disobedience of a subpoena which had not yet in fact been served upon him.

[7] Based on respondent's deemed admissions, the referee also properly found that respondent violated section 6106 by his misrepresentation since the commission of any act of dishonesty constitutes a violation of section 6106.

3. Count Two.

The elements of count two were also fully established by the facts deemed admitted due to respondent's failure to respond to the requests for admissions concerning his lack of cooperation with the State Bar investigation.[3] [8a - see fn. 3] (Requests for admissions, nos. 26-28; see also exh. 4.) [9] The examiner's request that respondent's failure to cooperate in the investigation be treated as a substantive violation of section 6068 (i) rather than just an aggravating factor is well taken.

B. Aggravation.

[10] The referee found three aggravating factors: (1) the fact that respondent "willfully mislead [sic] the Court by stating affirmatively that a witness had been subpoenaed to appear at the Trial"; (2) respondent's failure to cooperate with the investigation, and (3) respondent's prior discipline. Of these, only the third is appropriately considered an aggravating factor. As already noted, respondent's failure to cooperate was an additional substantive offense, not an aggravating factor. The finding that respondent wilfully misled the municipal court simply repeats part of the basis for the findings on culpability, and thus does not constitute an additional factor that aggravates respondent's misconduct. (See *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11, recommended discipline adopted, Nov. 29, 1990 (S016265).)

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* [Editor's note: Review granted, Nov. 15, 1990 (S016863); State Bar Court Review Department opinion superseded by *Conroy* v. *State Bar* (1991) 53 Cal.3d 495.]

3. [8a] Respondent was permitted to testify at the hearing that when he received the State Bar investigator's letter regarding this matter, he attempted to call the investigator, but was unable to reach him; however, he did nothing further in response to the investigator's letter. (R.T. pp. 17, 21-23.) This testimony was admissible only in mitigation, not in defense of culpability established by his admissions.

[11] With regard to the prior disciplinary matter, at the time of the hearing in this matter, only the hearing department decision had been issued. On review, the examiner moved to augment the record with the review department minutes; the motion was construed as a motion to take judicial notice, and was granted. Thereafter, this court took judicial notice on its own motion of the Supreme Court's order in the prior matter, which was filed on March 21, 1990, and became effective April 20, 1990 (S012372). Respondent's 90-day actual suspension in the prior matter expired on July 19, 1990.[4] **[12 - see fn. 4]**

The misconduct in the prior matter began in 1983, when respondent had been a member of the bar for over 12 years, and extended into mid-1985, 3 years before the present misconduct. The misconduct in the present matter was committed in March 1988, less than a month after the notice to show cause was filed in the prior.

The prior matter involved two counts. In the first count, respondent accepted a note and deed of trust from his client (to secure his fees, apparently), without the proper legal safeguards for business transactions with one's client. Respondent subsequently accepted a car from the same client in payment of his fee (again without proper safeguards), did not then reconvey the deed of trust to the client, and failed to register the car in his own name, causing his client's ex-husband (the registered owner of the car) to incur multiple citations for illegal parking. Respondent then complicated the situation even further by appearing without authority on behalf of the ex-husband to resolve the parking tickets. He also failed to return his client's file on request.

The second count of the prior matter was a simple abandonment in a domestic relations matter. Based on considerable mitigation, the referee recommended a 30-day actual suspension and one year probation. The former volunteer review department increased the recommendation to a two-year stayed suspension, ninety days actual suspension, and two years probation, with requirements that respondent pass the PREX and comply with rule 955 of the California Rules of Court. The Supreme Court adopted the review department's recommendation.

C. Mitigation.

Respondent testified at both the contempt and disciplinary hearings that he did not intend to mislead the court, and that he told the judge that Chastain had been subpoenaed because that was what he honestly believed based on information received from his secretary (who later became his wife). (Exh. 3, pp. 11-12; R.T. pp. 16-17, 25-26.) Apparently as a result of this testimony, the referee found in mitigation that respondent "believed that the witness Chastain had been previously served to appear as a witness at the Trial." (Decision, evidence in mitigation ¶ 1.)

[13] Respondent's testimony on direct examination regarding his state of mind at the time he made the false statements to the municipal court was admitted subject to the State Bar making a motion to strike. The examiner made a motion to strike at the conclusion of the testimony. (See R.T. pp. 6-8, 29.) However, the motion was limited to striking the testimony with regard to culpability only, not as to mitigation. (R.T. p. 29.) The examiner then himself elicited testimony from respondent, on cross-examination, to the effect that when the representations were made, respondent believed that all subpoenas had been served, including Chastain's, based on what his office staff had told him the morning of trial. (R.T. pp. 25-26.) The examiner thereby waived any objection to the testimony. (*Milton* v. *Montgomery Ward & Co., Inc.* (1973) 33 Cal.App.3d 133, 138-139.) Respondent also testified that the purpose of his telling the judge that he had another witness under subpoena was not to obtain a continuance, but merely to indicate to the judge how long he expected the matter to take, and that he might need to take witnesses out of order. (R.T. p. 14.)

4. Respondent was suspended again, this time for nonpayment of fees, effective July 30, 1990 (BM 6008). The latter suspension is not a disciplinary suspension and is not considered a prior disciplinary record. (See *Hitchcock* v. *State Bar* (1989) 48 Cal.3d 690, 701, 708.)

[2c] All of this evidence was received in mitigation and not to contradict the deemed admissions. **[14]** "The trial court has broad discretion in determining the admissibility and relevance of evidence." (*Milton* v. *Montgomery Ward & Co.*, *supra*, 33 Cal.App.3d at p. 138.) **[2d]** Respondent's deemed admissions, while conclusive as to the literal truth of the facts clearly set forth in the requests for admissions, did not preclude the referee from admitting and considering other evidence that tended to explain or helped to interpret the admitted facts. (*Fredericks* v. *Kontos Industries, Inc.* (1987) 189 Cal.App.3d 272, 276-278.) We interpret the finding in mitigation to mean that respondent believed a subpoena had been prepared and sent out for service upon the witness by his staff, but had no proof of service or basis for belief that the subpoena had in fact been served on the witness at the time he made the representation to the judge that the witness was under subpoena.

[8b] Respondent testified in an attempt to mitigate the section 6068 (i) charge that he had made some effort to reach the State Bar investigator by telephone, but had been unable to do so. (R.T. pp. 17, 21-23.) No finding in mitigation was made based thereon nor do we deem his testimony sufficient to make such a finding. We do note that the charge of lack of cooperation is limited to the investigation stage of the proceeding and that he did appear and was not found uncooperative at trial.

[15] Finally, respondent testified that he had been a solo practitioner for the last 10 years, representing primarily lower income and middle income clients in a general practice. (R.T. p. 34.) He did not have enough financial resources to pay for an attractive office or secretarial services. (R.T. pp. 35, 36-37.) Over half of his clients were served either on a pro bono or reduced fee basis. (R.T. pp. 35-36.) A record of extensive representation of pro bono clients would be a proper factor in mitigation (see, e.g., *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667), but the evidence below appears too sketchy to support such a finding here.

[16] Respondent also claimed that his inability to arrange for the prior service of the subpoena was due to insufficient and inexperienced office staff.[5] Accepting this as true, respondent is nonetheless held responsible for their proper supervision. (See, e.g., *Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 857.)

III. RECOMMENDED DISCIPLINE

A. Length of Actual and Stayed Suspensions and Probation.

[17] The examiner argues that under standard 1.7(a), Standards for Attorney Sanctions for Professional Misconduct ("standard(s)") (Trans. Rules Proc. of State Bar, div. V), respondent's discipline in the present matter should exceed the three months imposed in the prior matter. We agree. We consider the discipline that would normally be appropriate for misconduct of this nature, and then consider the prior as a factor in aggravation thereof, using standard 1.7(a) as a guideline. The level of discipline is based on a balancing of all factors involved.

[18] In *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d 924, the Supreme Court noted that contempt could result in no discipline at all or substantial discipline depending on the circumstances. The Supreme Court ordered one year's actual suspension of Maltaman for deceitful acts demonstrating serious moral turpitude and also involving willful bad faith disobedience to a series of court orders with no mitigating circumstances. (*Id.* at p. 958.) Here, we have a case of lesser misconduct. **[19]** Nevertheless, the hearing referee did not indicate why he recommended discipline lower than standard 1.7(a) calls for. He should have made clear his reasons for doing so. (*Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) We see no reason to depart from the standards. Taking into account all of the circumstances, including the prior

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5. At the time of the unlawful detainer trial, respondent's secretary had been his girlfriend (who later became his wife). She had no experience whatsoever as a secretary before starting to work for him a month before that trial. He also had another secretary working part-time who had only recently started to work for him. (R.T. pp. 36-37.) As a result of their inexperience, he had had problems in office management. (R.T. p. 37.)

three-month suspension, we increase the discipline recommendation to six months actual suspension.

B. Conditions of Probation and Other Requirements.

The examiner's proposal that standard terms and conditions of probation be added to the recommended discipline, together with a requirement that respondent comply with rule 955 of the California Rules of Court, is appropriate. We also recommend that respondent be required to provide the Probation Department with proof of attendance at a law office management course within one year of the effective date of the commencement of his suspension. **[20]** Under the Supreme Court's order in the prior, respondent must take and pass the PREX sometime between April 20, 1990, and April 19, 1991. Since respondent must comply with this order, there is no reason to require him to pass the PREX again in this matter if he has complied with the prior order. If, on the other hand, he fails to take and pass the PREX as already required, he will be suspended for such violation until he does pass it. In lieu of retaking the PREX, we recommend that respondent be ordered to take the State Bar's Ethics School program.

IV. FORMAL RECOMMENDATION

It is therefore RECOMMENDED to the Supreme Court that respondent John F. Farrell be suspended from the practice of law for two years; that such suspension be stayed, and that respondent be placed on probation for three (3) years subject to the following conditions:

1. That during the first six (6) months of said period of probation, he shall be suspended from the practice of law in the State of California;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

4. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

5. That respondent shall promptly report, and in no event in more than 10 days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

6. That respondent shall provide the State Bar Court Probation Department with satisfactory evidence of completion of a course on law office management offered by California Continuing Education of the Bar, or another similar course approved by the State Bar Court Probation Department, within one (1) year from the date on which the order of the Supreme Court in this matter becomes effective;

7. That respondent shall take and pass the State Bar's Ethics School program within one (1) year from the date on which the order of the Supreme Court in this matter becomes effective;

8. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective; and

9. That at the expiration of the period of this probation if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of two (2) years shall be satisfied and the suspension shall be terminated.

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within thirty (30) calendar days of the effective date of the Supreme Court Order in this matter, and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the Order showing his compliance with said Order.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

AARON LEE KATZ

A Member of the State Bar

[No. 83-C-14452]

Filed May 21, 1991

SUMMARY

Respondent was convicted in 1983 of one felony count of perjury resulting from his false testimony at a vehicle infraction trial relating to his avoidance of California use and vehicle registration taxes. Respondent was placed on interim suspension in April 1984 pending disposition of the disciplinary proceeding against him. The hearing judge recommended a three-year stayed suspension, three years probation, and actual suspension for an additional eighteen months and until respondent established rehabilitation, fitness to practice, and learning in the law pursuant to standard 1.4(c)(ii). (Hon. Alan K. Goldhammer, Hearing Judge.)

Both parties requested review. The examiner sought disbarment, and respondent sought to overturn certain findings and reduce the recommended actual suspension.

Because respondent was given full credit in the review department's disciplinary recommendation for the time that he had spent on interim suspension, the review department rejected respondent's claim that he had been prejudiced by delays during the disciplinary process. The review department also rejected respondent's claim that he had received insufficient notice that issues beyond his perjury conviction would be considered at trial. Although the review department found that respondent had failed to come to grips with his culpability and had not been entirely candid, the review department concluded that disbarment was not necessary in light of respondent's interim suspension of nearly seven years and other mitigating evidence. The review department recommended that respondent be suspended for three years on conditions of probation including actual suspension for six months from the effective date of the Supreme Court's order and until he satisfied the requirements of standard 1.4(c)(ii).

COUNSEL FOR PARTIES

For Office of Trials: Andrea T. Wachter

For Respondent: Marshall W. Krause

For Amici Curiae: William H. Morris

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
755.52 Mitigation—Prejudicial Delay—Declined to Find
1699 Conviction Cases—Miscellaneous Issues
Delays in disciplinary proceedings merit consideration only if they have caused specific, legally cognizable prejudice (e.g., by impairing the presentation of evidence). Where respondent was not prepared to state that his case would have been stronger if no delays had occurred, and respondent received credit for time on interim suspension following conviction, respondent failed to demonstrate prejudice from delay in disciplinary proceeding.

[2] **141 Evidence—Relevance**
1691 Conviction Cases—Record in Criminal Proceeding
1699 Conviction Cases—Miscellaneous Issues
In conviction referral proceedings, discipline is imposed according to the gravity of the crime and the circumstances of the case. In examining such circumstances, the court may look beyond the specific elements of a crime to the whole course of an attorney's conduct as it reflects upon the attorney's fitness to practice law.

[3] **106.20 Procedure—Pleadings—Notice of Charges**
135 Procedure—Rules of Procedure
192 Due Process/Procedural Rights
1691 Conviction Cases—Record in Criminal Proceeding
Given that the examiner's pretrial statement indicated that facts and circumstances surrounding respondent's perjury conviction would be at issue and that the record would include the transcript of a related infraction trial as well as respondent's perjury trial, and given the rule permitting the hearing judge to consider evidence of facts not directly connected with respondent's conviction if such facts are material to the issues stated in the order of reference, respondent had sufficient notice that all relevant facts and circumstances would be considered in the disciplinary proceeding. (Trans. Rules Proc. of State Bar, rule 602.)

[4] **139 Procedure—Miscellaneous**
151 Evidence—Stipulations
The respondent in a disciplinary proceeding must accept facts to which the respondent has stipulated.

[5] **801.10 Standards—Effective Date/Retroactivity**
1551 Conviction Matters—Standards—Scope
The Standards for Attorney Sanctions for Professional Misconduct may be applied retroactively to criminal conduct which occurred before they were adopted.

[6] **621 Aggravation—Lack of Remorse—Found**
745.52 Mitigation—Remorse/Restitution—Declined to Find
The law does not require false penitence; however, it does require that the respondent accept responsibility for his acts and come to grips with his culpability.

[7] **740.10 Mitigation—Good Character—Found**
The confidence in respondent expressed by fellow attorneys may be considered in mitigation. Where attorneys who testified as character witnesses knew respondent well and were aware of the

circumstances prompting the disciplinary proceeding, their testimony regarding respondent's integrity and honesty deserved consideration.

[8 a, b] **695 Aggravation—Other—Declined to Find**
1691 Conviction Cases—Record in Criminal Proceeding
In a disciplinary hearing, the record of a felony conviction conclusively establishes the attorney's guilt of the felony. Nevertheless, testimony from attorney character witnesses as to their belief that the respondent was innocent should not have been considered as an aggravating circumstance.

[9] **199 General Issues—Miscellaneous**
204.90 Culpability—General Substantive Issues
740.59 Mitigation—Good Character—Declined to Find
Focusing on technicalities in the law is a very shortsighted approach to the ethical obligations of attorneys; such technical approaches to the body of law regulating attorneys' ethics may be described as undermining the moral fiber of the profession. Evidence of good character does not rest on technicalities.

[10 a, b] **740.32 Mitigation—Good Character—Found but Discounted**
740.33 Mitigation—Good Character—Found but Discounted
Where hearing judge found that character witnesses' testimony was undercut by their inability to point to any persuasive reason for their belief in respondent's good character, and where the witnesses' lack of knowledge of the details of respondent's conviction also undermined the value of their testimony, respondent's contention that character evidence had not been sufficiently credited was rejected by review department.

[11 a, b] **801.30 Standards—Effect as Guidelines**
801.41 Standards—Deviation From—Justified
822.59 Standards—Misappropriation—Declined to Apply
1091 Substantive Issues re Discipline—Proportionality
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1552.59 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
The Standards for Attorney Sanctions for Professional Misconduct are guidelines; they do not need to be followed in talismanic fashion. Hearing judge in matter arising from perjury conviction properly analyzed relevant case law in order to arrive at appropriate sanction, rather than automatically applying standard 3.2, which provides that discipline for conviction of a crime involving moral turpitude shall be disbarment unless compelling circumstances clearly predominate. Supreme Court cases involving crimes of moral turpitude have considered the nature of the crime and the magnitude of its impact on the public and the integrity of the legal system. This factual analysis in determining the propriety of disbarment is similar to that used in matters involving entrusted funds or property.

[12 a-c] **176 Discipline—Standard 1.4(c)(ii)**
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
1552.59 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Where relevant facts and circumstances surrounding perjury conviction were serious, and respondent had not yet demonstrated sufficient rehabilitation, but in light of mitigation and circumstances as a whole disbarment was not necessary, lengthy actual suspension, including some prospective suspension, and standard 1.4(c)(ii) requirement were appropriate discipline. However,

review department reduced length of recommended prospective suspension to reflect time expired since issuance of hearing judge's decision.

[13 a-c] **755.10 Mitigation—Prejudicial Delay—Found**
1549 Conviction Matters—Interim Suspension—Miscellaneous
1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Credit for interim suspension in conviction matters is not restricted to cases in which there are compelling mitigating factors. All facts and circumstances, including unexplained delay in State Bar proceedings, are considered, and all relevant factors are balanced in arriving at a proper discipline. Disciplinary recommendations should not penalize the respondent for appealing a criminal conviction or contesting the State Bar Court's findings and recommendations. Where lengthy interim suspension has occurred, the appropriate consideration in determining whether prospective suspension is necessary is whether the facts and circumstances of a particular matter require a further period of actual suspension for the protection of the public, the profession or the courts.

[14] **135 Procedure—Rules of Procedure**
176 Discipline—Standard 1.4(c)(ii)
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues
Where examiner was concerned to obtain detailed, complete information regarding respondent's anticipated application to resume practice pursuant to standard 1.4(c)(ii), review department recommended that respondent follow same format in application as in an application for reinstatement; otherwise, examiner could seek such information by a discovery request which would be more time consuming. (Trans. Rules Proc. of State Bar, rules 810-826.)

[15] **141 Evidence—Relevance**
173 Discipline—Ethics Exam/Ethics School
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
Passage of the Professional Responsibility Examination would be relevant evidence in a hearing pursuant to standard 1.4(c)(ii), but is not a condition precedent. Accordingly, respondent ordered to take PRE was given the standard period of one year to do so even though respondent's standard 1.4(c)(ii) hearing might occur sooner.

[16] **175 Discipline—Rule 955**
1699 Conviction Cases—Miscellaneous Issues
Where respondent in conviction matter had complied with rule 955, California Rules of Court at time of respondent's interim suspension, and had not practiced since, order to comply with rule 955 again upon imposition of final discipline was not necessary.

ADDITIONAL ANALYSIS

Aggravation
Found
541 Bad Faith, Dishonesty
Discipline
1613.09 Stayed Suspension—3 Years
1615.04 Actual Suspension—6 Months
1616.70 Relationship of Actual to Interim Suspension—Prospective, but Reduced
1617.09 Probation—3 Years

Probation Conditions

1024 Ethics Exam/School
1630 Standard 1.4(c)(ii)

Other

1521 Conviction Matters—Moral Turpitude—Per Se
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

PEARLMAN, P.J.:

Respondent Aaron Lee Katz was admitted to the practice of law in California in December 1973 and has no prior record of discipline. This case arises from his criminal conviction in 1983 on one count of perjury involving a personal tax avoidance scheme. He has been on interim suspension since April 1984. The hearing judge considered all of the circumstances and concluded that respondent should be suspended for three years, stayed on conditions including probation for three years and actual suspension for eighteen months and until satisfactory proof of rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V [hereafter "standards"]). No credit was recommended for his seven years of interim suspension.

Both parties sought review: the examiner on the ground that the decision ought to have recommended disbarment; Katz on numerous grounds challenging both the findings and the length of suspension. Among other things, Katz alleged improper failure to consider his lengthy interim suspension, prejudicial delays during the disciplinary process, improper application of standard 3.2, lack of support for the hearing judge's conclusions regarding remorse, and mishandling of character testimony by three attorneys and by lay witnesses.

In addition to the briefs of the parties, one of the three attorneys who served as character witnesses filed an amicus brief in which the other two attorney witnesses subsequently joined. The brief challenged the hearing judge's findings with respect to their testimony and objected to the recommended discipline as too harsh.

Upon our independent review, we adopt the hearing judge's findings and disciplinary recommendation with a few modifications. Taking Katz's lengthy interim suspension, including the additional one year since the hearing judge entered his decision, into account, we reduce the prospective suspension to six months actual suspension and until compliance with standard 1.4(c)(ii).

I. PROCEDURAL HISTORY

In 1976, Katz formed a corporation called Caarco, Inc.,[1] under the laws of Nevada. Katz used Caarco to hold title to two automobiles, including a 1981 Mercedes Benz registered in Oregon, and to avoid paying California motor vehicle fees and taxes. Katz was convicted in 1982 on a vehicle infraction charge and in 1983 on a perjury charge arising from his testimony in the infraction trial.[2] The Court of Appeal for the First Appellate District affirmed the perjury conviction in 1987.[3]

In the infraction trial, Katz was charged with failing to register the two automobiles in California, failing to pay registration taxes, and displaying improper license plates. (Decision by State Bar Court Hearing Department [hereafter cited as "Decision"] at p. 5; App. Ct. Opn. at p. 3.) The record indicates that Katz was convicted only for displaying improper license plates. (III Reporter's Transcript of the State Bar Court hearing [hereafter cited as "R.T."] 368-369; II R.T. 163.)[4] During the infraction trial, Katz testified that Caarco had a branch office at 3060 Jump Off Joe Creek Road, Sunny Valley, Oregon, and owned two vehicles used in respect to its branch office operations at the Oregon address. (App. Ct. Opn. at p. 5)

1. Katz indicated that "Caarco" was an acronym combining the first names of his wife and himself and stood for "Carolyn and Aaron Company." (Appellate Court Opinion [hereafter cited as "App. Ct. Opn."] at p. 3, fn. 1.)

2. Shortly after Katz was found guilty in the infraction trial, Caarco prevailed in a mandate proceeding seeking the return of the two automobiles, which had been impounded. (App. Ct. Opn. at pp. 5-8.)

3. The California Supreme Court denied Katz's petition for review, but a federal habeas corpus attack on the perjury conviction was still pending by the end of September 1990.

4. Although the appellate court opinion suggests that Katz was convicted on all of the infraction charges, the uncontroverted testimony at the disciplinary hearing is to the contrary, and we rely on the testimony in the record. (See App. Ct. Opn. at p. 6.)

Although Katz was charged with multiple counts of perjury based on his testimony at the infraction trial, all but two counts were dismissed. (Decision at p. 4.) On one count, the jury found that he had not falsely testified in stating that Caarco had a branch office at 3060 Jump Off Joe Creek Road, Sunny Valley, Oregon, but found on the other count that he had falsely testified in stating that Caarco owned two vehicles used in respect to its branch office operations in Oregon.

As a result of the perjury conviction, Katz was sentenced to serve three years in state prison, suspended on condition of serving one year in the county jail. This sentence was later modified to remove the service of one year in the county jail and to require instead the payment of a $10,000 fine. Katz paid the fine; and in 1988, the Santa Clara County Superior Court entered an order terminating Katz's probation and expunging his conviction. (Agreed statement of facts at pp. 2-3.)

In the State Bar Court proceeding prompted by the perjury conviction, the hearing judge recommended three years stayed suspension on conditions including actual prospective suspension of Katz for eighteen months and until Katz has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law at a standard 1.4(c)(ii) hearing. (Decision at pp. 24-25.)

II. STATEMENT OF FACTS

In the agreed statement of facts, the examiner and the attorney for Katz stipulated that the facts surrounding Katz's perjury conviction were correctly stated in the appellate court opinion of June 9, 1987, as modified in minor ways on July 2, 1987. (Agreed statement of facts at pp. 2-3.) The following statement of facts is based on the facts as found by the court of appeal, except where otherwise noted.

Caarco was a shell corporation designed to avoid California use and vehicle registration taxes. During most of Caarco's existence, its only officers, directors, shareholders, and employees were Katz and his wife. (App. Ct. Opn. at p. 2.)

Katz involved Dorothy Cichon, a client whose marital dissolution he was handling at the time, in Caarco's affairs. In the infraction and perjury trials, she testified that she paid a $1,000 retainer fee at Katz's direction to Stevens Creek Volkswagen as a deposit on a 1981 Mercedes Benz. (*Id.* at pp. 3-4.) Katz denied that Cichon had purchased the car on his behalf, but acknowledged that the receipt for her $1,000 deposit indicated the deposit was "for and on behalf of the undersigned," who was Katz. (*Id.* at p. 13.)

Following Katz's instructions, Cichon took delivery of the 1981 Mercedes Benz in Germany, drove it in Europe, arranged for shipment to California, collected it from the U.S. Customs Service, and turned it over to Katz. At Katz's direction, she also signed an Oregon registration application listing her address as 3060 Jump Off Joe Creek Road, Sunny Valley, Oregon, although she had never lived there. Two days before the infraction trial, she received a letter in which Katz asked her to sign a bill of sale backdated by Katz and again listing her address as 3060 Jump Off Joe Creek Road, Sunny Valley, Oregon. (*Id.* at p. 4.)

At the infraction trial, California Highway Patrolman Milton Stark testified that he had received a tip from an anonymous informant, later identified as Katz's neighbor and former client Wayne Averill. Stark discovered that the 1981 Mercedes Benz, which bore the Nevada license plate "CAARCO," should have displayed the Oregon license plate "GPC301." (*Id.* at pp. 3-5.)

During the infraction trial, Katz denied that Caarco was a sham corporation. He also maintained that Caarco had a branch office in a rudimentary structure called a "pole house" at the Oregon address and that he had used the 1981 Mercedes Benz on Caarco business in California and Oregon. (*Id.* at pp. 5-6.)

Because of his testimony at the infraction trial, Katz was charged with eight counts of perjury, which were reduced to two counts by the time of trial. (Agreed statement of facts at pp. 1-2.) He was convicted in October 1983 on one count for falsely

testifying that Caarco owned two vehicles used in respect to its branch office operations in Oregon. (Perjury verdict.)

At the perjury trial, Sue Patterson testified that she lived near the pole house on the Jump Off Joe Creek Road property, which she had previously owned, but had sold to Richard Groen, a former client of Katz. Patterson explained that the pole house had no telephone, no electricity, and no septic tank or sewer connection; that the Jump Off Joe Creek Road address was actually a bullet-ridden mailbox about 12 miles from the pole house; that the road to the pole house ran in front of her home and through two gates at its side; that the property could not be approached in a Mercedes Benz without breaking an oil pan; that she could not recall any visit by Katz to the property; and that she had never heard of Caarco or Katz until early 1982. (App. Ct. Opn. at pp. 8-9.)

In early 1982, Patterson had received a letter written by Katz's wife with his knowledge and approval. The letter stated that Patterson, if asked about Caarco, need not cooperate with law enforcement authorities. Further, the letter urged Patterson, if she did respond to inquiries, to say that she was familiar with Caarco and that Caarco maintained an office on the Jump Off Joe Creek Road property. (*Id.* at p. 9.)

Richard Groen testified at the perjury trial that he had given Katz permission to use the pole house property, that he had gone with Katz to the property, that the property could be reached without a four-wheel-drive vehicle, and that he had personally introduced Katz to Patterson. (*Id.* at 11.) Groen's wife asserted that Caarco had permission to use the pole house property and that she had informed Patterson, who was forgetful, about Caarco and Katz. (*Id.* at p. 12.)

Katz testified at the perjury trial that he used the Oregon address to minimize registration fees and use taxes, had visited the pole house property several times, had met Sue Patterson, and had discussed with her the use of the property as Caarco's mailing address. In Katz's opinion, he had conducted Caarco business in traveling to Oregon to register his vehicles and had used the vehicles in respect to the Oregon branch office. (*Id.* at p. 13.)

Soon after the perjury trial began, Katz attempted to intimidate Averill, the initially anonymous police informant and a potential witness. Katz drove an automobile onto Averill's property, stopped a couple of feet from Averill, and pointed his finger at Averill in a threatening manner. In early 1982, Averill also had received three identical anonymous threatening letters which he believed Katz had sent. (*Id.* at pp. 19-21.)[5]

After his perjury conviction, Katz applied in March 1984 to become an inactive member of the State Bar. This application was given retroactive application to January 1, 1984. (III R.T. 411-412.)

On March 21, 1984, the California Supreme Court ordered that Katz be put on interim suspension pursuant to Business and Professions Code section 6102 (a) and that Katz comply with rule 955 of the California Rules of Court. The effective date of the order was April 20, 1984. (Interim suspension order.)

At the disciplinary hearing, the examiner argued that the only issue was the level of discipline and that disbarment was appropriate under standard 3.2 because the most compelling mitigating circumstances did not clearly predominate. (I R.T. 13-14.) Respondent's counsel claimed that Katz's conduct posed "a very technical question, inappropriate for a perjury conviction"; that Katz had merely pressed "a minor matter too far"; and that he was a rehabilitated, honest man. (I R.T. 15-17.) Testimony was presented by Katz, Patrolman Stark, Katz's psychotherapist, Katz's former probation officer, the

5. At the perjury trial, Katz denied threatening Averill. He asserted that Averill had hidden assets from him after previous litigation and that he had entered Averill's driveway to note the license number of an apparently new automobile, so that he might possibly obtain a writ of execution on it. (App. Ct. Opn. at p. 21.) The appellate court opinion, however, accepted the view that Katz threatened Averill. (*Id.* at p. 27.)

superior court judge who had presided at Katz's perjury trial, three attorneys who had either represented or worked for Katz, and six lay witnesses.

The hearing judge restricted his findings of fact to the facts stipulated by the parties and set forth in the appellate court opinion. (Decision at pp. 4-8.) He concluded that the crime of which Katz was convicted involved moral turpitude, as did the facts and circumstances surrounding it. (*Id.* at p. 8.) With regards to mitigation and aggravation, the hearing judge made two findings: that bad faith, dishonesty, concealment, and overreaching surrounded Katz's conduct and that the most compelling mitigating circumstances did not predominate. (*Id.* at p. 9.) As discussed above, the hearing judge declined to impose disbarment or to give Katz any credit for several years of interim suspension. Instead, the hearing judge recommended actual suspension for 18 months and until Katz has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii). (*Id.* at pp. 16-17, 21-22, 24.)

III. DISCUSSION

A. Delays During the Disciplinary Process.

[1] Katz alleges prejudicial delays during the disciplinary process, but was not prepared to state that his case would have been stronger if no delays had occurred. Delays in disciplinary proceedings merit consideration only if they have caused specific, legally cognizable prejudice (e.g., by impairing the presentation of evidence). (*Blair* v. *State Bar* (1989) 49 Cal.3d 762, 774; *In re Ford* (1988) 44 Cal.3d 810, 818; *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 310.) Absent any credit for time on interim suspension Katz might have been able to demonstrate prejudice from the delays, but we believe we have obviated any such potential prejudice by our recommended discipline. (See discussion *post.*)

B. Finding of Fact No. 7.

Katz argues that finding of fact number 7, which describes the infraction and perjury trials, exceeds the scope of the hearing ordered by the California Supreme Court because it deals with matters other than simply the perjury conviction. [2] In a conviction referral, discipline is imposed according to the gravity of the crime and the circumstances of the case. (Bus. and Prof. Code, § 6102 (d).) In examining such circumstances, the court may look beyond the specific elements of a crime to the whole course of an attorney's conduct as it reflects upon the attorney's fitness to practice law. (*In re Kristovich* (1976) 18 Cal.3d 468, 472; *In re Higbie* (1972) 6 Cal.3d 562, 572.) The disciplinary hearing thus properly encompassed the whole course of Katz's conduct resulting in the perjury conviction.

[3] Katz also alleges that he had lack of notice that matters beyond the perjury conviction were to be considered at the disciplinary hearing. The examiner, however, in his pretrial statement informed Katz that the facts and circumstances surrounding the perjury conviction would be at issue and that the record would include the transcript of the infraction trial, as well as the transcript of the perjury trial. In addition, pursuant to rule 602 of the Transitional Rules of Procedure,[6] the hearing judge may consider evidence of facts not directly connected with the crime of which the member was convicted if such facts are material to the issues stated in the order of reference. Both the examiner's pretrial statement and rule 602 gave Katz sufficient notice that all relevant facts and circumstances would be considered.

Katz especially objects to the references in finding of fact number 7 of the hearing judge's decision concerning alleged mistreatment of Cichon and Averill. The finding merely incorporates stipulated facts from the appellate court's opinion. [4] The respondent in a disciplinary proceeding must accept facts to which he has stipulated. (*Levin* v. *State Bar*

6. All further references herein to the Rules of Procedure refer to the Transitional Rules of Procedure of the State Bar.

(1989) 47 Cal.3d 1140, 1143; *Inniss* v. *State Bar* (1978) 20 Cal.3d 552, 555.)

C. Application of Standard 3.2 to Katz's Conduct.

[5] Katz claims that standard 3.2, which deals with the appropriate sanction for an attorney convicted of a crime involving moral turpitude, does not apply to his conduct because it did not exist when he committed perjury. (Respondent's request for review at p. 3.) The California Supreme Court, however, has made it clear that the standards may be applied retroactively. (*In re Aquino* (1989) 49 Cal.3d 1122, 1133-1134, fn. 5; *Kennedy* v. *State Bar* (1989) 48 Cal.3d 610, 617, fn. 3; *In re Ford* (1988) 44 Cal.3d 810, 816, fn. 6.)

D. Katz's Remorse.

Katz testified below that he was "very sorry" about the perjury conviction, but "probably more sorry on [sic]" himself. (III R.T. 376.) He realized that he had made a "very big mistake" and had harmed his family, clients, and the public, although he did not consider them victims. (III R.T. 389; I R.T. 48.) He believed that he did not deserve to be convicted of perjury and that certain "behavior traits" had gotten him into trouble, particularly a tendency to have "tunnel vision" and to ignore the adverse consequences of holding onto a position regardless of how right he considers the position. (I R.T. 38; III R.T. 374, 435, 439-440.) When the hearing judge suggested that Katz did not mean to say the lesson Katz had learned from his conviction was "You can't fight City Hall," Katz replied that it might be the lesson. The basic fault which Katz perceived in his conduct was that he had allowed minor matters to escalate. (III R.T. 433-434.) We have no basis for disturbing the hearing judge's findings.

In *In re Aquino*, *supra*, 49 Cal.3d 1122, the Supreme Court gave similar statements of remorse little weight. After his criminal conviction, Aquino published an advertisement in a paper serving his immigrant community. The advertisement stated that Aquino was "very sorry" for the shame which he had caused his family and community and that he was "equally sorry for the embarrassment" which he had caused the legal profession. At his disciplinary hearing, Aquino expressed regret for his conduct; and his psychologist testified that although Aquino had initially viewed himself as a victim of circumstance, he had come to accept responsibility for his conduct. Nevertheless, the California Supreme Court observed that Aquino's evidence raised serious doubts about whether, when, and to what extent he had come to grips with his culpability. (*Id.* at pp. 1132-1133.)

Here, similarly, Katz failed to come to grips with his culpability in asserting that he had merely made a mistake in pressing a correct position too far. (III R.T. 374, 376.) While he claimed to respect the perjury conviction, he repeatedly testified that he was innocent of perjury. (I R.T. 38; III R.T. 439-440.) Katz acknowledged fault only for having failed to communicate clearly. (III R.T. 439-440.) At no point in the disciplinary hearing did he either concede that he had lied under oath or express regret for such lying.

Katz also failed to acknowledge the other aspects of his culpability. In seeking to avoid paying California motor vehicle taxes and fees for his automobiles he engaged in extensive chicanery. He had his client, Dorothy Cichon, pay a retainer fee to that Oregon corporation to make it appear as though it were a car deposit. Then he directed her to lie about her address on a car registration application and asked her to sign a backdated bill of sale with the same wrong address. With his approval, his wife urged a key witness, Sue Patterson, not to cooperate with law enforcement authorities. During the perjury trial, he threatened his neighbor, Wayne Averill, a potential witness against him. Katz's actions can by no stretch of the imagination be considered a legitimate position asserting the inapplicability of the California tax laws for his use of an automobile. As the hearing judge properly observed, they showed bad faith, dishonesty, concealment, and overreaching. Such deliberate misconduct would have warranted discipline even if a jury had not convicted Katz of perjury in connection therewith.

[6] The law does not require false penitence. (Cf. *Hall* v. *Comm. of Bar Examiners* (1979) 25 Cal.3d 730.) But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. (*In re Aquino*, *supra*, 49 Cal.3d at p. 1133.)

E. Testimony by Three Attorneys as Character Witnesses.

The hearing judge described much of Katz's trial strategy as a "not well veiled attack on the conviction itself, despite some assertions to the contrary." (Decision at p. 10.) The hearing judge regarded the disciplinary hearing as the wrong forum for testimony by the three attorneys who served as character witnesses that Katz's conviction was invalid; and he stated that "the facts clearly show their opinions to be grievously, completely and utterly wrong." (*Id.* at p. 13.) The expression of such opinions by the attorneys led the hearing judge to believe that Katz's sanction "must be a strong one in order to deter such attitudes on the part of attorneys which can only generate disrespect of the public for the legal profession." (*Id.* at pp. 13-14.) Further, he suggested that the attorneys' character evidence was undercut by their view of Katz's crime. (*Id.* at p. 18.)

Katz argues that the character testimony by the three attorney witnesses should not have been discounted because they expressed the opinion that Katz's perjury conviction was a mistake. Katz also objects to the hearing judge's imposing a more severe discipline because the attorneys expressed their belief in Katz's innocence. The amicus brief raises similar concerns.

[7] The confidence of fellow attorneys may be considered in mitigation. (*In re Aquino*, *supra*, 49 Cal.3d at p. 1131; *In re Demergian* (1989) 48 Cal.3d 284, 296.) Because Morris, Mesirow, and Rosenblatt have all known Katz well and are aware of the circumstances prompting the disciplinary proceeding, their testimony regarding Katz's integrity and honesty deserved consideration.

William H. Morris clerked for Katz, did research about the vehicle infraction charges, and had fairly detailed knowledge of the perjury conviction. On direct examination, he testified that Katz was and is honest, that the jury in Katz's perjury trial made a mistake, and that Katz formerly suffered from hubris, but has outgrown his problems. On cross-examination, he conceded that Katz committed perjury, but contended that the conviction was probably not appropriate. (II R.T. 302, 306, 308, 310, 313.)

Charles M. Mesirow, who represented Katz in the perjury trial, expressed strong criticisms of the perjury trial and conviction on direct examination. He also stated that Katz had better judgment now than formerly, "is probably one of the more honest people that there are," poses no danger to the public, and should be reinstated. On cross-examination, he reiterated his opinion that Katz had not committed perjury. (II R.T. 199-200, 209, 210, 213.)

Philip S. Rosenblatt shared office space with Katz, represented him in the writ proceeding against the Department of Motor Vehicles, and "lived through" the perjury prosecution and conviction with him. On direct examination, he expressed the opinions that Katz would be an honest and effective attorney, poses no danger to the public, and was wrongly convicted of perjury. On questioning from the hearing judge, Rosenblatt reiterated that Katz had not committed perjury, but had a "mode of behavior" problem which has lessened. (II R.T. 151, 152, 155, 165, 167, 190, 191.)

All the attorneys criticized the perjury conviction on direct examination in accordance with respondent's strategy to attack the conviction outlined in the opening statement by Katz's counsel, who contended that Katz's conduct raised "a very technical question, inappropriate for a perjury conviction," and who expressed an intention to show that "Katz always believed he was telling the truth." (I R.T. 15-16.) **[8a]** In a disciplinary hearing, however, the record of a felony conviction conclusively establishes the member's guilt of the felony. (Bus. & Prof. Code, § 6101 (a).) The hearing judge was therefore correct in pointing out that it was both too late and the wrong forum to challenge the conviction.

[9] Indeed, although it is not uncommon for attorneys to focus on technicalities in all areas of the law, it is nonetheless a very shortsighted approach to the ethical obligations of attorneys. As the examiner pointed out at oral argument, a leading ethicist, Professor Josephson of the Josephson Institute for the Advancement of Ethics, in his numerous seminars and speeches, has described similar technical approaches to the body of law regulating attorneys' ethics as undermining the moral fiber of the profession. Evidence of good character does not rest on technicalities.

[8b] Nevertheless, by stating that Katz's sanction must be strong precisely because three attorneys expressed their belief in Katz's innocence of perjury, the hearing judge mistakenly converted misguided testimony by the attorneys into an aggravating circumstance. Character evidence from more disinterested attorneys with knowledge of the conviction might have deserved more weight in mitigation, but we decline to assess greater discipline against the respondent on the basis of the three attorneys' testimony as to their attitude toward the conviction.

F. Testimony by Six Lay Character Witnesses.

[10a] Katz claims that the hearing judge failed to give enough credit to the character evidence presented by six lay witnesses. We disagree. Although the hearing judge was impressed by the number of witnesses, by the breadth and strength of their backgrounds, and by their vouching for Katz's character, he described their testimony as "seriously undercut because aside from the bare fact of the attestation, none of the witnesses could point to any persuasive reasons other than their acquaintanceship" for believing Katz to have good character.[7]

[10b] The hearing judge's decision does not expressly address the fact that Katz's lay witnesses lacked knowledge of the details of his conviction. The guideline which is provided by the standards is "an extraordinary demonstration of a member's good character attested to by a wide range of references" if such references are aware of the "full extent" of the member's misconduct. (Standard 1.2(e)(vi).) Applying standard 1.2(e)(vi), the California Supreme Court has discounted extensive character testimony and letters because "*most* of those who testified or wrote *may not* have been familiar with the *details*" of a member's misconduct. (*In re Aquino*, *supra*, 49 Cal.3d at p. 1131, emphasis added.) In Katz's case, one lay witness knew that the perjury conviction related to a vehicle registration problem; and another knew that a state policeman had gone to Oregon for evidence against Katz. (II R.T. 269, 277-278.) None of Katz's lay witnesses knew the details of his conviction. (I R.T. 114, 137-138; II R.T. 266, 268, 269, 275, 277-278, 290, 299-300.) Such lack of knowledge undermined the value of their character testimony.

G. Recommended Discipline.

(1) Hearing Judge's Analysis.

The hearing judge started his analysis with the provisions of standard 3.2, which, as indicated above, may properly be applied to facts predating its adoption. **[11a]** The California Supreme Court treats standard 3.2 the same way as other standards—as a guideline which it is not compelled to follow in talismanic fashion. (*In re Young* (1989) 49 Cal.3d 257, 268 [declining to apply standard 3.2's prospective suspension requirement]; cf. *Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221.) The hearing judge found that Katz's conviction on one count of perjury involved moral turpitude, both inherently and in the surrounding facts and circumstances, and that compelling mitigating circumstances did not predominate. (Decision at p. 9.) He then properly proceeded to analyze the relevant case law in order to arrive at the appropriate sanction, instead of automatically applying standard 3.2 to disbar the respondent.

The hearing judge distinguished various cases cited by Katz (*In re Chira* (1986) 42 Cal.3d 904; *In re Effenbeck* (1988) 44 Cal.3d 306; *In re Chernick* (1989) 49 Cal.3d 467) on the grounds that these cases did not involve perjury. (Decision at pp. 10-11.) The hearing judge also distinguished cases cited by the examiner in which the California Supreme Court imposed disbarment on attorneys who bribed witnesses. (*In re Allen* (1959) 52 Cal.2d 762; *In re Hanley* (1975) 13 Cal.3d 448.) The hearing judge observed that the "perversion of the judicial process involved in bribing witnesses appears different in character than that of perjury." (Decision at p. 14.)[8]

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7. The hearing judge observed that most of the lay witnesses were acquaintances who saw Katz only occasionally, that three knew him only through a Hawaii condominium project, and that "none could point to good works, involvement in the community, civic or career achievements, or any of the usual benchmarks for notable character or compelling mitigation." (Decision at p. 18.)

8. The hearing judge declined to follow three other disbarment cases cited by the examiner (*Snyder* v. *State Bar* (1976) 18 Cal.3d 286, *Garlow* v. *State Bar* (1988) 44 Cal.3d 689, and *Marquette* v. *State Bar* (1988) 44 Cal.3d 253) because each case involved a number of dishonest acts. (Decision at p. 14.) The facts of *Snyder* v. *State Bar*, *supra*, *Garlow* v. *State Bar*, *supra*, and *Marquette* v. *State Bar*, *supra*, were far more egregious than the facts of Katz's case.

In his analysis, the hearing judge relied in part on the Supreme Court's decision in *In re Kristovich* (1976) 18 Cal.3d 468, which was decided only one year after *In re Hanley, supra.* In *In re Kristovich, supra,* in light of compelling mitigation, the attorney received three months suspension for two acts of perjury and preparing a false statement.

In determining the appropriate discipline, the hearing judge also looked for guidance from three other cases involving deceit: *Levin* v. *State Bar, supra,* 47 Cal.3d 1140 (six months actual suspension for numerous dishonest acts and careless handling of client's affairs), *Olguin* v. *State Bar* (1980) 28 Cal.3d 195 (six months actual suspension for abandoning a client, lying to a State Bar investigation committee, and fabricating false documents), and *Montag* v. *State Bar* (1982) 32 Cal.3d 721 (six months actual suspension for perjury before a grand jury). (Decision at pp. 15-17.)

The severity of the recommended discipline below compared to that in cases such as *Montag* v. *State Bar, supra,* 32 Cal.3d 721 and *In re Kristovich, supra,* 18 Cal.3d 468 appears to be predicated on Katz's surrounding acts of bad faith, dishonesty, concealment, and overreaching, as well as the lack of the most compelling mitigating circumstances.

(2) Recent Cases Applying Standard 3.2.

The most recent Supreme Court decision involving standard 3.2 is *In re Leardo* (1991) 53 Cal.3d 1,[9] in which the California Supreme Court unanimously rejected our predecessor volunteer review department's recommendation of disbarment, gave credit for four and one-half years' interim suspension, and imposed no prospective suspension for a drug offense as not required under the circumstances for the protection of the public, the profession or the courts. (*Id.* at p. 18.) In so ruling, the Court noted: "We recognize that standard 3.2 of the State Bar Standards for Attorney Sanctions for Professional Misconduct (Rules Proc. of State Bar, div. V) provides that discipline for conviction of a crime involving moral turpitude shall be disbarment unless compelling mitigating circumstances clearly predominate; and in the latter event, discipline shall not be less than a two-year actual suspension prospective to any interim suspension, 'irrespective of mitigating circumstances.' Those standards, however, 'are simply guidelines for use by the State Bar. Whether the recommended discipline is appropriate is still a matter for our independent review.' (*Boehme* v. *State Bar* (1988) 47 Cal.3d 448, 454; *Greenbaum* v. *State Bar* (1987) 43 Cal.3d 543, 550.) For the reasons stated herein, neither the discipline recommended by the review department nor the minimum discipline provided in standard 3.2 is appropriate. We note that the Office of Trial Counsel itself did not feel bound by the letter of this standard, because it recommended an actual suspension of one year rather than two." (*In re Leardo, supra,* 53 Cal.3d at p. 18, fn. 8.)

The mitigation in *In re Leardo, supra,* 53 Cal.3d 1, was far more compelling than here and the circumstances were unusual. In contrast, however, in four other recent criminal referral cases resulting in disbarment, the circumstances were substantially more egregious than those involved here and nonetheless caused the Court to split on the issue of appropriate discipline. (*In re Aquino, supra,* 49 Cal.3d 1122; *In re Lamb* (1989) 49 Cal.3d 239; *In re Rivas* (1989) 49 Cal.3d 794; and *In re Scott* (1991) 52 Cal.3d 968.)

[11b] In *In re Learda, In re Aquino, In re Lamb, In re Rivas,* and *In re Scott,* the Supreme Court went beyond the determinations that a crime of moral turpitude was involved to look at the nature of the crime and the magnitude of its impact on the public and the integrity of the legal system. This factual analysis in determining the propriety of disbarment is very similar to what it has done in applying the similarly worded guideline set forth in standard 2.2 for offenses involving entrusted funds or property. Thus, for example, in *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, the Supreme Court did not impose disbarment pursuant to standard 2.2 even with aggra-

9. Although the California Supreme Court issued its opinion in *In re Leardo, supra,* 53 Cal.3d 1, after oral argument in the present proceeding, we accepted posthearing briefing from the parties regarding *In re Leardo* and deferred submission of this matter to the date of the last filed posthearing brief.

vating circumstances involving perjury, in light of other mitigating factors, including the finding as made here that apart from the charged misconduct, the respondent was found to be basically honest and unlikely to commit a similar act again. There, the Supreme Court deemed disbarment excessive in view of the prophylactic purpose of attorney discipline. (*Id.* at p. 245; cf. *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 958 ["We have no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public"].) **[12a]** Here, because the relevant facts and circumstances surrounding the perjury conviction were serious, the hearing judge's recommendation of lengthy suspension, a standard 1.4(c)(ii) hearing, and a Professional Responsibility Examination requirement are clearly appropriate. Nonetheless, in light of the hearing judge's findings in mitigation and the circumstances taken as a whole, we adopt the hearing judge's conclusion that disbarment is not necessary.

We next consider the impact on the prospective aspect of the suspension recommendation of respondent's seven plus years on interim suspension, which resulted in part because he appealed his conviction and in part because of other delays.

H. Credit for Interim Suspension.

[13a] The hearing judge refused to give any credit for Katz's interim suspension because he interpreted *In re Young*, *supra*, 49 Cal.3d at p. 268 to make such credit available only on a finding of compelling mitigating factors. (Decision at pp. 21-22.) He noted that Young did not seek to promote his own self-interest or to obtain financial gain; suffered from physical, mental, and emotional exhaustion; and committed acts which were out of character and highly unlikely to recur. By contrast, Katz carefully planned his perjury and deliberately arranged a scheme for his own financial gain. (*Id.* at p. 22.)

[13b] The hearing judge's interpretation of *In re Young*, *supra*, appears too restrictive. In *In re Fudge*, *supra*, 49 Cal.3d at 645, the Supreme Court gave full credit for interim suspension without expressly finding compelling mitigation, but just upon "considering all the facts and circumstances" including unexplained delay in the State Bar proceedings. Delays also permit the respondent to show in mitigation a sustained period of good conduct following the misconduct at issue. (See, e.g., *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d at pp. 316-317.) Thus, in *In re Young*, *supra*, the California Supreme Court stressed that it balanced all relevant factors in arriving at a proper discipline. (*In re Young*, *supra*, 49 Cal.3d at p. 266.) In Young's case, these factors included an interim suspension of three years, as well as the facts and circumstances surrounding Young's crime and other significant mitigating factors. (*Id.* at p. 268.) As the Supreme Court recently stated in *In re Leardo*, *supra*, 53 Cal.3d at p. 18, "whether a suspension be called interim or actual, of course, the effect on the attorney is the same—he is denied the right to practice his profession for the duration of the suspension." Katz's interim suspension of nearly seven years should weigh heavily in balancing all the relevant factors of his case.

[13c] We are particularly concerned about penalizing Katz for pursuing his criminal appeal. The rationale underlying *In re Young* is that disciplinary recommendations should not "essentially penalize" a member for appealing a criminal conviction or contesting the State Bar Court's findings and recommendations. (*In re Young*, *supra*, 49 Cal.3d at p. 267.) Previously, in *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, we relied on *In re Young*, *supra*, in holding that "Respondent should not be penalized for his entirely proper exercise of his right to appeal by forfeiting his right to practice law for longer than would have been the case had he allowed his conviction to become final earlier." (*In the Matter of Stamper*, *supra*, 1 Cal. State Bar Ct. Rptr. at pp. 109-110.) Where lengthy interim suspension has occurred, the appropriate consideration in determining whether prospective suspension is necessary is whether the facts and circumstances of a particular matter require a further period of actual suspension for the protection of the public, the profession, or the courts. (*In re Leardo*, *supra*, 53 Cal.3d at p. 18.)

[12b] While we consider credit for time spent on interim suspension appropriate, we agree with the hearing judge that respondent has yet to demonstrate sufficient rehabilitation and therefore some prospective suspension is appropriate until respondent proves

his entitlement to resume practice in accordance with standard 1.4(c)(ii). We also note that more than a year has expired since the hearing judge recommended a prospective period of eighteen months. Although respondent's counsel maintains that respondent is entitled to immediate reinstatement, he also recognizes the appropriateness of a 1.4(c)(ii) hearing before respondent is permitted to resume the practice of law. The examiner prefers a reinstatement proceeding because of untested concerns regarding the scope of discovery in the newly established 1.4(c)(ii) proceeding and because of the higher burden of proof in a reinstatement proceeding. However, the examiner was unable to demonstrate that the hearing judge's recommendation of a 1.4(c)(ii) proceeding could not adequately protect the public. (Cf. *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d 924, 958.)

[12c] We therefore adopt the hearing judge's findings and decision that the misconduct was worthy of lengthy actual suspension and a standard 1.4(c)(ii) hearing, at which respondent by a preponderance of the evidence must affirmatively demonstrate rehabilitation, present fitness to practice, and present learning and ability in the general law. (Rule 817.)[10] We also agree with the need for his requirement of passage of the California Professional Responsibility Examination. With credit for time spent on interim suspension, and in recognition of the substantial passage of time since the hearing judge entered his order, we recommend actual prospective suspension from the effective date of the Supreme Court order for six months and until satisfaction of the standard 1.4(c)(ii) requirement. In making this recommendation, we note that an application for a standard 1.4(c)(ii) hearing may be filed no earlier than 150 days prior to the earliest date that the member's actual suspension can be terminated. (Rule 812.) Prospective suspension for six months will give the respondent a month to prepare the earliest application which may be entertained under the rules.[11] **[14 - see fn. 11]** We further recommend that respondent be allowed one year from the effective date of our decision to pass the California Professional Responsibility Examination. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 892.)[12] **[15 - see fn. 12]**

IV. FORMAL RECOMMENDATION

In light of the above, it is therefore recommended to the Supreme Court that it adopt the recommendation of the hearing judge below with the following modifications: In paragraph 1, substitute "six months" for "eighteen months." In the final paragraph, add the word "California" prior to "Professional Responsibility Examination" and substitute "within one year of the effective date of this order" for "the period of his actual suspension."[13] **[16 - see fn. 13]**

We concur:

NORIAN, J.
ROBBINS, J.*

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10. Rules 810 through 826 currently govern proceedings pursuant to standard 1.4(c)(ii). Such proceedings are expedited. (Rule 810.) The member and the Office of Trial Counsel may stipulate that the member meets the conditions for the termination of the member's actual suspension. (Rule 818.) However, if the matter is contested, discovery is permitted by an order of the assigned hearing judge upon a showing of good cause. (Rule 819.)

11. **[14]** Since the examiner has raised concerns regarding the ability of her office to determine its position with respect to respondent's resumption of practice absent information as detailed and complete as in an application for reinstatement, we recommend that respondent follow the same format in this case in presenting his initial application as someone applying for reinstatement would do. Otherwise, a discovery request from the examiner would be the appropriate means for seeking such information and would be more time-consuming.

12. **[15]** While passage of the Professional Responsibility Examination would be relevant evidence in a hearing pursuant to standard 1.4(c)(ii), it is not a condition precedent. We recognize that time constraints may not permit respondent to take and pass the Professional Responsibility Examination before the standard 1.4(c)(ii) hearing and therefore have recommended the standard period of one year for passage of such examination.

13. **[16]** Like the hearing judge below, we do not see the necessity of an order to comply with the provisions of rule 955, California Rules of Court since respondent did so at the time of his interim suspension and has not practiced since that time.

* By appointment of the Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT D

A Member of the State Bar

[No. 85-O-15225]

Filed May 29, 1991

SUMMARY

Respondent negotiated a settlement for his clients, who were defendants in a business litigation matter. After the settlement papers were signed, the plaintiff, acting on his own behalf, requested that the judgment and dismissals not be filed with the court until agreement was reached on the timing of the settlement payment. Respondent advised the plaintiff that the papers had already been mailed to the court. The plaintiff then brought in his counsel, who moved to set aside the dismissals. After the motion was granted, respondent filed a notice of appeal. Three days later, he also filed a petition for alternative writ of mandate. The alternative writ was issued, and respondent filed a proof of service indicating that the writ had been served on the plaintiff. Respondent did not serve the writ on the plaintiff's counsel.

After the appeal was dismissed as frivolous, the plaintiff complained to the State Bar. Respondent was charged in the notice to show cause with misrepresenting the nature of the settlement to the plaintiff, and with "pursuing appeals in bad faith." The hearing panel found that the misrepresentation charge had not been proven by clear and convincing evidence, but found respondent culpable of acting in bad faith and with intent to deceive in connection with the service of the writ application. (Theodore L. Johanson, Kenneth D. Gack, Edward Morgan, Hearing Referees.)

Respondent requested review, contending that he had not received adequate notice of the charges of which he had been found culpable. The review department agreed, concluding that the charge of "pursuing appeals in bad faith" did not constitute notice to respondent that he was charged with misconduct in connection with the service of papers in the writ proceeding. The review department also held that the record did not clearly and convincingly establish that the appeal in the litigation matter was pursued in bad faith, and that the misrepresentation charge had been properly dismissed based on the hearing panel's credibility determinations. Accordingly, the review department dismissed the proceeding.

COUNSEL FOR PARTIES

For Office of Trials: Mara J. Mamet

For Respondent: Tom Low

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **204.90 Culpability—General Substantive Issues**
232.00 State Bar Act—Section 6128
257.00 Rule 2-100 [former 7-103]
490.00 Miscellaneous Misconduct
Statute which requires that if a party is represented by counsel, papers must be served on counsel rather than on the party, does not apply to the service of a summons or a writ. Therefore, respondent did not have to serve alternative writ and petition for writ on opposing party's counsel, but could serve opposing party personally.

[2] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
192 Due Process/Procedural Rights
A respondent can only be found culpable of conduct which is charged in the notice to show cause. If the charges do not appear in the notice and the notice is not properly amended, the charges will not be sustained. However, culpability will be sustained in the event of a slight variation in the evidence from the notice, without an amendment, unless the respondent's defense can shown to have been compromised.

[3] **106.20 Procedure—Pleadings—Notice of Charges**
162.11 Proof—State Bar's Burden—Clear and Convincing
Specific charging in the notice to show cause is important; it prevents a respondent from having to guess at the charges. In addition, since the standard for a culpability finding in attorney discipline matters is clear and convincing evidence, the State Bar has the burden to charge the alleged misconduct correctly so that this standard can be met.

[4] **106.20 Procedure—Pleadings—Notice of Charges**
The allegations in the notice to show cause are a determining factor of the scope of an attorney's defense. A complete charge results normally in a full response.

[5] **106.20 Procedure—Pleadings—Notice of Charges**
165 Adequacy of Hearing Decision
A complete charge in the notice to show cause does not necessitate a lengthy pleading but does necessitate particularity to provide sufficient notice. As a result of specific charging the State Bar Court hearing judge is then provided with a proper framework within which to decide the issues raised.

[6] **106.20 Procedure—Pleadings—Notice of Charges**
232.00 State Bar Act—Section 6128
Where an appeal and a petition for extraordinary writ had each been pursued by respondent, a notice to show cause charging respondent with "pursu[ing] appeals in bad faith" did not convey sufficient information to advise respondent that the manner of service of the writ of mandate was at issue in the disciplinary case. Respondent therefore was not held culpable for alleged misconduct in connection with the writ proceeding since the notice to show cause did not provide reasonable notice of such charges.

[7 a, b] **162.11 Proof—State Bar's Burden—Clear and Convincing**
191 Effect/Relationship of Other Proceedings
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
Where a municipal court order finding an appeal frivolous and awarding sanctions did not explain the basis for such finding or the statutory basis for awarding sanctions, and no additional evidence was introduced to establish that the appeal was substantively without merit, the record did not clearly and convincingly establish for disciplinary purposes that the appeal was frivolous or pursued in bad faith.

[8] **191 Effect/Relationship of Other Proceedings**
162.90 Quantum of Proof—Miscellaneous
204.90 Culpability—General Substantive Issues
Civil verdicts and judgments have no disciplinary significance apart from the underlying facts. While civil findings bear a strong presumption of validity if supported by substantial evidence, the disciplinary court must assess them independently under the more stringent standard of proof applicable to disciplinary proceedings.

[9] **166 Independent Review of Record**
221.00 State Bar Act—Section 6106
232.00 State Bar Act—Section 6128
Where neither party sought review of the dismissal of misrepresentation charges, and the testimony at the hearing was in conflict on the matter, then in light of the weight accorded to credibility findings of the trier of fact and in view of the record as a whole, the review department adopted the hearing department's findings regarding the misrepresentation charge.

[10 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
204.90 Culpability—General Substantive Issues
Respondent's decision not to send a copy of a writ petition to counsel who was representing the opposing party in a related appeal appeared to have been a breach of normally expected professional courtesy and was not a model of good practice; nonetheless, because allegations of notice to show cause failed to give respondent reasonable notice of charge of which he was found culpable, review department dismissed proceeding.

ADDITIONAL ANALYSIS

Culpability
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
221.50 Section 6106
232.05 Section 6128

OPINION

NORIAN, J.:

Respondent D,[1] a member of the State Bar since June 1978 with no prior record of discipline, has requested review of a decision of a three-member hearing panel. The hearing panel unanimously found that respondent deceived his opposing party in a civil matter by obtaining a writ of mandate without notice to the opposing party in violation of Business and Professions Code sections 6068 (a), 6103 and 6128 (a) (all further section references are to the Business and Professions Code unless otherwise stated). The panel recommended that respondent be publicly reproved.

Respondent argues that he did not have adequate notice of the charges for which he was found culpable and maintains that the record does not establish misconduct by clear and convincing evidence. The State Bar asserts that there was sufficient notice to respondent and that the record fully supports the hearing panel's findings and conclusions.

After our independent review of the record we conclude that the charging document, the notice to show cause, did not give respondent adequate notice of the charge of which he was found culpable. We therefore dismiss the proceeding.

FACTS

We first will summarize the hearing panel's findings of fact. Except as discussed hereafter, we conclude that the panel's findings of fact are supported by the record and adopt them as our own.

Respondent was counsel for a corporation (company), an enterprise operated by David Y. and Paige G. Respondent also at times represented David Y. and Paige G. individually in this matter. The company sold coin-operated air inflation equipment used at gas stations. Mike W. purchased five of the devices. Thereafter Mike W. became dissatisfied with the investment. Mike W., while at times acting on behalf of himself, had his attorney, Robin P., send a letter and notice of rescission to the company on December 7, 1983. (Exhs. 1-A, 5.)

Robin P. helped Mike W. prepare a complaint which Mike W. filed himself on November 1, 1984, in Municipal Court, Marin County, against the company, the company's two principals, Paige G. and David Y., and the equipment manufacturer. The verified complaint showed that both Mike W. and Robin P. were aware that the company was an insolvent corporation. (Exh. 1-A, p. 4.) On January 3, 1985, respondent submitted to Mike W. an offer of compromise pursuant to Code of Civil Procedure section 998. The offer provided for a judgment in the sum of $500 to be taken against the company and the dismissal of the complaint against the individual defendants. (Exh. 4.) After consulting Robin P., and after some negotiating, Mike W. signed the acceptance of an offer of $1,100 on February 5, 1985, before a notary public (exhs. B, C) and took it to respondent's office where he also signed requests for dismissal of the complaint with respect to Paige G. and David Y.

Later on the same day, February 5, 1985, Mike W. wrote a letter to respondent stating the "offer" and requests for dismissal should not be filed until "we reach agreement as to when I will receive the settlement." (Exh. 8.) By letter dated February 8, 1985, respondent acknowledged receipt of Mike W.'s February 5th letter and advised Mike W. that he had already filed by mail the offer and the dismissals with the court. Further, respondent stated that the judgment Mike W. held was against the company alone, that the individual defendants were relieved from any financial responsibility and that Mike W. might have a good case against the manufacturer. (Exh. 9.) On February 21, 1985, Robin P. filed with the municipal court a motion to set aside the dismissals on the grounds of fraud and mistake, together with an association of counsel form. (Exhs. 1-B, D.) Respondent opposed the motion, and served his responding papers on Robin P. (Exhs. E, B.)

1. In light of our disposition by dismissal of this matter we deem it appropriate not to identify respondent by name.

Following a contested hearing at which respondent, Mike W. and Robin P. appeared, the municipal court judge by minute order filed March 20, 1985, granted the motion to set aside the dismissals and imposed sanctions against respondent for $700 pursuant to Code of Civil Procedure section 128.5. (Exh. 1-C.)[2]

Respondent filed with the municipal court a notice of appeal on May 21, 1985, with respect to the municipal court's March 20th order and served Robin P. with a copy of the notice. (Exh. 1-D.) Mike W.'s attorney filed in the municipal court a motion to dismiss the appeal and asked for sanctions against respondent. (Exh. 1-E.) Respondent did not appear at the hearing on June 15, 1985. (*Id.*) The municipal court granted the motion to dismiss by order filed on June 21, 1985, and imposed additional sanctions of $500 on the ground that the appeal was frivolous. (*Id.*)[3]

On May 24, 1985, respondent filed a petition for alternative writ of mandate in superior court on behalf of Paige G. asking the superior court to issue the writ commanding the municipal court below to enter an order denying Mike W.'s motion to set aside the dismissals. (Exh. E.)

The superior court on May 24, 1985, issued the alternative writ with a return date of June 28, 1985. Respondent filed with the superior court on June 28, 1985, the proof of service of the writ which indicates service by a process server on May 28, 1985. (Exh. F.) This proof of service contains the home address of Mike W. but does not identify him by name. It states service was made upon "defendant."[4] The process server was a client of respondent experienced in serving papers for respondent and other attorneys. The hearing panel found that Mike W. was out of state on the date the writ was allegedly served on him in California. No evidence was introduced that respondent knew that Mike W. had not in fact been served. Respondent did not attempt to have the writ served on Robin P.[5] **[1 - see fn. 5]**

On June 28, 1985, the superior court partially granted respondent's unopposed petition for a writ of mandate (exh. G) and set aside the $700 sanction of the municipal court's minute order of March 20, 1985, but left the remainder of the municipal court order intact. The writ did not address the $500 in sanctions ordered on June 18, 1985, as part of the subsequent dismissal of respondent's appeal. The superior court directed respondent to prepare a formal order granting the writ. Respondent did not prepare the order.

Mike W. and his attorney took no further formal action to recover the $500 sanction ordered by the

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2. The hearing panel granted respondent's motion to strike from the record all evidence regarding monetary sanctions. (1 R.T. pp. 117-118 [see *post*, fn. 6].) In addition the panel denied the examiner's motion to amend the notice to show cause to allege the failure to pay sanctions as grounds for discipline. (1 R.T. p. 128.) We agree with the hearing panel's denial of the motion to amend on the grounds that it was untimely. Our disposition of the case renders the hearing panel's decision to strike the testimony regarding sanctions moot. We adopt the panel's finding of fact on the sanctions only for clarity.

3. In its decision, the hearing panel raised the issue of whether the municipal court had jurisdiction to entertain Mike W.'s motion to dismiss the appeal. Since the motion to dismiss the appeal and its outcome are not central to the charges in the notice to show cause, we do not adopt the panel's analysis of the issue nor do we intend by our disposition of this case to rule on the jurisdictional question.

4. The writ identifies the Municipal Court, Marin County as the respondent and identifies Mike W. as the real-party-in-interest.

5. [1] While an attorney may be a person authorized to receive service as an agent on behalf of a party (Code Civ. Proc., § 416.90; *Warner Bros. Records, Inc. v. Golden West Music Sales* (1974) 36 Cal.App.3d 1012, 1018), respondent was not required to serve Mike W.'s attorney. Code of Civil Procedure section 1015 requires that service of papers on parties represented by counsel must be upon the attorney, not the party. However, contrary to the State Bar's argument, section 1015 does *not* apply to the service of a summons. (Code Civ. Proc., § 1016.) Even if the procedures in Title 14, part 2, chapter 5 (Code Civ. Proc., §§ 1010-1020) did apply in this instance, service of a writ is specifically exempted from the general rule mandating service on a party's attorney. (Code Civ. Proc., § 1015.) Therefore, respondent did not have to serve the alternative writ and petition on Robin P., but could do what he maintains he had done, served the petition and alternative writ on Mike W. personally.

municipal court and, thereafter, Mike W. filed a complaint with the State Bar. (1 R.T. pp. 88-89.)[6] Both Mike W. and his attorney claimed at the State Bar hearing to have been unaware of the writ proceeding until it was disclosed to them by a State Bar examiner in April 1988. (1 R.T. pp. 33, 89-90.)

On October 4, 1988, a notice to show cause was filed against respondent charging that he had obtained the request for dismissal by misrepresenting to Mike W. that the individual defendants would pay Mike W. $1,100. The notice further stated that after filing the offer of compromise (Code Civ. Proc., § 998, subd. (b)(1)) and signed request for dismissal, respondent advised Mike W. that the effect of the settlement totally relieved the individual defendants from any financial responsibility to Mike W. In addition, the notice charged respondent with "pursuing appeals in bad faith." The notice alleged that respondent's conduct violated sections 6068 (a), 6103, 6106 and 6128 (a).[7]

The hearing panel found that the State Bar failed to prove by clear and convincing evidence that respondent obtained Mike W.'s settlement agreement by misrepresentation or deceit.[8] The hearing panel did find the following, that respondent: failed to serve counsel of record for Mike W. with the application for the alternative writ of mandate; knew or should have known that Mike W. was not properly served with the application; did not appear at the hearing on the motion to dismiss the appeal to avoid disclosing the writ proceeding to the municipal court, Mike W. or Robin P.; and acted in bad faith and with intent to deceive Mike W., his counsel and the court. The hearing panel concluded that respondent violated sections 6128 (a), 6103 and 6068 (a).

ISSUES ON REVIEW

1. Adequate Notice of the Charges

Respondent argues he did not receive adequate notice of the charges because the notice to show cause did not indicate that his alleged knowledge of the failure of the process server to complete the service of process of the writ would be at issue in the case and respondent was denied a fair hearing as a result. Thus, respondent argues, the panel's finding of culpability on this unnoticed matter must be set aside as a violation of due process. The State Bar contends that respondent was provided with adequate notice of the charges in that the allegation in the notice to show cause that respondent pursued appeals in bad faith encompassed respondent's conduct concerning the petition for an alternative writ of mandate.

[2] Respondent can only be found culpable for conduct which is charged in the notice to show cause. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35; *Arm v. State Bar* (1990) 50 Cal.3d 763, 775; *Gendron v. State Bar* (1983) 35 Cal.3d 409, 420.) If the charges do not appear in the notice and the notice is not properly amended, the charges will not be sustained. (*Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1151-1152; *Arm v. State Bar, supra*, 50 Cal.3d at p. 775; *Rose v. State Bar* (1989) 49 Cal.3d 646, 654.) However, culpability will be sustained in the event of a slight variation in the evidence from the notice without an amendment unless the respondent's defense can be shown to have been compromised. (*Grim v. State Bar* (1991) 53 Cal.3d 21, 34; *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928-929.)

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6. The two volumes of reporter's transcripts in this matter are not consecutively numbered. We have referred to the hearing on May 25, 1989, as 1 R.T.

7. Section 6068 describes the duties of an attorney which include, under subdivision (a), the duty to support the Constitution and state and federal laws. Section 6103 provides, in relevant part, that any violation of an attorney's duties constitutes cause for disbarment or suspension. Section 6106, in relevant part, provides that the commission of any act involving moral turpitude, dishonesty or corruption is a cause for disbarment or suspension. Section 6128 (a), in relevant part, makes it a misdemeanor to intentionally deceive a court or a party.

8. The hearing panel granted respondent's motion to dismiss this portion of the charges at the close of the State Bar's case. (See rule 411, Trans. Rules Proc. of State Bar.)

The notice to show cause specified that respondent "pursued appeals in bad faith." The notice also identified section 6128 (a) as the code section respondent allegedly violated. The notice also advised respondent that the underlying Mike W. lawsuit was at issue. Respondent had been sanctioned for filing a frivolous appeal from the order setting aside the dismissals and the words "pursued appeals in bad faith" fairly put him on notice of a disciplinary charge resulting from this conduct. There was no specific reference to the writ proceedings in the notice nor was the notice amended to include mention of it.

Respondent objected to the introduction of evidence concerning service of the writ on Mike W. from the outset of the hearing, on the grounds that it was outside the allegations in the notice to show cause and that he would need additional time to prepare to meet the additional allegations. Only after his objection was overruled and upon the completion of the State Bar's case-in-chief, did respondent present evidence on the issue to the hearing panel.

A writ proceeding is an original proceeding and is not an appeal. (Cal. Const., art. VI, § 10; Cal. Rules of Court, rule 56.) The appeal and the writ matters were filed in different courts on different days and requested different forms of relief. Moreover, the disciplinary issue regarding the appeal was whether it was substantively frivolous. The disciplinary issue regarding the writ was whether respondent knew that the writ had not been served and sought to mislead the court and take improper advantage of opposing counsel. A similar issue of notice was raised in *Arm v. State Bar, supra*, 50 Cal.3d 763. There, the attorney had been found culpable by the former, volunteer review department of misleading both the judge and opposing counsel concerning his imminent disciplinary suspension. While acknowledging that deception of counsel is an independent ground for discipline, the Court struck the culpability finding for that conduct because the attorney had only been charged in the notice to show cause with misleading the trial court. (*Id.* at p. 775.)

[3] This department's opinion in *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163 discussed the importance of specific charging in the notice to show cause. We pointed out that specific charging prevents respondent from having to guess at the charges. In addition, since the standard for a culpability finding in attorney discipline matters is clear and convincing evidence, the State Bar has the burden to correctly charge the alleged misconduct so that this standard can be met. **[4]** It is also apparent that the allegations in the notice to show cause are a determining factor of the scope of respondent's defense. A complete charge results normally in a full response. **[5]** However, this requirement of a complete charge does not necessitate a lengthy detailed pleading but does necessitate particularity to provide sufficient notice. As a result of specific charging the State Bar Court hearing judge is then provided with a proper framework within which to decide the issues raised.

[6] After considering the facts and legal arguments on this issue, we disagree with the hearing panel that the notice language charging respondent with "pursu[ing] appeals in bad faith" conveyed sufficient information to advise respondent that the manner of service of the writ of mandate was at issue, particularly in this matter where an "appeal" and a petition for extraordinary writ were each pursued. As a consequence, respondent is not held culpable for alleged misconduct in connection with the writ proceeding since the notice to show cause did not provide respondent with reasonable notice of the charges. (See Bus. & Prof. Code, § 6085.)

2. Pursuit of Appeals in Bad Faith

[7a] As noted above, the notice to show cause alleges that respondent "pursued appeals in bad faith." The record does not clearly and convincingly establish that the appeal was frivolous or pursued in bad faith. The municipal court order finding that the appeal was frivolous and filed for purpose of delay and awarding sanctions (exh. 1-E) does not explain the basis for the finding or even the statutory basis for awarding sanctions. **[8]** Civil verdicts and judgments "... have no disciplinary significance apart from the underlying facts. While civil findings bear a strong presumption of validity if supported by substantial evidence, we must nonetheless assess them independently under the more stringent standard of proof applicable to disciplinary proceedings." (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947.) **[7b]** No evidence was introduced to establish that the appeal

was substantively without merit. Although respondent did abandon the appeal, he did so because he thought the appeal was superseded by the writ. (1 R.T. p. 142.) Regardless of the correctness of respondent's actions, there is no clear and convincing evidence that they were taken in bad faith.

3. Misrepresentations Concerning the Stipulated Settlement Offer

[9] Neither party sought review of the dismissal of the charges alleging that respondent obtained Mike W.'s settlement agreement by misrepresentation or deceit. The hearing panel heard conflicting testimony from Mike W. and respondent as to representations made as to payment of the Code of Civil Procedure section 998 offer. The hearing panel found respondent's testimony to be more credible than Mike W.'s. (Decision, p. 6.) In light of the weight accorded to the credibility findings of the trier of fact (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055), and in view of the evidence in the record as a whole, we conclude the findings on these charges are supported by the record and we adopt them as our own.

CONCLUSION

[10a] We do not condone the manner in which respondent performed his legal duties. As an example, respondent's decision not to send a copy of the writ petition to opposing counsel on the appeal appears to have been a breach of normally expected professional courtesy. His failure to bring closure to his appeal did not illustrate professionalism. His actions were not what would be offered as a model of good practice.

[10b] Nonetheless, for the reasons stated above, upon our independent review of the record, we find that the allegations set forth in the notice to show cause failed to give respondent reasonable notice of the charge of which he was found culpable. We therefore dismiss this proceeding.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD N. POTACK

A Member of the State Bar

[No. 89-P-11031]

Filed May 31, 1991

SUMMARY

In a probation revocation proceeding, respondent was found to have failed to timely file an amended probation report as requested by the State Bar probation department, and to have failed to complete restitution in a timely manner. (Hon. Ellen R. Peck, Hearing Judge.)

By the date of the hearing in the probation revocation matter, respondent had belatedly filed the amended report and completed restitution. The late probation report charge had already been adjudicated in a prior probation revocation matter then pending before the Supreme Court, and the review department therefore declined to impose culpability for that misconduct in this proceeding. The notice to show cause did not charge respondent with failing to meet his duty to respond to all inquiries from the State Bar, an independent duty from his obligation to file quarterly reports, and therefore respondent could not be found culpable of misconduct on that basis. As a result, the only charge properly before the review department was the restitution allegation.

The review department concluded that in order to impose discipline for a probation violation, it must be shown that the violation was wilful. After considering respondent's ability to make restitution and the sufficiency and good faith of his efforts to pay, the review department concluded that there was a wilful failure to pay restitution in a timely manner in this case.

The former review department, in a prior probation revocation case against respondent that was still pending before the Supreme Court, had recommended revocation of probation and lifting of the stay of the three years of actual suspension originally imposed on respondent. The record did not make clear whether, in making this recommendation, the former review department had relied on respondent's failure to make timely restitution, which had been considered as an aggravating factor in the prior matter, and which was the hasis for culpability in the instant proceeding. For this reason, alternative discipline was recommended. If the Supreme Court were to act on both probation violation cases together and take the belated restitution into account in the first matter, the review department recommended that if the discipline in the earlier matter involved two years or more of actual suspension, no additional suspension should be imposed in the present matter. If the Supreme Court were to impose less than the recommended two-year actual suspension in the first matter, the review department recommended that additional discipline of up to one year of actual suspension be imposed in this matter, such that the aggregate actual suspension in both matters would not exceed two years. (Pearlman, P.J., filed a concurring opinion.)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

COUNSEL FOR PARTIES

For Office of Trials: Russell G. Weiner

For Respondent: No appearance

HEADNOTES

[1] **1714 Probation Cases—Degree of Discipline**
Actual suspension imposed as sanction for violation of probation may include entire period of previously stayed suspension, or may give credit for actual suspension already served as condition of probation.

[2] **106.20 Procedure—Pleadings—Notice of Charges**
106.30 Procedure—Pleadings—Duplicative Charges
179 Discipline Conditions—Miscellaneous
1711 Probation Cases—Special Procedural Issues
Attorney could not be found culpable of violating probation by failing to respond to an inquiry from the State Bar Court, as required by conditions of his probation, where the notice to show cause in the probation revocation proceeding referred only to the requirement to file quarterly reports, an independent probation condition, and such charge would be factually duplicative of previously-adjudicated charge of failing to file quarterly report.

[3 a, b] **130 Procedure—Procedure on Review**
166 Independent Review of Record
The review department may appropriately exercise its independent review authority to reach an issue which is otherwise moot as a result of the hearing judge's disposition of the matter below, where the issue comes before the State Bar Court on a regular basis or is an issue of public importance likely to recur.

[4] **135 Procedure—Rules of Procedure**
162.90 Quantum of Proof—Miscellaneous
192 Due Process/Procedural Rights
1711 Probation Cases—Special Procedural Issues
Probation revocation proceedings are disciplinary proceedings, and no additional discipline can be imposed for a breach of probation absent proof of such violation in conformity with fundamental due process (notice and an opportunity to be heard), as set forth in rules 612-613, Trans. Rules Proc. of State Bar.

[5] **802.21 Standards—Definitions—Prior Record**
1719 Probation Cases—Miscellaneous
A past revocation of probation is viewed as a prior disciplinary proceeding.

[6 a, b] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
1712 Probation Cases—Wilfulness
Notwithstanding omission of term "wilful" from statute and rule governing imposition of discipline for probation violations, wilfulness is a necessary element to establish culpability in a probation revocation case alleging failure to pay restitution.

[7] **163 Proof of Wilfulness**
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act
1712 Probation Cases—Wilfulness
Although attorney disciplinary proceedings are sui generis and not criminal in nature, rules of criminal law may provide guidance in appropriate circumstances; case law and statutes in criminal law indicate that lack of wilfulness constitutes a reason not to revoke probation.

[8] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
1712 Probation Cases—Wilfulness
In disciplinary cases arising from violations of rule 955, Cal. Rules of Court, a showing of wilfulness requires only a "general purpose or willingness" to commit the act or suffer the omission, and need not involve bad faith. The same definition of wilfulness applies to the mental state required to justify discipline for violations of probation conditions.

[9 a-c] **162.90 Quantum of Proof—Miscellaneous**
171 Discipline—Restitution
175 Discipline—Rule 955
1713 Probation Cases—Standard of Proof
For the purpose of determining culpability for violation of restitution requirement imposed as condition of disciplinary probation, it is inappropriate to distinguish between "substantial" and "insubstantial" or "technical" violations. Restitution conditions are as significant as the notification requirements in rule 955, Cal. Rules of Court, as to which the Supreme Court has declined to draw such a distinction. The importance of the goals of restitution makes distinctions between "substantial" and "insubstantial" or "technical" failures to make restitution inappropriate.

[10] **171 Discipline—Restitution**
Requiring restitution forces errant attorneys to confront the consequences of their misconduct in a concrete way and thereby serves the state's interest in rehabilitating such attorneys and protecting the public.

[11 a, b] **171 Discipline—Restitution**
192 Due Process/Procedural Rights
194 Statutes Outside State Bar Act
1712 Probation Cases—Wilfulness
2590 Reinstatement—Miscellaneous
As with the treatment of failure to pay restitution in reinstatement and criminal probation cases, in a disciplinary proceeding for failure to make timely restitution as a condition of attorney disciplinary probation, due process requires an examination of the probationer's ability to make restitution and the sufficiency and good faith of the probationer's efforts to acquire the resources to pay.

[12 a, b] **163 Proof of Wilfulness**
171 Discipline—Restitution
1712 Probation Cases—Wilfulness
1751 Probation Cases—Probation Revoked
A wilful breach of respondent's restitution duty was established where respondent: (1) had the financial ability to make some restitution payments during the period when he had not done so; (2)

repeatedly chose to pursue professional goals which foreseeably rendered him financially unable to make timely restitution; (3) failed to protect his funds from attachment by creditors; and (4) failed to seek an extension of time to make his restitution payments. His conduct showed a conscious disregard of his restitution obligations and a failure to make sufficient good faith efforts to acquire the resources to pay.

[13] **725.59 Mitigation—Disability/Illness—Declined to Find**
795 Mitigation—Other—Declined to Find
Evidence concerning respondent's education, experience and drug use which occurred well prior to his probation violations was not causally related to the misconduct, nor did it demonstrate why a lesser disciplinary sanction would adequately protect the public, the courts and the legal profession. Therefore, it did not constitute mitigating evidence.

[14] **745.31 Mitigation—Remorse/Restitution—Found but Discounted**
Restitution payments made under the direct pressure of probation revocation proceedings were entitled to little weight in mitigation.

[15] **765.39 Mitigation—Pro Bono Work—Found but Discounted**
Respondent's public service work and representation of juveniles under court appointment deserved credit and recognition, but did not relieve respondent of his restitution obligations; it was incumbent on respondent to manage his limited finances to meet those obligations.

[16] **740.32 Mitigation—Good Character—Found but Discounted**
The mitigating value of character testimony is undermined when the witness is unaware of the full extent of a respondent's misconduct.

[17] **740.31 Mitigation—Good Character—Found but Discounted**
The requirement that mitigating character testimony come from a wide range of references exhibiting a familiarity with the details of respondent's misconduct was not met by testimony by respondent himself and a letter from one character witness reflecting no knowledge of respondent's misconduct.

[18] **720.50 Mitigation—Lack of Harm—Declined to Find**
Finding of lack of harm to clients as mitigating factor was unsupported in the record where respondent failed to submit any evidence at the hearing of lack of harm resulting from his misconduct, and where respondent's clients (and the Client Security Fund, which had reimbursed them) had to wait years for restitution.

[19] **511 Aggravation—Prior Record—Found**
802.21 Standards—Definitions—Prior Record
1714 Probation Cases—Degree of Discipline
In determining appropriate discipline for probation violations, respondent's original disciplinary matter, in which probation conditions were imposed, constituted a prior disciplinary record and was required to be treated as an aggravating circumstance.

[20] **802.69 Standards—Appropriate Sanction—Generally**
806.59 Standards—Disbarment After Two Priors
The number or fact of prior disciplinary proceedings cannot, without more analysis, foretell result of subsequent discipline proceeding.

[21] **805.10 Standards—Effect of Prior Discipline**
1714 Probation Cases—Degree of Discipline
Where respondent's prior discipline arose from serious misconduct, and his subsequent breach of probation conditions arose after that prior discipline, it was appropriate to impose more actual suspension in probation revocation matter than in earlier disciplinary proceeding.

[22] **135 Procedure—Rules of Procedure**
511 Aggravation—Prior Record—Found
801.41 Standards—Deviation From—Justified
802.21 Standards—Definitions—Prior Record
806.59 Standards—Disbarment After Two Priors
Although non-final prior discipline recommendation for probation violation, still pending before Supreme Court, is record of prior discipline under rule 571, Trans. Rules Proc. of State Bar, review department does not apply rigidly, or without regard to facts of prior matters, disciplinary standard indicating disbarment as appropriate sanction for third disciplinary proceeding.

[23] **513.90 Aggravation—Prior Record—Found but Discounted**
806.59 Standards—Disbarment After Two Priors
1714 Probation Cases—Degree of Discipline
Where it was unclear whether or not the former review department had considered respondent's delayed restitution in its assessment of the appropriate discipline in a prior probation revocation matter still pending before the Supreme Court, no significant aggravating weight was accorded that prior probation matter as prior discipline.

[24] **802.30 Standards—Purposes of Sanctions**
1714 Probation Cases—Degree of Discipline
The factors to be considered in weighing the recommended discipline in probation revocation matters should include the aims of attorney discipline: protection of the public and rehabilitation of the attorney. The greatest discipline should be imposed where there is a breach of a condition significantly related to the underlying misconduct, particularly when the circumstances raise concerns about the need for public protection or the attorney's failure to undertake rehabilitation. Less discipline is required where a less significant probation condition is at issue under circumstances which do not call into question public protection or the attorney's rehabilitation. The length of stayed suspension which could be imposed as a sanction, and the length of the actual suspension earlier imposed, should also be considered.

ADDITIONAL ANALYSIS

Aggravation
Found
563.10 Uncharged Violations
582.10 Harm to Client
Mitigation
Found
735.10 Candor—Bar
Discipline
1815.06 Actual Suspension—1 Year
1815.08 Actual Suspension—2 Years
Other
107 Procedure—Default/Relief from Default

OPINION

STOVITZ, J.:

In this proceeding to revoke the disciplinary probation of an attorney, the State Bar examiner has requested that we review a decision of a hearing judge of the State Bar Court. The judge was faced with very difficult procedural issues and proposed several alternative recommendations, depending on the action taken on a separate probation revocation proceeding ("*Potack II*") now pending before the Supreme Court.*

As we shall detail, our independent review of the record and persuasive authorities have led us to conclude, in general accord with the hearing judge, that the scope of the proceeding before us should be limited to respondent's undisputed failure to make restitution timely as required by an earlier order of the Supreme Court and that respondent wilfully failed to make the required restitution when due. For the reasons which follow, we shall modify the judge's findings regarding aggravating and mitigating circumstances, and shall recommend that if the Supreme Court imposes the recommended two-year actual suspension in *Potack II*, we recommend that no additional discipline be imposed in this proceeding ("*Potack III*"). If the Supreme Court imposes less than two years actual suspension in *Potack II* and leaves the discipline for belated restitution to be addressed in *Potack III*, we recommend up to an additional year of actual suspension for *Potack III* and an aggregate discipline for both *Potack II* and *Potack III* no greater than two years actual suspension.

I. PROCEDURAL BACKGROUND

Respondent was admitted to practice in California in December 1975.

For ease of understanding, we set forth the different proceedings which bear on this review.

A. "Potack I" (Exh. 15 (Bar Misc. No. 5066)); Respondent's Prior Discipline Which Placed Him on Disciplinary Probation.

Effective June 6, 1986, the Supreme Court suspended respondent for three years, stayed execution of that suspension, and placed him on probation for that period on certain conditions, including actual suspension for the first year of probation and until he made restitution of $945 to two clients. He was also ordered to make restitution of $8,293 to other clients within 30 months and file reports quarterly with the State Bar Court regarding his compliance with the terms and conditions of his probation. This discipline rested on respondent's written stipulation as to facts and discipline. In that stipulation, he admitted misconduct in seven matters, which involved eight clients (Anita Barr, Donald and Marilyn Zawacki, Gene Giacomelli, Yves Emond, Claire Hanchett, Joe Hargrove, and Katherine Guthrie) and resulted from failure to perform legal services and to return unearned fees. (Hearing Judge's decision ("decision") p. 8; exh. 15.) By the terms of the Supreme Court's order, respondent's actual suspension ran from June 6, 1986, to June 6, 1987, and until he made $945 of restitution. Because respondent paid the $945 on April 30, 1987, his actual suspension ended in June of 1987.[1] His probation extended until June 6, 1989, but he had to complete restitution of the $8,293 to all clients by December 6, 1988.

B. "Potack II" (Exh. 16 (State Bar Court No. 89-P-14598)); Respondent's Probation Revocation Proceeding Pending Before the Supreme Court.

Proceeding No. 89-P-14598 is a probation revocation matter now pending in the Supreme Court for review. In that matter, the referee found that respondent wilfully failed to file his October 10, 1988, probation report. As an aggravating circumstance, the referee found that respondent had failed to make restitution by the December 6, 1988, deadline. The referee recommended that respondent be suspended for two years. On October 5, 1989, by a vote of nine

* [Editor's note: See *Potack v. State Bar* (1991) 54 Cal.3d 132.]

1. After paying required State Bar membership fees, respondent returned to good standing on July 16, 1987.

to five, the former review department adopted the referee's decision in *Potack II*, except that it deleted his conclusion regarding respondent's failure to make restitution. The former review department did not explain why it adopted the recommended discipline even though it deleted the sole aggravating factor. Four of the five dissenting members of the review department would have recommended three months actual suspension and one year's probation; the fifth dissenting member would have recommended only three months suspension. On March 28, 1990, *Potack II* was submitted to the California Supreme Court, which granted review at respondent's request, but is awaiting a recommendation from the State Bar Court in *Potack III* before acting on *Potack II*.

C. "Potack III" (State Bar Court No. 89-P-11031)); Respondent's Probation Revocation Proceeding Before Us for Review.

We shall refer to the proceeding we now review as "*Potack III*." It was initiated by a notice to show cause ("notice") on March 27, 1989, more than a month before the State Bar Court hearing in *Potack II*. As pertinent, the notice charged that respondent failed, as requested by the probation department on November 23, 1988, to file an amended report for October 10, 1988, and failed to make restitution ordered by the Supreme Court to five named clients by the deadline for that restitution.[2] Respondent was ordered to show cause why it should not be recommended to the Supreme Court that the stay of the order for his suspension be set aside and recommended discipline imposed.

II. FACTS

Just prior to the State Bar Court hearing in *Potack III*, the parties filed a written stipulation to the basic facts placed in issue by the notice in that matter. (Exh. 15.) Respondent agreed that he failed to file a probation report as required on or before October 10, 1988; that on October 22, 1988, the probation department of the State Bar Court asked him to file his report; that he filed a report on November 22, 1988; and that the next day, the probation department returned his report as not complying with the terms of his probation. On November 23, 1988, the probation department requested that respondent submit an amended report within 10 days; but he did not file it until July 1989 (over seven months after the notice was filed in *Potack III*). (*Id.* at ¶¶ 5-9.)

In their pre-hearing stipulation, the parties also agreed that prior to the end of the 30-month period for the making of restitution ordered by the Supreme Court, respondent failed to make restitution to three clients or to the State Bar Client Security Fund on account of restitution it made to three other clients. Respondent did not file a written motion or petition with either the State Bar Court or the Supreme Court to request an extension of the time within which to make restitution. (See, e.g., *In the Matter of Galardi*, L.A. No. 32184 [minute orders extending time for making of restitution based on attorney's showing].) Finally, the parties stipulated that respondent completed the prescribed restitution on May 30, 1989, almost six months after the deadline of December 6, 1988. (Exh. 15 at ¶¶ 10-12.)

The following additional facts were established at the hearing; and we adopt them as our findings of fact, in addition to the foregoing stipulated facts.

From late 1986 until August 1987, respondent earned $10 per hour as a law clerk. His net monthly income ($1,100) equalled his monthly expenses. (Decision at p. 9.)

After repaying $945 to Joe Hargrove and Katherine Guthrie in 1987, respondent resumed the practice of law as allowed by the Supreme Court order. As an attorney for Community Defenders, Inc., from August 1987 until July 1988, he earned an annual salary of approximately $27,000. His net monthly income ($1,650) slightly exceeded his monthly expenses ($1,500). (*Id.* at pp. 9-10.)

In August 1988, respondent opened a private law practice based exclusively on appointments

2. Respondent had also failed to make timely restitution to a sixth client. The notice stated that respondent owed restitution to the sixth client, but did not charge respondent with failure to make timely restitution to that client.

through the San Diego Superior Court's Juvenile Department. From August through December 1988, he billed approximately $3,500 per month and had expenses of approximately $2,600 per month. Because payments for his services to the juvenile court arrived more slowly than he anticipated, he was unable to make restitution in 1988. (*Id.* at p. 10.)

After paying the $945 necessary to end his actual suspension, respondent made no further restitution until 1989. He claimed that he "diligently sought employment, and worked, and did not waste money, and tried to put money aside in order to make . . . restitution payments." (I Reporter's Transcript ["R.T."] 40.) Yet from August 1987 (when he resumed the practice of law) through December 1988, he did not make even a small restitution payment; nor did he consider switching jobs or taking an extra job to increase his income, so that he could make timely restitution. (I R.T. 102.)

Respondent testified repeatedly that he was not able to pay restitution by the time it was due. (I R.T. 91, 93, 95.) He stated that nothing required him to work as a law clerk for $10 per hour, but that he happily chose to take the job. Although Community Defenders, Inc., paid him only $27,000 per year, he stated that he chose the position because of his passion to do criminal law and public interest law. (I R.T. 99-100.) Despite his inability to pay restitution, he was able in April 1988 to buy a 1987 Ford Taurus requiring monthly payments of $339. (I R.T. 104-105.)

At the hearing in *Potack III*, respondent presented no financial statements, copies of tax returns, or other documents to support his claims about his financial situation during the 30 months he had to make full restitution. The examiner, however, did not present evidence to rebut his testimony, which the hearing judge accepted.

In October 1988, respondent traveled to Pennsylvania to deal with serious problems arising from his mother's mental illness and hospitalization. (Decision at p. 10.) He failed to file the quarterly report due by October 10, 1988. On October 20, 1988, the probation department sent respondent a letter stating that unless he filed the overdue report with an explanation within 10 days, it would issue a notice to show cause. (Stipulation in *Potack III* at pp. 4-5.)

On November 22, 1988, the State Bar Court received a report from respondent. This report stated that he had not filed a report by October 10, 1988, because his probation was "scheduled to terminate" in December 1988. The report also stated that he had visited his family in Pennsylvania for three weeks in October 1988, had not received the probation department's letter concerning the overdue report until the end of October, had encountered problems fighting the flu and catching up with his case load, planned to make payments in December 1988 and every month thereafter until he completed his restitution, and requested an extension of his probation until June 1989. Absent from the report was the required assertion about compliance with all provisions of the State Bar Act and Rules of Professional Conduct for the quarterly period ending with October 1988.

On November 23, 1988, the probation department returned the report of November 22, 1988, to respondent because it failed to contain the required assertion. The probation department's letter of November 23 asked respondent to submit an amended report within 10 days. It also informed him that his probation was not scheduled to end until June 1989, that full restitution was due in December 1988, and that he could petition the Supreme Court for an extension of time to pay the restitution.

In a probation report filed on January 13, 1989, respondent asserted his compliance with the State Bar Act and Rules of Professional Conduct during his probation period. This report did not state that it purported to respond to the probation department's request of November 23, 1989, and to cover the period prior to October 10, 1988. Because he believed that the report filed on January 13, 1989, complied with the probation department's request of November 23, 1988, he did not file a proper amended report for October 10, 1988, until July 21, 1989. (Decision at pp. 7, 13.)

On November 22, 1988, the probation department filed a notice to show cause in *Potack II*. Based on probation condition three of the *Potack I* stipula-

tion, which required respondent to file quarterly reports, the notice charged him with failure to file the report due on October 10, 1988. Respondent defaulted in *Potack II* because he mistakenly believed that *Potack III*, for which the notice was filed on March 27, 1989, superseded *Potack II*. (II R.T. 201, 276.)

On May 3, 1989, a hearing referee held the hearing in *Potack II*, at which the same examiner appeared as in *Potack III*. The referee's decision was filed on May 15, 1989. Determining that respondent had wilfully failed to file the report required by October 10, 1988, and concluding, as an aggravating fact, that respondent had not made the restitution required by December 6, 1988, the referee recommended that respondent's probation be revoked and that respondent "commence the remaining period of his suspension." Amending his decision on June 9, 1989, the referee stated that he intended the remaining period of respondent's suspension to be two years.[3] **[1 - see fn. 3]**

In early January 1989, within a few days of respondent's receiving the first big check for his services to the San Diego Juvenile Court, a creditor attached his bank account. As a result of the attachment, he lost over $7,000. (Answer to Interrogatories at p. 3.) Despite this setback, respondent made full restitution within six months of the date when it was due. His payments to the Client Security Fund included $1,000 on January 6, 1989; $1,000 on January 20, 1989; $2,000 on April 9, 1989; $1,000 on May 14, 1989; and $348 on May 25, 1989. On May 30, 1989, he completed the restitution by paying $1,000 to Anita Barr, $500 to Marilyn Zawacki, and $500 to Donald Zawacki.[4] (Decision at pp. 7-8.)

The hearing in *Potack III* was on November 14 to 15, 1989, more than a month after the former review department's decision in *Potack II*. The examiner argued that respondent's conduct had been wilful and that respondent had not substantially complied with the terms of his probation. Representing himself, respondent disputed both claims.

During the degree of discipline phase of the hearing in *Potack III*, the examiner and respondent informed the hearing judge of *Potack II*, of which the judge was previously unaware. The essential part of the record in *Potack II* was admitted in evidence. (Exh. 4.)[5]

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3. [1] Even though respondent served one year of actual suspension as a condition of probation, the hearing referee could have recommended up to three years actual suspension, as indicated by the notice in *Potack II*. The Supreme Court's own minute orders in past revocation of probation cases sometimes give credit for actual suspension imposed as a condition of the earlier probation and sometimes do not, usually based on the State Bar Court's recommendation.

4. The timing of respondent's final restitution payments may explain why the hearing referee concluded, as an aggravating fact in *Potack II*, that respondent had failed to make restitution and why the former review department deleted this conclusion from its decision in *Potack II*. The hearing in *Potack II* was on May 3, 1989; respondent's five last restitution payments occurred from May 14, 1989 to May 30, 1989; and the former review department reached its decision on October 5, 1989. Because respondent made his final payments during the period after the evidentiary hearing in *Potack II* and before the former review department's decision, it was factually understandable for the hearing referee in *Potack II* to conclude that respondent had failed to make restitution and for the former review department to delete this conclusion. Nevertheless, we are unable to ascertain whether the former review department in *Potack II* has already taken into consideration respondent's delay in making restitution in recommending his two-year suspension.

   Because *Potack II* is not before us and we have decided its weight is not significant as an aggravating circumstance, we need not reach the question of the propriety of the referee in *Potack II* receiving evidence in a default proceeding as to a significant matter not charged in the notice to show cause: failure to timely make restitution. (Contrast *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35-36 [in a contested matter, evidence of uncharged misconduct may be relevant to establish an aggravating circumstance]; see *In The Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 217, [defaulting attorney has no reasonable opportunity to defend against matters not raised in original notice to show cause].)

5. The State Bar Court's case information record of this matter, *Potack III*, appears to erroneously show that exhibit 16 was not admitted into evidence. However, the judge's and parties' treatment of exhibit 16 shows that it was so admitted. (Decision at p. 2; II R.T. p. 211.) We therefore treat exhibit 16 as part of the record in *Potack III*.

III. FINDINGS AND CONCLUSIONS BELOW

In *Potack III*, the judge made findings consistent with the stipulated facts and evidence, finding, inter alia, that respondent neither timely filed an amended report when requested to do so on November 23, 1988, nor made restitution in a timely manner. (Decision at pp. 6-8.)

The judge concluded that while wilfulness is not required for culpability of a probation violation, the evidence showed that respondent's violation of his probation conditions was wilful. (*Id.* at pp. 14-15.) Although respondent's violation of his probation duty to make timely restitution was clearly established, as was his failure to amend his quarterly report as requested in November of 1988, the judge concluded that the latter violation was adjudicated by *Potack II* and that it would be inherently unfair to respondent and wasteful of judicial resources to base culpability on it in *Potack III*. (*Id.* at pp. 16-26.)

With regard to respondent's obligation to make restitution, the hearing judge noted that respondent undertook that obligation by personal agreement (stipulated disposition) approved by the Supreme Court. Although he suffered some financial setbacks, he "failed to assume responsibility to structure" his commitments to make amends for his past misconduct to those he harmed or to the State Bar Client Security Fund.

After considering mitigating circumstances, including a number arising before the start of his probationary period, and after declining to consider as aggravating respondent's prior record of discipline (which record the judge stated exists in every probation revocation matter), the judge recommended several disciplinary alternatives, depending on whether and what action is taken in *Potack II*. None of her alternatives recommended additional actual suspension. In the event that the Supreme Court has revoked probation in *Potack II* and set aside some or all of the suspension earlier stayed, the judge recommended that this matter (*Potack III*) be dismissed. If the Supreme Court has imposed less than a two-year actual suspension in *Potack II* and "believes that it is not a denial of due process to hold that respondent's violation of probation" in *Potack II* may be cause for discipline in *Potack III*, the judge recommended that respondent be suspended for one year, stayed, on conditions including no actual suspension, to run concurrent to discipline in *Potack II*. Finally, if the Supreme Court has not acted on *Potack II*, the judge recommended that the Supreme Court revoke probation and impose a two-year period of suspension stayed on conditions, including no actual suspension.

IV. ISSUES ON REVIEW

Seeking review, the State Bar examiner urged several arguments: the hearing judge's allegedly inadequate recommendation of discipline, inadequate weighing of aggravating circumstances, improper consideration of certain factors as mitigating, incorrect conclusion that matters in this case were decided in *Potack II*, inappropriate comment on a disciplinary matter not pending in the present case, and improper proposal of alternative recommendations. Although granted an opportunity to file his reply brief, respondent has not done so and did not appear at oral argument.

V. DISCUSSION

A. Proper Scope of This Proceeding.

We first deem it appropriate to identify the probation violations which are properly the scope of this proceeding. While the record in *Potack II* is pending before the Supreme Court it is part of the record we now review. We are therefore able, as was the hearing judge below, to consider the basis of that proceeding in relation to the charges in *Potack III*. In *Potack II*, the State Bar Court hearing referee determined that respondent failed to timely file the probation report due by October 10, 1988, for the preceding quarter. The referee considered fully the circumstances surrounding respondent's probation reporting failure, including his failure to avail himself of an opportunity to correct the defective report he filed in a belated attempt to satisfy the October 10, 1988, reporting requirement. (Exh. 16, referee's decision, finding 4, p. 2.) In the circumstances of this matter, we hold that the referee's decision in *Potack II* resolved completely all duties respondent had with respect to the October 10, 1988, report.

[2] Respondent did have a duty under paragraph six of the conditions of his probation to answer fully and promptly, except as privileged, any inquiries as to whether he was complying with his probation. That duty was *independent* of the duty placed on respondent by paragraph three of those conditions to file quarterly reports with the State Bar Court as to his compliance with the rules and laws governing attorney conduct. Yet on the record before us, the only purpose which could have been served by the request made to respondent by the State Bar Court clerk's office on November 23, 1988, was to seek respondent's filing of a complete quarterly probation report due October 10, 1988. Since the very basis of the charges and recommendation in *Potack II* was respondent's failure to file an acceptable report for the quarter in question, we agree with the hearing judge that no culpability in *Potack III* should be based on respondent's failure to respond to the November 23, 1988, inquiry. Our conclusion is supported further by review of the charges in *Potack III*. The portion of the notice to show cause which started this proceeding referring to respondent's failure to respond to the November 23, 1988, inquiry cited only paragraph three of the conditions of probation, *not* paragraph six.

Accordingly, we deem the only aspect of respondent's probation compliance properly at issue in this proceeding to be respondent's duty set forth in paragraph seven of the conditions of his probation to make restitution by December 6, 1989, to the named individuals (or the client security fund) in the specific amounts.

B. Wilfulness as an Element of Culpability of a Probation Violation.

The hearing judge stated that a showing of "wilfulness" was unnecessary before concluding that a member of the State Bar could be culpable of violating a condition of disciplinary probation. Yet the judge made the issue moot by concluding that in this case, respondent's failure to make restitution as required was wilful. (Decision at pp. 14-15, 27-29.)

[3a] As we stated earlier, our scope of review of this proceeding is independent. As the judge implicitly recognized, no statute or rule has specifically defined whether or not wilfulness is a requirement for finding a respondent subject to revocation of probation for violation of a probation condition. Considering that probation revocation matters come before the State Bar Court on a regular basis, we deem it an appropriate exercise of our independent review power to reach that issue.[6] **[3b - see fn. 6]**

[4] As a preface to our analysis of the wilfulness issue, we must make clear that this probation revocation proceeding is a disciplinary proceeding. The examiner takes the view that this proceeding is not truly a disciplinary proceeding, but merely an inquiry to determine whether discipline already decided upon when probation was earlier imposed and suspension was stayed should now be put into effect. This view of the matter before us fails to take into account the fact that no added discipline may be imposed on an attorney-probationer for breach of probation absent requisite proof of such breach following fundamental due process steps (i.e., notice and a fair opportunity to be heard). (Trans. Rules Proc. of State Bar, rules 612-613.) [5] Moreover, our Supreme Court has considered an attorney's past revocation of probation to be a prior *disciplinary* proceeding. (E.g., *Barnum* v. *State Bar* (1990) 52 Cal.3d 104, 113; *Slaten* v. *State Bar* (1988) 46 Cal.3d 48, 62-63.)

[6a] The hearing judge's conclusion that a showing of wilfulness was unnecessary in a probation revocation proceeding was based on a review of Business and Professions Code sections 6077, 6103, and 6093 (b) and standard 1.2(f).[7] Section 6077 permits discipline only for a "wilful" breach of the

6. [3b] Even if we were bound by the constraints of a civil appeal, which we are not (see *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916), we would be able to resolve the issue of wilfulness notwithstanding its possible mootness in this proceeding based on our determination that it is an issue of public importance likely to recur. (See, e.g., *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 167, fn. 2; *Zeilenga* v. *Nelson* (1971) 4 Cal.3d 716, 719-720; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 526, pp. 511-513.)

7. Unless noted otherwise, references to "sections" are to the Business and Professions Code and references to "standards" are to the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.)

rules of professional conduct, and section 6103 permits discipline only for "wilful" disobedience or violation of a court order. By contrast, section 6093 (b) provides: "Violation of a condition of probation constitutes cause for revocation of any probation then pending, and may constitute cause for discipline." It does not state whether violation of a probation condition must be wilful in order to provide a cause for probation revocation or discipline. Also, standard 1.2(f) defines the term "prior record of discipline" as including "a member's violation of probation or wilful violation of an order" to comply with rule 955. Observing that section 6093 (b) and standard 1.2 (f) do not include the word "wilful," the hearing judge concluded that a probation revocation proceeding did not require the wilful violation of a probation condition.

The United States Supreme Court has indicated that as a matter of fundamental due process, revocation of criminal probation for violation of a probation condition is not appropriate if "substantial reasons . . . justified or mitigated the violation . . . ." (*Gagnon* v. *Scarpelli* (1973) 411 U.S. 778, 790.) [7] Although disciplinary proceedings are sui generis and are not criminal in nature, rules of criminal law may provide guidance in appropriate circumstances. (*Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 226.) Lack of wilfulness appears to constitute a substantial reason for not revoking probation in a disciplinary proceeding where, for example, a probationer has failed to file a required report or make restitution as ordered.

Pursuant to Penal Code section 1203.2, subdivision (a), a court may revoke and terminate probation in a criminal matter for various reasons, including the violation of any conditions of probation. However, that statute prohibits the revocation of probation for failure to pay any restitution required as a condition of probation unless the court determines that the probationer "has willfully failed to pay and has the ability to pay." [6b] In a disciplinary proceeding, therefore, wilfulness would seem necessary before any revocation of probation for failure to pay restitution.

Although we have found no Supreme Court opinion directly on point, *Phillips* v. *State Bar* (1989) 49 Cal.3d 944, 952 suggests that a probation revocation proceeding may require a showing of wilfulness equivalent to the wilfulness needed for discipline resulting from a violation of rule 955, California Rules of Court (hereinafter, "rule 955"). Phillips argued that a mental disorder prevented him from having the intent necessary for wilful violation of either the duties owed to his clients pursuant to the State Bar Act and Rules of Professional Conduct or the duties imposed by Supreme Court orders requiring him to comply with rule 955, pass the Professional Responsibility Examination, and cooperate with his probation monitor. Phillips stipulated, however, that he had wilfully violated duties imposed by the State Bar Act and Rules of Professional Conduct. Also, Phillips did not explain how he could have wilfully violated such duties, but have been incapable of wilfully violating probation conditions. Asserting that Phillips's mental disorder did not render him incapable of wilful misconduct, the Supreme Court concluded that he had wilfully violated his probation conditions. (*Phillips* v. *State Bar*, *supra*, 49 Cal.3d at pp. 953-954.) At no point did the Supreme Court consider the possibility that a showing of wilfulness was unnecessary in dealing with violations of probation conditions.

[8] We find especially apt to probation violation proceedings the analysis which surrounds the wilfulness requirements of rule 955. Pursuant to rule 955(e), violations of rule 955 must be "wilful" to warrant discipline. Such wilfulness need not involve bad faith; instead, a "general purpose or willingness" to commit an act or permit an omission is sufficient. (*Durbin* v. *State Bar* (1979) 23 Cal.3d 461, 467; see also *Lydon* v. *State Bar* (1988) 45 Cal.3d 1181, 1186.) Insofar as violations of rule 955 require such a mental state to justify discipline, violations of probation conditions should require the same mental state, and we so hold.

C. "Substantial Compliance" With Probation Conditions.

The examiner claimed below that respondent did not substantially comply with the terms of his probation, whereas respondent claimed that he did. Apparently underlying these claims was the assumption that substantial compliance with the probation terms would have allowed respondent to escape culpability. We reject this assumption.

[9a] For the purpose of determining culpability, it is misguided to distinguish between "substantial" and "insubstantial" or "technical" violations of the probation conditions involved in respondent's case. The Supreme Court has refused to draw such a distinction in dealing with violations of rule 955 notification requirements because they serve the critical protective function of insuring that all concerned parties learn about an attorney's discipline. (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1096; *Lydon* v. *State Bar*, *supra*, 45 Cal.3d at p. 1187.)

[9b] Probation restitution requirements are as significant as discipline notification requirements. [10] By forcing culpable attorneys to confront the consequences of their misconduct in a concrete way, restitution serves the state's interest in rehabilitating such attorneys and protecting the public. (*Brookman* v. *State Bar* (1988) 46 Cal.3d 1004, 1009.) Recently, the Supreme Court described restitution as "a necessary condition of probation designed to effectuate . . . rehabilitation and to protect the public from similar future misconduct." (*Sorenson* v. *State Bar* (1991) 52 Cal.3d 1036, 1044.) [9c] The importance of these goals makes distinctions between "substantial" and "insubstantial" or "technical" violations of probation restitution requirements inappropriate, particularly on this record.

D. Wilfulness of Respondent's Failure to Comply With the Restitution Duties of His Probation.

No reported California disciplinary proceeding has addressed the issue of an attorney's failure to pay restitution required as a condition of probation. [11a] In reinstatement proceedings, however, the Supreme Court has evaluated the efforts of attorneys to make restitution by examining both their financial ability and their attitude toward restitution. (See *In re Gaffney* (1946) 28 Cal.2d 761, 764-765; *In re Andreani* (1939) 14 Cal.2d 736, 750.)

[11b] In the context of criminal matters, the United States Supreme Court has suggested that a court should evaluate the reasons for a probationer's failure to make restitution and that probation is revocable if "the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay." (*Bearden* v. *Georgia* (1983) 461 U.S. 660, 672-673.) As we observed earlier, pursuant to California Penal Code section 1203.2, subdivision (a), a criminal court must not revoke probation because of a failure to make restitution required as a condition of probation unless the court determines that the probationer "has willfully failed to pay and has the ability to pay." In a disciplinary proceeding for failure to make timely restitution, due process requires that we examine whether the probationer was able to make restitution and whether the probationer made sufficient good faith efforts to acquire the resources to pay.

In *Potack I*, respondent *stipulated* to the discipline imposed, including probation condition 7, which required him to pay $8,293 in restitution by December 6, 1988. (Stipulation in *Potack I* at p. 16.) In this proceeding, he also stipulated to the fact that as of December 6, 1988, he still owed $7,348 in restitution. (Exh. 15, stipulation at pp. 4, 6.)

[12a] The hearing judge determined that respondent wilfully breached his duties although he was unable to make restitution. (Decision at p. 27.) Yet between August 1987 and July 1988, respondent's salary from Community Defenders, Inc., exceeded his expenses by approximately $150 per month. Also, he did not consider earning more money by taking an extra job; and from April 1988 onwards, he afforded monthly car payments of $339. These facts show that despite his assertions to the contrary, respondent was able to make some restitution payments between August 1987 and December 6, 1988.

[12b] Even if respondent was unable to make restitution, we must examine the reasons for this inability to pay. As the hearing judge observed, respondent repeatedly chose to pursue professional goals which rendered him financially unable to make timely restitution. He chose to work as a law clerk for $10 per hour. He chose to work for Community Defenders at an annual salary of $27,000. He chose to begin a solo practice when start-up costs and delays in reimbursement were foreseeable. Although he knew that he would not make timely restitution and was advised by the probation department to seek an extension from the Supreme Court, he failed to do so. Although he knew that he had creditors who could levy against his checking accounts, he failed to

protect the funds with which he hoped to make restitution from attachment. (Decision at pp. 27-28.) Such conduct clearly shows respondent's conscious disregard of his obligations and failure to make sufficient good faith efforts to acquire the resources to pay. Thus, we agree with the judge's conclusion of respondent's wilful breach of his restitution duties.

E. Factors Bearing on the Appropriate Degree of Discipline.

The hearing judge found that respondent presented extensive mitigating evidence covering five broad areas: his education and experience prior to his suspension in 1986, his cocaine usage and recovery from 1981 to 1986, his full restitution in 1989, his extensive pro bono work throughout his legal career, and his character. (Decision at pp. 29-35.) Standard 1.2(e) defines the term "mitigating circumstance" as "an event or factor established clearly and convincingly by the member subject to a disciplinary proceeding as having caused or underlain the member's professional misconduct and which demonstrates that the public, courts and legal profession would be adequately protected by a more lenient degree of sanction than set forth" in the standards. Examples of mitigating circumstances include "good faith" on the part of the attorney, "lack of harm to the client or person who is the object" of the attorney's misconduct, "spontaneous candor and cooperation" during the disciplinary investigation and proceedings, "an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct," and "objective steps" which the attorney has promptly taken to atone for his misconduct and which demonstrate remorse or recognition of wrongdoing. (Standard 1.2(e)(ii), (iii), (v), (vi), (vii).)

[13] Evidence about respondent's education and experience before 1986 and evidence about his illegal drug usage and recovery by 1986 bore no causal relationship to his failure to file the amended report for October 10, 1988, or his failure to make full restitution by December 6, 1988. (Cf. *Hawes* v. *State Bar* (1990) 51 Cal.3d 587, 595.) Nor did such types of evidence demonstrate how a sanction less than the sanction set forth in the standards would adequately protect the public, courts, and legal profession. Thus, pursuant to standard 1.2(e), they did not constitute mitigating evidence and we disregard those factors as mitigating.

Evidence about respondent's restitution payments from January 1989 through May 1989 showed that he ultimately took steps to atone for his misconduct, albeit belatedly. Pursuant to standard 1.2(e)(vii), the judge regarded such evidence as mitigating. (Decision at p. 36.) Yet all of the $8,293 in payments which respondent made after his return to active status in 1987 were made when the charges in *Potack II* were pending against him, and most ($6,293) were made when the charges in *Potack III* were pending against him. **[14]** Because respondent made such payments under direct pressure of the proceedings against him, they are entitled to little weight. (See *Howard* v. *State Bar* (1990) 51 Cal.3d 215, 222; *Hipolito* v. *State Bar* (1989) 48 Cal.3d 621, 628; *Rosenthal* v. *State Bar* (1987) 43 Cal.3d 658, 664.)

[15] Respondent's public service work as a Community Defenders attorney and his later work representing juveniles under court appointment deserves credit and recognition. Nevertheless, the valuable aims of these public service positions did not relieve respondent from his restitution requirements; and, given the more limited income his employment offered, it was incumbent on respondent to manage his finances better to accomplish his restitution duties.

[16] Respondent's character evidence consisted of testimony from Cruz Saavedra, a tax attorney who referred a juvenile case to respondent and who testified that respondent did a "good job" for a "very reasonable" fee. (I R.T. 58, 60; see decision at p. 34.) Saavedra, however, knew only that respondent had been "disbarred for one year" and that the State Bar was holding a disciplinary hearing involving respondent because he had failed "to pay some restitution." (I R.T. 60; see decision at pp. 34-35.) Pursuant to standard 1.2(e)(vi), Saavedra's lack of awareness about the full extent of respondent's misconduct undermined the value of his character testimony. **[17]** Because such evidence concerned respondent's character, standard 1.2(e)(vi) sets forth a guideline of an extraordinary demonstration of good character, as

attested to by a wide range of references who knew the full extent of respondent's misconduct in order to serve as a mitigating circumstance. Testimony by respondent himself and one letter from a person who expressed no knowledge about respondent's misconduct did not meet this requirement.[8] The Supreme Court has indicated that significant mitigating testimony should show familiarity "with the details" of an attorney's misconduct.

[18] Asserting that respondent's delay in paying restitution caused no harm to his clients or the State Bar Client Security Fund, the judge concluded that such lack of harm deserved "some weight in mitigation" pursuant to standard 1.2(e)(iii). (Decision at p. 35.) Respondent, however, submitted no evidence concerning lack of harm. Without such evidence, the judge's conclusion appears unsupported by the record, particularly when the clients whom respondent harmed in *Potack I* (or the Client Security Fund which had earlier reimbursed those clients) had to wait years for restitution.

The record supports the judge's observation that respondent demonstrated "candor and cooperation" during the proceeding. Pursuant to standard 1.2(e)(v), the judge properly accorded mitigating weight to his candor and cooperation. (*Id.* at p. 35.)

[19] The judge rejected the examiner's claim that *Potack I* was an aggravating circumstance. "Because every existing probation proceeding arises necessarily from an underlying proceeding," the judge stated, "it seems unfair to automatically find that prior a circumstance in aggravation." (Decision at p. 37.) Standard 1.2(b)(i), however, provides that "a prior record of discipline" shall be an aggravating circumstance. Because *Potack I* resulted in discipline, standard 1.2(b)(i) required the hearing judge to consider it an aggravating circumstance. In *Conroy* v. *State Bar* (1990) 51 Cal.3d 799, 805, a case decided after the hearing judge filed her decision, the Supreme Court determined that standard 1.7(a) applied in a later original proceeding founded solely on the attorney's failure to pass a professional responsibility examination ordered when imposing discipline earlier. Also, in *Barnum* v. *State Bar*, *supra*, 52 Cal.3d at p. 113, another opinion filed after the hearing judge's decision, the Supreme Court considered an attorney who had previously been found culpable in a single original discipline matter (Bar Misc. 5779) to have three prior records of discipline: the probation order in 1988, a suspension order in 1989 for violating a requirement of the 1988 order, and a suspension order in 1990 for violating another requirement of that order. Thus, we consider *Potack I* an aggravating circumstance under standard 1.7(a). Next we consider its weight. **[20]** In *Arm* v. *State Bar* (1990) 50 Cal.3d 763, the Supreme Court made clear that the number or fact of prior disciplinary proceedings cannot, without more analysis, foretell the result. (*Id.* at pp. 778-780.) The discipline in *Potack I* became effective in 1986. **[21]** Because *Potack I* arose from serious misconduct in seven matters, and respondent's breach of probation arose after being disciplined, standard 1.7(a) indicates the need for more actual suspension in *Potack II* and *Potack III* than in *Potack I*.

While determining that additional discipline than imposed in *Potack I* is warranted, the specific recommendation to make is complicated somewhat by *Potack II*, which is now before the Supreme Court, and which we view as overlapping, if not coextensive with the probation violations in this proceeding.

[22] We must also consider whether *Potack II* is prior discipline under standard 1.7(a) or 1.7(b). In defining prior discipline, standards 1.7(a) and (b) use the definition of standard 1.2(f); which, in turn, refers to rule 571 of the Transitional Rules of Procedure of the State Bar. Under rule 571, the recommendation in *Potack II* is prior discipline. Nevertheless, we are not required to apply standard 1.7(b) rigidly, without regard to the facts of the prior matters. (See

8. By contrast, in *Gadda* v. *State Bar* (1990) 50 Cal.3d 344, 356, the Supreme Court observed that an attorney's apparent zeal in undertaking pro bono work deserved mitigating weight where the attorney presented several letters and certificates commending his volunteer efforts from the State Bar and the Bar Association of San Francisco and where a letter from a judge highly praised the attorney's continuous and unselfish efforts to defend the indigent.

Conroy v. *State Bar* (1991) 53 Cal.3d 495, 506-507.) **[23]** We do not deem it appropriate in the unique facts before us to give any significant weight to *Potack II* as prior discipline. This is so because we are unable to discern whether and to what extent the former review department, in reaching its two-year suspension recommendation in that matter has already considered the facts of what is now the central focus of *Potack III*: the timing of respondent's belated restitution to former clients. Clearly the former review department had facts before it bearing on this issue and its recommendation does not guide us as to whether any aspect of the delayed restitution accounted for the recommended two-year actual suspension.

There have been many revocations of attorney disciplinary probation over the years. The resultant discipline in those matters has ranged from actual suspension for the entire period of stayed suspension (see prior disciplinary cases discussed in *Barnum* v. *State Bar, supra,* 52 Cal.3d 104, 107 and *Slaten* v. *State Bar, supra,* 46 Cal.3d 48, 62) to some extension of the earlier-imposed probation with no actual suspension. (See, e.g., *In the Matter of Beauvais* (1990) Bar Misc. 5580 [minute order]; *In the Matter of Cooper* (1990) Bar Misc. 5708 [same].) Because all such past probation revocations have been by Supreme Court minute order, we have no explicit guidance by the high court as to the factors to be considered in weighing the discipline to recommend for violation of probation.

[24] We have earlier recognized the chief aims of attorney disciplinary probation to be protection of the public and rehabilitation of the attorney. (See *In The Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291.) If we measure an attorney's violations of probation against those aims, the greatest amount of discipline would be merited for violations which show a breach of a condition of probation significantly related to the misconduct for which probation was given. This would be especially significant in circumstances raising a serious concern about the need for public protection or showing the probationer's failure to undertake rehabilitative steps. Conversely, the least amount of discipline would appear appropriate for a violation of a less significant condition in circumstances which did not call into question either the need for public protection or the attorney's progress toward rehabilitation. Also to be considered are the total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted.

The few examples of Supreme Court discussion we have found relative to an attorney's failure to comply with probation or probation-like duties appear consistent with our framework. In *Barnum* v. *State Bar, supra,* 52 Cal.3d 104, the Supreme Court noted that an attorney who had been previously disciplined by a one-year stayed suspension (no actual suspension) had that probation revoked and was actually suspended for a full year. The court described the attorney's breach of probation as failure to file "all but the first" of the required quarterly reports and noted that he defaulted to charges of probation violation, leading the hearing judge to characterize that attorney's probation breach as aggravated and as involving an "indifference towards rectification." (*Id.* at p. 107.)

In *Conroy* v. *State Bar, supra,* 51 Cal.3d 799, the attorney had been reproved and had been ordered to pass a professional responsibility examination within one year. He passed the examination about three months late and provided no explanation for his untimely compliance, defaulting to the charges brought against him. Although the examination requirement was imposed under rule 956, California Rules of Court and not as a true probation condition, passage of the examination was required as part of the State Bar Court's earlier order of discipline. The Supreme Court imposed the discipline recommended by the State Bar Court of a one-year suspension stayed, on conditions including a sixty-day actual suspension. Deeming as extenuating the attorney's passage of the examination at the first opportunity possible after the deadline, the Court nonetheless imposed actual suspension for violation of the condition of his prior reproval noting the aggravating circumstances of failure to participate in the later disciplinary proceedings and failing to show an understanding of the grave nature of the earlier misconduct.

Applying the foregoing analyses to *Potack III*, we must conclude that restitution was a preeminent probationary duty for this respondent. He was clearly

aware of his duty to fulfill that condition as he had stipulated to it as part of his earlier disciplinary proceedings. He was not required to complete the restitution at issue here until 30 months had passed. But having stipulated to complete it on schedule, he offered none of that restitution timely nor did he timely seek any extension based on any showing of good cause. But for his completion of all of the restitution within six months of when it was due, very severe discipline would be warranted. Respondent did participate in the trial proceedings in *Potack III* and testified openly as to his resources and actions. This is a favorable factor until it is noted that respondent did not participate in the review before us. Moreover, respondent's testimony below does show that his actions were virtually calculated to make it impossible to repay the funds to his victims by the time he had long earlier agreed to do so.

Recognizing that *Potack II* is before the Supreme Court with a recommendation of a two-year actual suspension ostensibly for respondent's failure to timely file his probation report but in circumstances in which the hearing panel expressly took into account his failure to make timely restitution and the review department may also have done so, we would recommend the following discipline in *Potack III* if the Supreme Court wishes to act on both matters in the aggregate: if the Supreme Court imposes a two-year or greater actual suspension in *Potack II*, taking into account the belated restitution as an aggravating factor, we recommend that no additional discipline be imposed in *Potack III*. If the Supreme Court imposes less than the recommended actual suspension in *Potack II* and leaves the discipline for belated restitution to be addressed in *Potack III*, we recommend that additional discipline be imposed in *Potack III*, up to one year actual suspension and that the aggregate discipline for both *Potack II* and *Potack III* not exceed two years actual suspension. We would recommend that respondent be ordered to comply with the provisions of rule 955, California Rules of Court, but that he not again be ordered to take and pass a professional responsibility examination.

Because of our desire to expedite the transmittal of this opinion and our recommendation and the record to the Supreme Court pursuant to its request, we direct that the clerk of our court effect such transmittal within thirty (30) days of the service of our opinion, together with the State Bar Court certificate of costs and the Office of Trial Counsel certificate of costs, if received by such date.

We concur:

PEARLMAN, P.J.
NORIAN, J.

PEARLMAN, P.J., concurring:

I fully concur in the majority opinion but wish to address the unnecessary complexity of this proceeding. Under our current system, formal proceedings for violation of probation are initiated by the Probation Department of the State Bar Court. *Potack II* and *Potack III* thus were separately initiated for two apparent violations of probation by respondent. Thereafter, the Office of Trial Counsel had full control over the prosecution of the charges. The same examiner prosecuted both cases and introduced all of the probation violations as evidence in *Potack II* without seeking to consolidate the proceedings or amend *Potack II* and dismiss *Potack III* and without informing the Judge in *Potack III* of the existence of the other proceeding until the hearing in *Potack III* was almost concluded.

The sole, significant difference between *Potack II* and *Potack III* is that in *Potack III* the respondent answered and participated at the hearing, and the hearing judge made findings in mitigation based on evidence which was not part of the record in *Potack II*, in which respondent defaulted. The basic violations and evidence in aggravation are the same in both proceedings, i.e., no charged misconduct occurred in *Potack III* that was not already part of the record which is now before the Supreme Court in *Potack II*.

In light of the seriousness of the original misconduct, I view respondent's failure to adhere to the conditions of probation and on-again off-again participation in these State Bar proceedings to warrant imposition of substantial actual suspension in revocation of his probation. Nonetheless, the referee in *Potack II* recommended two years actual suspension based in part on the aggravating factor of respondent's

failure to make any restitution. Thereafter he completed restitution to all of his clients. The unexplained deletion of the lack of restitution as a factor in aggravation by the former review department leaves open the question of whether that was done to acknowledge belated restitution or to leave the issue for separate consideration in *Potack III* because of concerns regarding sufficiency of notice to a defaulting respondent. Whatever the reason for its deletion, it had no effect on the examiner's recommended discipline. The examiner, appearing before this review department in *Potack III*, sought two years actual suspension for all of the probation violations in *Potack II* and *Potack III* combined.

The alternative recommendations of this review department essentially recommend that the Supreme Court treat both cases as one consolidated case before the Supreme Court and impose discipline accordingly. Aside from the considerations of fairness to the respondent, this would have the salutary effect of encouraging the consolidation of similar matters into a single proceeding.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

PHILLIP FRASCINELLA

A Member of the State Bar

[No. 88-C-14346]

Filed May 31, 1991

SUMMARY

Respondent was convicted of exhibiting a replica of a firearm in a threatening manner. He requested review of a hearing referee's decision concluding that the facts and circumstances of his conviction involved moral turpitude. (Anya Weisnewski, Hearing Referee.)

Respondent contended that the referee should have considered two declarations he submitted in mitigation; that improper evidence was admitted, and that his criminal conduct did not involve moral turpitude or other misconduct warranting discipline. Upon the review department's independent review of the record, it rejected respondent's evidentiary contentions; concurred with the hearing referee's determination that the matter involved moral turpitude, and remanded the matter to the hearing department for a hearing and decision recommending the appropriate discipline to be imposed.

COUNSEL FOR PARTIES

For Office of Trials: Mark A. Brooks, Sherry L. Pantages

For Respondent: Phillip Frascinella, in pro. per.

HEADNOTES

[1] **141 Evidence—Relevance**
740.59 Mitigation—Good Character—Declined to Find
1699 Conviction Cases—Miscellaneous Issues
In proceeding to determine whether criminal convictions involved moral turpitude, declarations submitted by respondent in which clients attested to respondent's character and legal abilities were properly disregarded as irrelevant, because neither declarant was present during the incident underlying the convictions nor did the declarations contain any information which could shed light on the incident.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **142 Evidence—Hearsay**
Witness's testimony as to witness's knowledge of respondent's conflicts with management of respondent's office building was not hearsay and was properly admitted.

[3] **142 Evidence—Hearsay**
1699 Conviction Cases—Miscellaneous Issues
In proceeding to determine whether criminal convictions involved moral turpitude, arresting officer's testimony regarding observations of witnesses at the scene was not hearsay and was properly admitted.

[4] **159 Evidence—Miscellaneous**
There is no rule that excludes the admission of proper evidence because the object to which testimony relates is not introduced into evidence. Evidence relating to replica gun was therefore admissible, even though gun was not offered into evidence.

[5] **142 Evidence—Hearsay**
159 Evidence—Miscellaneous
166 Independent Review of Record
1699 Conviction Cases—Miscellaneous Issues
In proceeding to determine whether criminal convictions involved moral turpitude, the arresting officer's testimony describing a victim's retelling of the incident was hearsay, but was properly admitted because respondent waived hearsay objection by failing to appear at the hearing. The review department independently reviewed the hearsay evidence, found sufficient trustworthiness, and concluded it was properly relied on by the referee.

[6] **148 Evidence—Witnesses**
166 Independent Review of Record
The review department is obligated to afford great weight to the assessments of credibility made by the hearing referee, for the referee is in the best position to see witnesses and judge, by their demeanor and address, the truthfulness of each. Respondent's repeating his version of the events does not demonstrate that the referee's findings were unfounded.

[7 a, b] **191 Effect/Relationship of Other Proceedings**
1513.10 Conviction Matters—Nature of Conviction—Violent Crimes
1691 Conviction Cases—Record in Criminal Proceeding
Respondent's conviction for exhibiting a replica of a firearm in a threatening manner to cause reasonable fear or apprehension of harm conclusively established that respondent's acts were done in a threatening manner so as to cause a reasonable person apprehension or fear of bodily harm.

[8] **1516 Conviction Matters—Nature of Conviction—Tax Laws**
1527 Conviction Matters—Moral Turpitude—Not Found
The wilful failure to file income tax returns alone does not involve moral turpitude per se.

[9] **1523 Conviction Matters—Moral Turpitude—Facts and Circumstances**
Where facts showed respondent had sufficient time, however short, for respondent to plan criminal acts and to reflect upon them, review department concluded that respondent's criminal acts were premeditated.

[10] **1528 Conviction Matters—Moral Turpitude—Definition**
Moral turpitude determinations are a matter of law. Moral turpitude is not a concept that fits a precise definition. The definition most often recited by the Supreme Court is "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." The definition of moral turpitude is measured by the morals of the day, and may vary according to the community or the times. The moral turpitude prohibition is a flexible, "commonsense" standard, with its purpose not the punishment of attorneys but the protection of the public and the legal community against unsuitable practitioners. A holding that an attorney's act constitutes moral turpitude characterizes the attorney as unsuitable to practice law.

[11] **1528 Conviction Matters—Moral Turpitude—Definition**
Some offenses are crimes of moral turpitude on their face, including acts universally decried as morally reprehensible or necessary involving fraudulent or dishonest acts for personal gain. Other offenses do not in and of themselves constitute crimes of moral turpitude, such as voluntary manslaughter and simple assault. The commission of such lesser offenses by an attorney in the heat of anger or as result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law and should not be deemed to constitute moral turpitude.

[12 a-d] **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
Where, in brandishing replica firearm so as to cause reasonable fear of harm, respondent did not act out of uncontrollable anger or other disabling disorder; had the time and opportunity to ponder his acts beforehand; repeated his outrageous conduct after additional time for reconsideration; put innocent bystanders in fear for their safety and well-being; responded inappropriately to a dispute easily and routinely settled through normal legal processes; and did not act due to any abuse of alcohol, review department agreed with hearing referee's conclusion that the circumstances surrounding respondent's criminal offenses involved moral turpitude.

[13] **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
In determining whether respondent's criminal convictions for exhibiting a replica firearm in a threatening manner involved moral turpitude, it was of no consequence that no one was physically injured by respondent's acts. The acts were intended to be, and were, perceived to be life-threatening, and could have provoked heart attacks or an armed response, thus demonstrating a flagrant disregard toward human life.

[14] **1513.10 Conviction Matters—Nature of Conviction—Violent Crimes**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances
1528 Conviction Matters—Moral Turpitude—Definition
Any determination of moral turpitude in an offense not inherently involving moral turpitude is fact-sensitive. Serious assaultive conduct has sometimes been found not to involve moral turpitude.

ADDITIONAL ANALYSIS

Other

1545 Conviction Matters—Interim Suspension—Not Ordered

OPINION

NORIAN, J.:

Respondent, Phillip Frascinella, has requested review of a hearing referee's decision that the facts and circumstances of his conviction for violations of Penal Code section 417.2, subdivision (a), involved moral turpitude. After our independent review of the record, we concur with the hearing panel's determination that this matter involved moral turpitude. We return the matter to the hearing department of the State Bar Court, consistent with the Supreme Court's order dated December 20, 1989, for a hearing and decision recommending the appropriate discipline to be imposed.

PROCEDURAL HISTORY

Respondent was convicted on September 23, 1988, of two counts of exhibiting a replica of a firearm in a threatening manner to cause fear of bodily harm to another, in violation of Penal Code section 417.2, subdivision (a). By order dated November 23, 1988, the Supreme Court referred this conviction to the State Bar Court for a hearing, report and recommendation on the issue of whether the facts and circumstances surrounding the violations involved moral turpitude or other conduct warranting discipline. (Bus. & Prof. Code, §§ 6101-6102; Cal. Rules of Court, rule 951.) The Supreme Court did not place respondent on interim suspension.

The matter was heard by a hearing referee on July 10, 1989. Respondent did not appear but submitted declarations on his own behalf. The referee's decision was filed on October 31, 1989, finding that the circumstances surrounding respondent's conviction entailed "moral turpitude and misconduct warranting discipline." (Decision p. 5.) Respondent requested review on November 28, 1989. Upon finality of the criminal conviction, the Supreme Court issued an order dated December 20, 1989, augmenting its previous order and asking the State Bar, in the event that discipline is warranted, for a recommendation of the appropriate discipline to be imposed.

FACTS

This synopsis of the facts is drawn from the decision of the hearing referee as well as from the record of the hearing on July 10, 1989.

The conduct underlying the conviction occurred on September 2, 1988, in an office building in Los Angeles in which respondent was a tenant. Respondent had been involved in a number of disagreements with the property owner, had been given written warning to make timely rent payments and had been rude and abusive to employees of the building owner on a number of occasions. The receptionist for the building, Stephanie Hart (Hart), had been instructed to refuse to speak to respondent and to hang up when he was rude or abusive.

At approximately 11 a.m. on September 2, 1988, Hart had prepared and caused to be delivered to respondent at his third floor office a three-day notice to quit the premises. Ten minutes after service of the notice, respondent went to the reception area of the landlord's office on the first floor. Hart was not present at respondent's arrival but was informed by a handyman working in the reception area that someone was there to see her. As she entered the area, she saw respondent facing her approximately 10 to 15 feet away, feet spread apart, arms fully extended with both hands on what she thought was a gun. The gun was pointed at her. Respondent's manner toward her was threatening. She stood fixed for approximately five seconds, then turned her back on respondent and said, "That's not funny." (R.T. p. 26.) She heard a click and believed he had pulled the trigger. At that sound her heart stopped and she thought she would die. After a few seconds, she turned around and saw respondent had left. When she looked on her desk, she found the three-day notice she had previously given torespondent torn into little pieces and taped back together.

After respondent left the first floor reception area, he proceeded to the third floor to the reception area of an office near his office suite. Margo Payne (Payne), the receptionist in the third floor office,

testified that respondent walked into the back office area where she was working with two other employees. Payne testified that respondent announced, "'[e]verybody freeze'" (R.T. p. 18), held what appeared to be a gun with two hands and pointed it at her, and then, in a sweeping motion, fanned the room with the gun. She testified that she believed the gun to be real and was frightened. Payne testified that respondent started to laugh, said, "'[y]ou guys are no fun'" (R.T. p. 19), and walked out of the back office.

Another employee present in the back office with Payne was Jennifer Hale (Hale), an employee of a business with offices on the first floor. Hale observed respondent enter the area, say "'[f]reeze'" (R.T. p. 37), and pull out the gun and point it at the women sitting behind the reception desk. She believed the gun was real. She saw respondent point the gun at Payne and pull the trigger, the gun making a clicking sound. Hale said, "[t]hat's sick" (R.T. p. 37) to respondent and he responded by pointing the gun approximately six inches from her face. She said again, "[t]hat's sick" or "[t]hat's not funny." (R.T. p. 37.) His answer was "'[y]es, it is'" (R.T. p. 37), and he pulled the trigger. Testifying as to respondent's facial expression she said, "[t]hats' why it was so scary because it [his face] was not joking at all. It was just very blank. Very, very scary because it was just very calm, just 'freeze,' so not—[sic] it was just very serious." (R.T. p. 39.)

Hale proceeded to the elevators to return to her office on the first floor and while waiting for the elevator she said respondent "came out of there and he was holding the gun like a cowboy and just walked into his office." (R.T. p. 37.) She returned to her suite on the first floor. She said "I thought maybe I am overacting. I walked in and saw Stephanie [Hart] freaking out . . . ." "She was shaking and almost crying. I was shaking and she [Hart] told me what happened and I told her what happened . . . ." (R.T. pp. 37-38.) Their boss said to call the police and one of them did.

One of the officers who responded to the call was Officer Toisha Ellerson (officer). As part of her investigation, she secured the replica gun from its stand on respondent's desk. In her opinion, the gun looked real and operable, and only after a close examination could she and her partner discern that the barrel of the gun had been closed.

Respondent was arrested, charged with two counts of drawing or exhibiting a firearm in a threatening fashion to cause reasonable fear or apprehension of harm, contrary to Penal Code section 417.2, subdivision (a), and released on bail. Formal charges were filed by the City Attorney of Los Angeles on September 20, 1988.[1] On September 23, 1988, respondent pled no contest to two counts of violating Penal Code section 417.2, subdivision (a) and was sentenced to, among other things, two years probation, a $225 fine and forty hours of community service. Respondent paid his fine and completed his community service. No evidence was presented at the hearing that he had violated the terms of his criminal probation.

The hearing referee's decision found that respondent's conduct created genuine fear in those at whom he aimed the gun since each believed the gun to be real and that respondent intended to use it against them. The referee found that none of the victims knew the gun was a replica nor without careful examination would such information be reasonably apparent. The referee found that the facts and circumstances surrounding respondent's violation of Penal Code section 417.2, subdivision (a) involved an act of moral turpitude.

ISSUES ON REVIEW

Summary of Issues

Respondent challenges the hearing referee's decision in three basic areas: (1) mitigating factors in two declarations submitted by respondent were not

1. The City Attorney added a third count against respondent alleging a violation of section 55.09, subdivision (a) of the Los Angeles County Municipal Code, for a willful display of a replica firearm. This charge was dismissed by the municipal court judge.

considered in the finding of culpability; (2) improper evidence was admitted on which the referee relied for the findings of fact, which tainted the hearing and undermines the decision; and (3) disciplinary action is not required for respondent's criminal conduct in that it does not involve moral turpitude or otherwise warrant discipline.

The examiner for the Office of Trial Counsel contends that: the mitigating factors set forth in the declarations are not relevant to a determination of whether respondent's convictions involved moral turpitude or other misconduct warranting discipline; respondent's evidentiary concerns are without merit and were waived by his not appearing at trial; and the facts and circumstances surrounding respondent's convictions involve moral turpitude and warrant discipline.

1. Declarations

The declarations respondent submitted (exhs. B and C) are from two of his clients attesting to his character and legal abilities. The examiner objected to the declarations being admitted into evidence by the referee since they were hearsay and deprived the Office of Trial Counsel of the opportunity to cross-examine the declarant.

[1] Neither declarant was present during the incident underlying respondent's criminal conviction nor did their declarations contain any information which could shed light on the incident. Therefore, under our charge from the Supreme Court to determine whether the facts and circumstances of respondent's criminal conduct involve moral turpitude, the proffered client declarations are not relevant and the hearing referee was correct in not relying on them in his evaluation of the moral turpitnde issue.

2. Evidence Admitted and Credibility Findings

Respondent asserts that inadmissible hearsay evidence was admitted at the hearing and the decision is tainted as a result. Two of the examples respondent cites are not hearsay. [2] Payne's testimony declares her knowledge of respondent's conflicts with the office building's management and is not hearsay. [3] Nor is the officer's testimony of her observations of witnesses at the scene. [4] Respondent also asserts that the replica gun was not offered into evidence and that necessitates excluding any evidence relating to it. There is no rule that excludes the admission of proper evidence because the object to which testimony relates is not introduced into evidence.

[5] The officer's testimony describing Hart's retelling of the incident was hearsay insofar as the truth of her statements is concerned, but respondent waived his hearsay objection when he failed to appear at the hearing. (*Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 109; *Morales* v. *State Bar* (1988) 44 Cal.3d 1037, 1044.) Under our independent review (rule 453, Trans. Rules Proc. of State Bar), we find sufficient trustworthiness as to the hearsay evidence and conclude it was properly relied on by the referee.

Respondent's attack on the testimony of the witnesses at the hearing is unavailing as well. What he characterizes as inconsistent statements by the witnesses are their observations of and reactions to respondent's conduct: the expression on respondent's face, their belief that the gun was real, the click of the hammer when the trigger was squeezed, and the fear generated by respondent's pointing of the weapon at them and his order to freeze. Respondent's reiterated contention that Hart, Payne and Hale falsely manufactured their fear in order to get respondent in trouble is contradicted by the credibility findings of the hearing referee and the criminal conviction itself. [6] We are obligated to afford great weight to the assessments of credibility made by the hearing referee, for he is in the best position to see the witnesses and judge, by their demeanor and address, the truthfulness of each. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 931.) By repeating his version of the events, respondent does not demonstrate the referee's findings were unfounded. (*Ibid.*) [7a] Moreover, the conviction conclusively established that respondent's acts were done in a threatening manner so as to cause a reasonable person apprehension or fear of bodily harm. (Bus. & Prof. Code, § 6101 (a); Pen. Code, § 417.2, subdivision (a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097.) We therefore see no reason to alter the hearing referee's factual findings.

3. Moral Turpitude

Respondent contends that his acts do not rise to the level of moral turpitude. He argues that the primary purpose of lawyer discipline is the protection of the public, not the punishment of the attorney. In evaluating his own conduct, he asserts that no clients were involved, no person was harmed and no property was mishandled. He declares that the general public was adequately protected by the criminal justice system, which imposed a two-year probation term on respondent with conditions, including admonitions. Respondent notes examples of behavior in which moral turpitude was found, such as: writing bad checks with knowledge that there are insufficient funds in the bank account; serious offenses against minors; willful attempt to evade taxes;[2] **[8 - see fn. 2]** or a criminal conviction for possession of marijuana with intent to distribute. Respondent contends that the nature of his criminal conduct falls far short of the standards of moral infirmity represented by the moral turpitude instances he presents. He urges that the referee's finding of moral turpitude be reversed.

In response, the examiner contends what should have been a situation routinely heard and resolved by a legal process, the notice of an eviction, was turned by respondent's "outlandish and depraved tactics" (Examiner's Review Department Brief, p. 6) into a threatening episode. The examiner states that respondent's motive for brandishing the replica weapon was to gain some advantage over his landlord. The examiner also suggests that if respondent's reaction to pressure under the circumstances in this case resulted in criminal conduct which placed at least three people in fear of their lives, then the public needs protection in the future from any further reactions from respondent to pressure-filled legal disputes. The examiner argues that respondent's actions were premeditated and designed to induce fear and terror in those persons working for his landlord.

[7b] We affirm the finding of the referee below that respondent's acts caused reasonable fear and apprehension of harm, for those elements were established by respondent's criminal conviction. **[9]** The conclusion of premeditation is drawn from the amount of time respondent had after the delivery of the three-day notice to quit until completion of his criminal acts. Respondent went to the first floor reception area of the office of the building and asked for Hart, speaking to a handyman who was working there. Hart came out from the back and looked up to see respondent pointing the replica gun at her. After a few seconds she turned away and heard him pull the trigger. He left the area and went up to the third floor. At the third floor reception area he entered a back room, where he again with deliberation brandished the gun, pointed it at Payne and Hale and pulled the trigger. The time it took from receiving the notice until the first incident, as well as the break between traveling from the first floor back to the third floor area between incidents, was sufficient time, however short, for respondent to plan his acts and to reflect upon them.

[10] Moral turpitude determinations are a matter of law. (*In re Higbie* (1972) 6 Cal.3d 562, 569.) Moral turpitude is not a concept that fits a precise definition. (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 110.) The definition most often recited by the Supreme Court is presented in *In re Craig* (1938) 12 Cal.2d 93, 97: "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." The Supreme Court has stated that the definition of moral turpitude is measured by the morals of the day (*In re Higbie, supra*, 6 Cal.3d at p. 572) and may vary according to the community or the times. (*In re Hatch* (1937) 10 Cal.2d 147, 151.) The Supreme Court has characterized the moral turpitude prohibition as a flexible, "commonsense" standard (*In re Mostman* (1989) 47 Cal.3d 725, 738) with its purpose not the punishment of attorneys but the protection of the public and the legal community against unsuitable practitioners. (*In re Scott* (1991) 52 Cal.3d 968, 978.) Consistent with that purpose, "holding that an attorney's act

2. **[8]** The willful failure to file income tax returns alone does not involve moral turpitude per se. (E.g., *In re Fahey* (1973) 8 Cal.3d 842, 850.)

constitutes moral turpitude characterizes the attorney as unsuitable to practice law." (*In re Strick* (1983) 34 Cal.3d 891, 902, citing *In re Higbie, supra,* 6 Cal.3d at p. 570.)

[11] Some offenses are crimes of moral turpitude on their face, including acts universally decried as morally reprehensible or necessarily involving fraudulent or dishonest acts for personal gain. (*In re Kirschke* (1976) 16 Cal.3d 902, 904 [first degree murder]; *In re Basinger* (1988) 45 Cal.3d 1348, 1358 [grand theft].) Other offenses do not in and of themselves constitute crimes of moral turpitude, such as voluntary manslaughter (*In re Strick* (1987) 43 Cal.3d 644, 653) and simple assault (*In re Rothrock* (1940) 16 Cal.2d 449, 459). "The commission of such lesser offenses [as simple assault] by an attorney in the heat of anger or as the result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law and should not be deemed to constitute moral turpitude." (*In re Rothrock, supra,* 16 Cal.2d at p. 459.) In this case, the Supreme Court did not find moral turpitude to be imputed from the conviction itself and directed the State Bar Court to examine the facts behind the offense.

[12a] It is evident that respondent's actions were provoked in part by the three-day notice to vacate his office space. This event was, however, the culmination of a series of disagreements between respondent and his landlord. Their relationship had been acrimonious. We do not accept as an excuse, nor did the referee, respondent's claim that due to the strained relationship with his landlord, combined with very hot weather on the day in question, the service of the three-day notice to quit caused something inside respondent to snap. The testimony of the witnesses concerning his demeanor, particularly his cold, blank stare, and the professional manner in which he deployed the replica gun, provided a sufficient basis for the referee to conclude that respondent was not acting out of uncontrollable anger or other disabling disorder. He had the time and opportunity to ponder his acts prior to the initial confrontation on the first floor. Respondent had traveled from the third to the first floor, waited while the handyman working in the office reception area summoned Hart from a back office, then confronted her with the replica gun. Respondent had additional time for reconsideration between his criminal episodes on the first and third floors to consider his actions. However, he repeated his outrageous conduct, ordering innocent bystanders to freeze in the face of his apparent deadly weapon and putting all in fear for their safety and well-being.

[13] It is not of consequence that no one was physically injured by respondent's acts. (See *In re Mostman, supra,* 47 Cal.3d at p. 740, fn. 6.) Respondent's acts were intended by respondent to be perceived as, and were in fact perceived by his victims to be life-threatening. There was no reason for them to believe that the weapon was not real, that respondent was not prepared to fire it and that when he did pull the trigger, they would not be shot and killed. By his acts, respondent could have provoked heart attacks in the victims or armed response to the perceived threat, thus demonstrating a flagrant disregard toward human life. (Cf. *In re Alkow* (1966) 64 Cal.2d 838, 841.)

[12b] Respondent's inappropriate acts in answer to the three-day notice are unacceptable from anyone in society and particularly reprehensible from an attorney. As noted earlier, respondent's dispute with his landlord was one easily and routinely settled through normal legal processes. There was insufficient provocation to warrant an extraordinary, let alone extralegal, remedy. Rather than respecting and using legal methods to resolve his own conflict, respondent chose to threaten instead. Respondent's criminal conduct put members of the general public not involved in the underlying dispute in fear for their lives.

[14] Any determination of moral turpitude in an offense not inherently involving moral turpitude is fact-sensitive. We are aware that there have been recent prior cases in which serious assaultive conduct has not been found by the Supreme Court to involve moral turpitude. In *In re Larkin* (1989) 48 Cal.3d 236, Larkin contracted with a former client to have the client assault the boyfriend of Larkin's estranged wife, and threaten the boyfriend to leave town or face further injury. Larkin was originally charged with felony charges of assault and conspiracy.

Those counts were later reduced to misdemeanor charges and Larkin was convicted after a jury trial. The review department and hearing panel found Larkin's conviction for assault with a deadly weapon and conspiracy to commit that offense not to involve moral turpitude but found it to be other conduct warranting discipline. (*Id.* at p. 243.) The State Bar did not challenge the moral turpitude finding before the Supreme Court and the Supreme Court explicitly declined to consider the issue. (*Id.* at p. 244.) In *In re Otto* (1989) 48 Cal.3d 970, the Supreme Court affirmed the finding of the review department that Otto's conviction for assault by means to inflict great bodily injury (Pen. Code, § 245, subd. (a)) and infliction of corporal punishment on a cohabitant (Pen. Code, § 273.5), both misdemeanor charges, did not involve moral turpitude.

[12c] In *In re Larkin, supra*, 48 Cal.3d 236, the acts were by a surrogate, not by the attorney himself. The record in *In re Otto, supra*, 48 Cal.3d 970 indicates that the conduct stemmed in part from the attorney's abuse of alcohol, a circumstance which may influence a finding of moral turpitude. (*In re Rothrock, supra*, 16 Cal.2d 449, 459.) There are no such findings in this case.

CONCLUSION

[12d] Based on the foregoing, we agree with the hearing referee's assessment that the circumstances surrounding respondent's criminal offenses involve moral turpitude. Consistent with the Supreme Court's order of December 20, 1989, we remand the matter to the hearing department for a hearing and decision recommending the degree of discipline to be imposed.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN C. DEIERLING

A Member of the State Bar

[No. 88-C-15291]

Filed June 4, 1991

SUMMARY

Respondent was convicted of one felony count of possession of marijuana for sale. The Supreme Court placed him on interim suspension from the practice of law pending disposition of the disciplinary proceeding against him. Upon consideration of the facts and circumstances surrounding respondent's conviction, the State Bar Court hearing judge found that respondent's conduct involved moral turpitude, but that disbarment would be an excessive sanction. The hearing judge recommended a four-year stayed suspension, four years probation, and actual suspension for two years (including up to one year credit from the interim suspension) and until respondent showed rehabilitation and fitness to practice under standard 1.4(c)(ii). (Hon. Alan K. Goldhammer, Hearing Judge.)

The examiner requested review, seeking respondent's disbarment. Upon its independent review, the review department held that the hearing judge had properly considered evidence of respondent's 1982 arrest for growing marijuana plants, which had been disposed of by diversion, since respondent had testified voluntarily on the matter and made no objection to the questions. In light of the commercial nature of respondent's marijuana growing, offset by the mitigating evidence of respondent's subsequent rehabilitation from drug and alcohol abuse, the review department concurred with the hearing judge's conclusions that the facts and circumstances surrounding the conviction involved moral turpitude, but that there were sufficient mitigating circumstances to warrant respondent's suspension rather than disbarment. In order to place respondent in the same position with respect to the length of his actual suspension that he would have been in absent a request for review, the review department recommended that respondent be suspended for four years, stayed, with four years of probation and actual suspension for thirty months, retroactive to the effective date of his interim suspension, and until respondent complied with standard 1.4(c)(ii).

COUNSEL FOR PARTIES

For Office of Trials: Hans M. Uthe, Jerome Fishkin

For Respondent: Harry J. Englebright

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **159 Evidence—Miscellaneous**

Respondent's assertion that the hearing judge improperly considered his prior arrest for growing marijuana, the prosecution of which had been diverted, was without merit, where respondent voluntarily testified, with advice of counsel, that he had grown marijuana at the time in question, and where respondent did not object to questions on the subject.

[2] **159 Evidence—Miscellaneous**
194 Statutes Outside State Bar Act

It is not clear that the statute regarding inadmissibility of evidence regarding diversion proceedings (Penal Code section 1000.5), and related case law, applies in attorney disciplinary proceedings, since such proceedings are conducted in the judicial branch of government by the State Bar Court, acting as an arm of the Supreme Court, and are aimed at assessing the attorney's fitness to practice law. Even if such authorities are applicable, evidence of respondent's arrest which resulted in diversion was properly used to show that respondent had a long history of involvement with marijuana.

[3 a, b] **1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes**

No Supreme Court opinion has determined that a conviction of possession of marijuana for sale is one that inherently involves moral turpitude; hearing judge's conclusion that such a conviction did inherently involve moral turpitude was in error.

[4] **164 Proof of Intent**
191 Effect/Relationship of Other Proceedings
1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes
1691 Conviction Cases—Record in Criminal Proceeding

The commercial or distribution aspect of respondent's crime was conclusively established by his conviction of possession of marijuana for sale.

[5] **1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes**
1523 Conviction Matters—Moral Turpitude—Facts and Circumstances

In matter arising from conviction of possession of marijuana for sale, respondent's role as a principal, his motive of potential financial gain and his awareness of the illegality of his actions demonstrated that moral turpitude was involved in the circumstances surrounding respondent's conviction.

[6] **801.30 Standards—Effect as Guidelines**

It is important to examine the Standards for Attorney Sanctions for Professional Misconduct as guidelines.

[7] **801.41 Standards—Deviation From—Justified**
1552.59 Conviction Matters—Standards—Moral Turpitude—Declined to Apply

Where enough mitigating circumstances had been sufficiently established, and were coupled with the lack of extreme seriousness of respondent's offense, the hearing judge correctly concluded that suspension rather than disbarment was the appropriate discipline for a conviction of possession of marijuana for sale, even though the circumstances of the conviction involved moral turpitude.

[8] **162.20 Proof—Respondent's Burden**
725.12 Mitigation—Disability/Illness—Found
750.10 Mitigation—Rehabilitation—Found
Although the Supreme Court requires that lawyers' claims in mitigation based upon substance abuse show adequate evidence of a causal connection between the abuse and misconduct and a meaningful and sustained rehabilitative period, the Court does not require that the respondent's rehabilitation be complete to qualify as mitigation. Where respondent showed that his marijuana use and alcohol abuse led in part to his criminal activity, and that he had undertaken a program of steady progress toward rehabilitation, and had successfully dealt with his addiction and maintained sobriety, mitigation was properly found.

[9] **172.20 Discipline—Drug Testing/Treatment**
172.30 Discipline—Alcohol Testing/Treatment
Probation conditions which included regular substance screening were well directed to maintain respondent's program of rehabilitation from drug use and alcohol abuse and to offer appropriate protection to the public.

[10] **613.90 Aggravation—Lack of Candor—Bar—Found but Discounted**
While respondent was less than fully candid with the State Bar Court in his lack of explanation of some of the circumstances surrounding his conviction, the hearing judge properly found that respondent's lapses of candor were not so egregious as to require a finding in aggravation.

[11] **695 Aggravation—Other—Declined to Find**
While respondent's criminal offense was surrounded by his possession of firearms, such possession was not a separate aggravating circumstance, where there was no evidence that the firearms were illegal or that they were used in an aggressive or threatening manner.

[12] **695 Aggravation—Other—Declined to Find**
While attorneys' illicit conduct involving minors has been viewed critically by the Supreme Court in the past, the presence of marijuana in respondent's home where his teenage sons resided was not an aggravating factor in the absence of direct evidence that the minors were exposed to illegal conduct or had access to the marijuana.

[13] **1515 Conviction Matters—Nature of Conviction—Drug-Related Crimes**
Other than one disbarment in a matter involving additional very serious misconduct, marijuana distribution convictions of attorneys have resulted in suspension ranging from no actual suspension to three years stayed suspension and two years actual suspension.

[14 a, b] **130 Procedure—Procedure on Review**
1549 Conviction Matters—Interim Suspension—Miscellaneous
1552.53 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Where review department saw no justifiable reason to deviate from hearing judge's recommendation of suspension in felony conviction matter which had resulted in interim suspension, and effect of examiner's request for review had been to extend interim suspension, review department believed it appropriate to attempt to place respondent in same position as if examiner had not requested review, by modifying length of suspension and giving increased credit for interim suspension.

[15] **116 Procedure—Requirement of Expedited Proceeding**
135 Procedure—Rules of Procedure
176 Discipline—Standard 1.4(c)(ii)
2403 Standard 1.4(c)(ii) Proceedings—Expedited
2409 Standard 1.4(c)(ii) Proceedings—Procedural Issues
Under applicable expedited hearing procedures, a respondent may apply for a hearing pursuant to standard 1.4(c)(ii) up to 150 days before the respondent's actual suspension is set to expire. (Rules 810-826, Trans. Rules Proc. of State Bar.)

[16] **175 Discipline—Rule 955**
1699 Conviction Cases—Miscellaneous Issues
Where respondent in conviction matter had been ordered to comply with rule 955, California Rules of Court, at the time of respondent's interim suspension, and that suspension had remained in effect continuously since ordered, review department did not recommend that respondent be ordered to comply again in connection with final imposition of discipline.

ADDITIONAL ANALYSIS

Aggravation
Found
541 Bad Faith, Dishonesty
586.11 Harm to Administration of Justice
691 Other
Mitigation
Found
791 Other
Discipline
1613.10 Stayed Suspension—4 Years
1615.08 Actual Suspension—2 Years
1616.50 Relationship of Actual to Interim Suspension—Full Credit
1617.10 Probation—4 Years
Probation Conditions
1023.10 Testing/Treatment—Alcohol
1023.20 Testing/Treatment—Drugs
1024 Ethics Exam/School
1630 Standard 1.4(c)(ii)

OPINION

STOVITZ, J.:

Respondent John C. Deierling was admitted to practice law in California in 1977. He has no prior record of discipline. In 1989, he was convicted of one count of violation of Health and Safety Code section 11359 (possession of marijuana for sale). Effective May 19, 1989, the Supreme Court placed him on interim suspension, since his conviction was of a California felony. (Bus. & Prof. Code, § 6102 (a).)

After referral of his conviction by the Supreme Court, a State Bar Court hearing judge found that the facts and circumstances surrounding respondent's offense involved moral turpitude. The judge recommended a four-year stayed suspension on conditions including probation for that period and actual suspension for the first two years and until respondent demonstrates his rehabilitation and fitness to practice under standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V). The hearing judge also recommended that up to one year of the actual suspension be credited to respondent's interim suspension.

Claiming that the hearing judge's suspension recommendation is inadequate and that disbarment is called for, the examiner has sought our review. He also contends that some mitigating circumstances found by the judge were not sufficiently established and that a number of aggravating circumstances predominate. In contrast, the respondent, although not seeking review, contends that some of his testimony was improperly considered but that the examiner's claims are not well taken with regard to aggravating and mitigating circumstances.

Independently reviewing the record, we have concluded that, with one insignificant exception, the hearing judge's findings of fact are fully correct. In our view, the judge weighed appropriately all mitigating and aggravating circumstances to reach a disciplinary result consistent with the balance of factors present and clearly in line with comparable Supreme Court decisions arising from similar offenses. Because we find no reason to disturb the hearing judge's essential findings or recommendation, we adopt the essence of the judge's recommended discipline as if this review had not intervened and extended respondent's interim suspension. Accordingly, we recommend to the Supreme Court that respondent be suspended from the practice of law for four years, that execution of that suspension be stayed on conditions including a four-year probation, and that actual suspension be for a period of thirty months commencing May 19, 1989, and until respondent establishes proof of rehabilitation and fitness to practice under standard 1.4(c)(ii). We also recommend that respondent comply with the other conditions of probation recommended by the hearing judge.

I. PROCEDURAL HISTORY

In January 1989, respondent pled nolo contendere in a municipal court of El Dorado County, California, to one count of violating Health and Safety Code section 11359 (possession of marijuana for sale).[1] In May 1989, the Superior Court of El Dorado County suspended imposition of sentence and admitted respondent to three years probation on conditions including six months in county jail and the duty to abstain from alcoholic beverages and any restricted dangerous drugs or narcotics, including marijuana. (Exh. 1.)

In the meantime, the State Bar had transmitted to the Supreme Court the record of respondent's conviction; and, effective May 19, 1989, the Supreme Court suspended respondent until final disposition of this proceeding of because of his California felony conviction. (Bus. & Prof. Code, § 6102 (a).) On October 11, 1989, the high court referred respondent's conviction to the State Bar Court for a hearing, report and recommendation as to whether the facts and

1. Upon respondent's plea, an "armed" allegation under Penal Code section 12022, subdivision (a) was stricken. Dismissed were counts charging respondent with a violation of Health and Safety Code section 11358 (planting or cultivating marijuana) and Penal Code sections 12025 (carrying a concealed firearm) and 12031 (carrying a loaded firearm). (Exh. 1.)

circumstances surrounding his offense involved moral turpitude or other misconduct warranting discipline. That Supreme Court order gave rise to the proceeding we now review.

II. THE FACTS AND CIRCUMSTANCES SURROUNDING RESPONDENT'S CONVICTION

We agree with the hearing judge's observation (decision, pp. 6, 8-9) that the basic facts of this case are not disputed. With one insignificant exception noted in the following footnote, we adopt all 13 of the judge's "findings of fact."[2] The findings and supporting facts may be summarized as follows:

Respondent was arrested in 1988 while tending his marijuana plants in a small grove in the El Dorado Forest. Originally, he planted 40 to 70 plants. Using botanical principles to maximize marijuana quality, he ended up with about 25 plants. (Decision, pp. 2-3; R.T. pp. 57-62, 148.) One was seven feet tall. Most of the rest were not fully mature and were three to four feet tall. Expert evidence posited that if a single mature (six- to seven-foot tall) plant were to yield one pound of saleable marijuana plant tops, the street value of each of respondent's plants when mature would be $1,800 to $2,200 per pound for a total value of between $45,000 to $55,000. (Decision, p. 4; R.T. pp. 104, 124-125.)

When arrested, respondent had a loaded revolver (.357 Colt "Python") in his day pack slung over his back. There was a dispute in the testimony whether the weapon was holstered or not but it was undisputed that respondent never touched the revolver during the arrest and the arrest was peaceful; respondent was cooperative. (Decision, p. 3; R.T. pp. 21, 35-36, 222-224.)

After arrest, a search warrant was executed on respondent's home. His 18-year-old son was there. Investigating officers found marijuana-growing paraphernalia such as instruction books, seed packages, indoor growing lights and irrigation equipment. They also found scales for weighing marijuana, marijuana seeds and several firearms including a semi-automatic rifle[3] and pistol. Respondent's 16-year-old son also lived there but was not home during the search. (Decision, p. 5; R.T. pp. 81, 84-89, 93, 101-102, 134-135.)

There is no evidence and no claim that respondent had ever sold any of the marijuana he was cultivating, but it almost all was still maturing. There is no doubt from the several law enforcement officers who testified that the "crop" respondent was growing was a commercial one. Respondent acknowledged his conviction of possession of marijuana for sale; but other than testifying that he did not have any intention of going into the marijuana growing business, he did not explain what his aims were in growing marijuana. (R.T. pp. 209-210.) Respondent also testified that the guns in his home were for collecting and hunting purposes, that some of the equipment found in his home was for ceramics, not marijuana, and that the scales were for weighing out ammunition for bullets he made for his guns. (*Id.* at pp. 211-214, 221, 232.)

Since his admission in 1977, respondent's law practice was devoted almost entirely to criminal defense matters either as a sole practitioner or in association with others. He had defended persons charged with narcotics law violations and was familiar with those laws as well as the illegality of his own acts in cultivating marijuana. By the time of his arrest, his practice was "doing okay." (Decision, p. 4; R.T. pp. 207, 210-211, 227-228.)

Respondent had used marijuana for many years, first "smoking pot" when he was 13. (Decision, p. 4.) In 1987 and 1988 he was buying marijuana in one-eighth ounce units for between $25 and $40 per unit.

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2. We modify the fifth line of finding 10 (decision, p. 4, line 20) to find that respondent entered the Other Bar program in October 1988, not 1989.

3. Respondent disputed sharply testimony of a law enforcement officer that this rifle was an "assault" rifle. It is undisputed that it was a semi-automatic rifle. (R.T. pp. 101-102, 222.) At the time respondent's house was searched, the rifle was a legal weapon and it was legal to have it in his residence. (R.T. pp. 134-135.)

Sometimes, this quantity would last respondent a week; at other times, if he was really "into smoking," only a day. He described the drug's effects as follows: "It didn't show. I wasn't abusing the drug at that point, at least, I didn't feel that I was abusing it, or didn't realize that I was abusing at that point in time. I restricted it to evenings and weekends. And I couldn't tell myself, I didn't see that it was interfering with my practice of law, and I didn't do anything that would give any outward, I mean I didn't miss appearances, I did all the work I was supposed to do, there weren't any indications like that that I wasn't—I was doing real well, I was doing okay." (R.T. pp. 211-212.)

On direct examination, respondent testified that about 15 years earlier, he grew a single marijuana plant as a "lark" and did not grow any more until 1988. (*Id.* pp. 208-209.) On cross-examination he again testified that these were his only two instances of marijuana growing. When later asked if he had ever been to Woodland (Yolo County), he testified that he had grown marijuana plants there and was arrested for it in 1982. (Decision, p. 4; R.T. p. 230.)

In addition to his long-time marijuana use, respondent testified that he had had occasional bouts with alcohol abuse resulting in an occasional "binge." He never had blackouts or memory loss. While testifying that his marijuana and alcohol usage were sporadic, respondent considered that he was an addict. (Decision, p. 4; R.T. pp. 217-218, 232-233, 236-237.)

Between his 1989 plea and sentencing, respondent completed a 90-day alcohol recovery program at the Sacramento Recovery House (decision, p. 4; exh. B) and since October 1988, he has participated in the Other Bar program for recovering alcoholics. Norwood Grisham, program consultant, who had 15 years of experience counselling or monitoring persons who have abused chemicals, admitted that he never tested respondent nor was he his sponsor but Grisham testified that he checked on respondent "from time-to-time" and that he was still adhering to his program and maintained sobriety. (R.T. pp. 178, 185, 195.)

III. FINDINGS OF FACT AND CONCLUSIONS OF HEARING JUDGE

After making the essential findings of fact about the circumstances surrounding respondent's misconduct, which we have adopted, the hearing judge concluded that respondent's offense and the facts and circumstances surrounding its commission involved moral turpitude.[4] The hearing judge also found applicable certain portions of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ["standards"]). He found that respondent's offense was surrounded by bad faith and concealment as an aggravating circumstance. (Standard 1.2(b)(iii).) The judge also found aggravating that respondent's misconduct significantly harmed the administration of justice (standard 1.2(b)(iv)) and that respondent was convicted of a crime involving moral turpitude inherently and in the facts and circumstances. Under standard 3.2, disbarment was required unless compelling mitigating circumstances clearly predominate. (Decision, pp. 5-6.)

In discussing the evidence, the hearing judge noted that respondent, because of his criminal defense law practice, was well aware of the laws prohibiting narcotics cultivation or distribution, that he was a principal in the marijuana cultivation, that respondent's plan to cultivate marijuana was secretive, that weapons were implicated in the offense but only peripherally, that the fact of respondent's conviction as well as the surrounding circumstances showed that it was a modest but unquestionably commercial enterprise; and that respondent's testimony was incredible that he did not intend any commercial use of the marijuana he was growing. (Decision, pp. 7-11.) Despite the serious aspects of respondent's crime and its surrounding circumstances, the hearing judge concluded that respondent's mitigation was compelling and predominating. Therefore, the judge concluded that disbarment would be disproportionately harsh when viewed against relevant decisions of the Supreme Court. (Decision, p. 10.) The judge found it significant that respondent's offense was not committed in the capacity of attor-

4. See discussion, *post*, p. 560, regarding the judge's conclusion.

ney at law, nor directly related to the practice of law, that the amount of marijuana involved was far less than in other comparable Supreme Court opinions, that respondent did not profit from his illegal acts, that respondent did embark on a program of rehabilitation, albeit as a result of his arrest, and that a measurable period of stayed and actual suspension was necessary to fulfill the primary purposes of imposing discipline including the preservation of public confidence in the legal system. The hearing judge identified the primary factors which led him to conclude that disbarment was too harsh: the relatively small amount of marijuana involved, that respondent's own use of marijuana led to his offense and that he undertook a program of recovery from drug and alcohol abuse. (Decision, pp. 15-16.)

IV. DISCUSSION

A. Respondent Is Not Entitled to a New Hearing Based on His Claim of Prejudice in Admitting Evidence.

[1a] Upon review for the first time respondent asserts that the hearing judge improperly considered respondent's 1982 arrest in Woodland arising out of his having grown marijuana plants there. Since that prosecution had been diverted, respondent contends that any evidence received about it in this State Bar Court hearing was inadmissible and that the hearing judge should either redraft his decision to reflect its elimination from the record or, in the alternative, respondent should be given a new hearing.

[1b] Respondent's claim of error is without merit. At trial, respondent did appear surprised when asked if he had ever been in Woodland and appeared to realize that his answer would contradict his earlier testimony that he had only grown marijuana twice. Before respondent gave testimony about his 1982 cultivation, the examiner asked him twice whether he wanted to consult with his counsel. Not only did he decline to do so, but his counsel advised him to answer one of the questions about this 1982 matter. Before he was asked about his 1982 arrest, he volunteered that he had grown marijuana in 1982 in Woodland. (R.T. p. 230.) Respondent made no objection to his being asked these few questions and the examiner never introduced any documentary evidence concerning the 1982 arrest.

In support of his claim of error in admitting evidence, respondent cites Penal Code section 1000.5 and *B.W.* v. *Board of Medical Quality Assurance* (1985) 169 Cal.App.3d 219. In that case, the court construed Penal Code section 1000.5 and held that disciplinary proceedings before the Board of Medical Quality Assurance ("BMQA") cannot be predicated solely on the record of a diverted arrest after successful completion of diversion. The court noted that BMQA was not barred from using information in the doctor's arrest record to start proceedings before the licensee completed diversion, nor was the board barred from investigating the matter prior to diversion completion to "develop additional information." (*Id.* at pp. 232-233.)

[2] For several reasons, the cited authorities do not aid respondent. First, it is not at all clear that either Penal Code section 1000.5 or the *B.W.* case would apply to this attorney disciplinary proceeding, conducted in the *judicial* branch of government by the State Bar Court acting as an arm of the Supreme Court of California and having as its aim the assessment of an attorney's fitness to practice law. (Cf. *Stratmore* v. *State Bar* (1975) 14 Cal.3d 887, 891.) It should also be noted that in a relatively recent moral character admissions matter, in assessing whether an applicant for admission to practice law was possessed of good moral character, the Supreme Court recited evidence about several arrests for drug offenses not followed by filed charges or which were dismissed. (*Seide* v. *State Bar* (1989) 49 Cal.3d 933, 936.) Even if, arguendo, the principles of *B.W.* are deemed applicable to this situation, respondent's 1982 arrest was not used as the predicate for any disciplinary proceeding or action. As we recited, *ante*, this proceeding was started based upon respondent's 1989 conviction. Respondent's 1982 arrest was of no consequence in this proceeding. The only significance of the 1982 incident was respondent's voluntary testimony that he had grown marijuana. That fact was only significant to show, together with other facts freely testified to by respondent, that he had a long history of involvement with marijuana prior to his unchallenged 1989 conviction which started this disciplinary proceeding.

B. The Facts and Circumstances Surrounding Respondent's Conviction Involve Moral Turpitude.

[3a] Although we do correct the hearing judge's conclusion in his decision that respondent's conviction inherently involved moral turpitude,[5] [3b - see fn. 5] we adopt the judge's conclusion that the facts and circumstances surrounding that conviction do involve moral turpitude. [4] There can be no dispute as to the commercial or distribution aspect of respondent's crime. Not only was it conclusively established by his conviction (see Bus. & Prof. Code, § 6101), but on review respondent concedes the commercial potential of his activity. [5] Guided by the Supreme Court decisions in similar cases, we conclude that the circumstances showing respondent's role as a principal, his motive of potential financial gain and his awareness of the illegality of his actions demonstrate the correctness of the hearing judge's conclusion that moral turpitude was involved in the circumstances surrounding respondent's conviction. (See *In re Possino* (1984) 37 Cal.3d 163, 168, fn. 3; *In re Cohen*, *supra*, 11 Cal.3d at p. 421.) Significantly, respondent does not dispute that his conviction involved moral turpitude in its surrounding circumstances and did not seek review before us.

C. A Balanced Consideration of All Relevant Factors Leads toSuspension Rather Than Disbarment as the Appropriate Degree of Discipline, as the Hearing Judge Concluded.

In its essence, the examiner's position is that respondent's conviction warrants disbarment, that any mitigating circumstances are not sufficiently established and that aggravating circumstances predominate. We disagree, for we believe that the examiner has failed to focus sufficiently on the actions of our Supreme Court in specific cases involving marijuana distribution offenses.

[6] We acknowledge the importance of examining the standards as guidelines. (See *Harford* v. *State Bar* (1990) 52 Cal.3d 93, 100.) [7] Most applicable is standard 3.2, providing that final conviction of a member of a crime involving moral turpitude in the facts and circumstances shall result in disbarment unless the most compelling mitigating circumstances clearly predominate, in which case, not less than a two-year actual suspension shall be imposed. Review of this record supports the hearing judge's determination that enough mitigating circumstances have been sufficiently established, when coupled with the lack of extreme seriousness of respondent's offense, to warrant suspension rather than disbarment as the appropriate discipline. The examiner points to several factors to attempt to show that aggravation, not mitigation, preponderates. We shall deal with each factor in turn.

[8] The examiner claims that respondent did not show convincingly that his misconduct was attributed to his addiction or that he is sufficiently rehabilitated. While our Supreme Court does require lawyers' claims in mitigation based on substance abuse to show adequate evidence of a causal connection between the abuse and misconduct and a meaningful and sustained rehabilitative period (e.g., *Porter* v. *State Bar* (1990) 52 Cal.3d 518, 528; *Harford* v. *State Bar*, *supra*, 52 Cal.3d at p. 101), the Court does not require that the respondent's rehabilitation be complete to qualify as mitigating. Here, respondent presented convincing, uncontradicted testimony showing that his long-time marijuana use, and his alcohol abuse at least in part led to his marijuana cultivation. Equally uncontradicted was his testimony that he has successfully dealt with his addiction to date, maintaining sobriety. Whatever may have been the motivation for respondent's rehabilitative steps, he has undertaken a program of steady progress toward rehabilitation. Although witness Grisham was not respondent's counsellor, he checked up on him periodically and believed he was main-

5. [3b] We regard as more of an inadvertent error the judge's conclusion that respondent's conviction inherently involved moral turpitude. The Supreme Court order referring this matter to the State Bar Court did not so determine and no Supreme Court opinion in other cases involving the same or comparable marijuana offenses has so determined. (*In re Kreamer* (1975) 14 Cal.3d 524, 527, 530; *In re Cohen* (1974) 11 Cal.3d 416, 421; *In re Higbie* (1972) 6 Cal.3d 562, 569-570.)

taining sobriety. As noted, *ante*, Grisham had extensive experience observing persons addicted to chemicals. Respondent's testimony is buttressed further by the documentary evidence that he completed a three-month resident alcohol abuse program in Sacramento. (Exh. B.) [9] Moreover, the hearing judge's recommended probation conditions, including regular substance screening, which we adopt, seem well directed to maintain respondent's program of rehabilitation and offer appropriate protection to the public.

[10] Next, the examiner contends that respondent was not candid in these proceedings. In these circumstances, respondent cannot be overly faulted for not initially revealing his 1982 marijuana growing. As a criminal defense lawyer, he may have thought he was not required to reveal it since it ended in a diverted prosecution and he seemed momentarily surprised when the issue came up. If there was any lack of candor, it centered around his lack of explanation of what he planned to do with a grove which started with 40 to 70 marijuana plants. The hearing judge struck at the heart of the matter when he characterized respondent as "more childish and immature than dishonest or venal. While [r]espondent was less than fully candid with the Court, his lapses of candor were not so egregious as to require a finding that Standard 1.2(b)(vi) applied." (Decision, p. 14.)

[11] The examiner points to respondent's possession of firearms as an aggravating circumstance. While respondent's offense was indeed surrounded by his firearm possession, there is no evidence whatever that those firearms were illegal or used in an aggressive or threatening manner. The hearing judge correctly concluded that the circumstance that respondent was armed spoke more of the commercial nature of his marijuana activity than as a separate aggravating circumstance. (See decision, pp. 10, 15.)

[12] The examiner also seeks to aggravate respondent's offense by contending that it showed his exposure of minor children to illicit conduct. An attorney's illicit conduct involving minors has been viewed quite critically by our Supreme Court in the past. (E.g., *In re Duggan* (1976) 17 Cal.3d 416, 420; *In re Plotner* (1971) 5 Cal.3d 714, 727.) However, here there is no direct evidence that minors were exposed to any illegal conduct. Respondent's son who was at home at the time of the search was 18 and there is no proof that he or respondent's other son had access to any marijuana used by respondent. While the hearing judge did not expressly deal with this factor, he did note that respondent was the sole principal since "no one else was implicated." (Decision, p. 9.)

[13] The only case of which we are aware resulting in disbarment following an attorney's conviction of marijuana distribution activities was *In re Possino*, *supra*, 37 Cal.3d 163. However, the facts and circumstances of that offense were far more serious than the record before us. Possino offered to sell 350 pounds of marijuana and, in addition, offered to buy sizable amounts of cocaine and sell large amounts of stolen securities. His offense was aggravated by his improper approach to a juror during his criminal trial. Other marijuana distribution convictions of attorneys have resulted in suspension ranging from no actual suspension for an attorney who, on two instances, had distributed large quantities of marijuana and had presented undisputed evidence concerning his rehabilitation and past and present good character (*In re Kreamer*, *supra*, 14 Cal.3d 524), to three years stayed suspension and two years actual suspension for an attorney who knowingly assisted another in transporting a large quantity of marijuana and who also presented favorable character evidence. (*In re Cohen*, *supra*, 11 Cal.3d 416.)

Although the foregoing cases were all decided prior to the standards, we believe that the Supreme Court would not take a materially different approach to the circumstances surrounding respondent's conviction. In that regard, we take note of *In re Leardo* (1991) 53 Cal.3d 1, where the Court deemed adequate a suspension completely retroactive to a lengthy interim suspension for an attorney's possession of heroin and cocaine with intent to distribute, fully considering the strong evidence of rehabilitation in that record, as well as Leardo's addiction to prescribed medication which led ultimately to his illegal drug abuse.

[14a] In the matter before us, we conclude that the hearing judge appropriately weighed all relevant factors and did so in a most careful, thorough and balanced manner. We see no justifiable reason to deviate from the judge's essential recommendation which fully reflects the seriousness of respondent's offense. Because that recommendation is for suspension and because respondent's felony conviction resulted in his interim suspension, the necessary effect of the examiner's request for review has been to extend that interim suspension. We estimate that if the examiner had not sought review and that if the Supreme Court had adopted the hearing judge's decision without any petition for review filed in the Supreme Court, the Supreme Court would likely have acted by January 1991 and respondent's actual suspension would have been set to expire as early as January 1992 if respondent had, by that time, made the showing under standard 1.4(c)(ii) required in the hearing judge's decision filed August 6, 1990.

[14b] We believe it appropriate in this particular matter to attempt, as much as possible, to place the respondent in relatively the same position as he would have been had the examiner not requested review. We therefore recommend that respondent be suspended from the practice of law for four years, that execution of that suspension be stayed, and that respondent be placed on probation for a period of four years upon conditions including that he be actually suspended from practice for a period of 30 months commencing May 19, 1989, and until he makes a satisfactory showing of his rehabilitation and fitness under standard 1.4(c)(ii).[6] [15] Under the expedited hearing procedures adopted by the Board of Governors, respondent may apply for a hearing to demonstrate his rehabilitation and fitness up to 150 days before his actual suspension is set to expire, should the Supreme Court follow this recommendation. (Rules 810-826, Trans. Rules Proc. of State Bar.)

V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, John C. Deierling, be suspended from the practice of law in the State of California for a period of four years, that the execution of such suspension be stayed, and that respondent be placed on probation for a period of four years upon the following conditions:

1. Respondent shall be actually suspended from the practice of law in California for a period of 30 months commencing May 19, 1989, the effective date of his interim suspension and until he has shown proof satisfactory to the State Bar Court of his rehabilitation and fitness to practice pursuant to standard 1.4(c)(ii).

2. Respondent shall comply with the provisions of paragraphs 2 through 15 of the conditions recommended by the hearing judge and contained on pages 18 through 22 of his decision.

We also recommend to the Supreme Court that respondent be ordered to take and pass the California Professional Responsibility Examination administered by the State Bar of California Committee of Bar Examiners within one (1) year from the effective date of the Supreme Court's order. [16] We do not recommend that respondent be ordered to again comply with the provisions of rule 955, California Rules of Court, as respondent was so ordered at the time of his interim suspension and that suspension has remained in effect continuously since ordered.

We concur:

PEARLMAN, P.J.
NORIAN, J.

6. Although the hearing judge recommended a two-year actual suspension as a probation condition, our recommendation of a 30-month actual suspension is not intended as increased discipline. Since, due to this intervening review, our recommendation affords greater credit for respondent's interim suspension than did that of the hearing judge, our recommendation proposes the same practical length of actual suspension as did that of the hearing judge.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HARRISON E. TAYLOR

A Member of the State Bar

[No. 87-O-17713]

Filed June 5, 1991; as modified, July 17, 1991

SUMMARY

A hearing referee found, after a default hearing, that an attorney was culpable of representing clients while under suspension for failure to pay his State Bar membership fees; failing to perform the services for which he was hired; failing to communicate with clients; failing to return client files, papers and unearned advanced fees; deceiving a client, and failing to cooperate with the State Bar in the investigation of the client matters. Based on these findings and on the existence of earlier discipline, the referee recommended disbarment. (Jared Dreyfus, Hearing Referee.)

The review department modified the referee's decision to expand the findings of fact and revise the conclusions of law and, with those modifications, adopted the recommendation that the attorney be disbarred. The review department held that attorneys' duty to cease practicing law while suspended supersedes their duty to render competent legal services and their duty not to withdraw from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of their clients. As a result, the attorney could not be found culpable of violating these duties by virtue of acts or omissions during his suspension. However, attorneys' duties to communicate with clients (other than by giving legal advice) and to refund unearned fees survive their suspensions, and all fees advanced for work performed while suspended must be returned.

The charge of failing to cooperate with the State Bar investigation was overturned because of the absence of evidence that the address to which the investigator's letters were sent was a valid address for the attorney.

The review department concluded that the attorney had repeatedly practiced law while suspended; deceived a court and client by filing an unauthorized lawsuit and by using a presigned verification of a civil complaint without ascertaining from the client the veracity of the facts therein; failed to communicate with clients, and failed to return client files, papers and unearned advanced fees. This misconduct, coupled with the attorney's prior State Bar discipline; his failure to comply with his criminal probation; his failure to participate in both the present and past disciplinary proceedings, and the lack of mitigating circumstances, clearly demonstrated that the risk of future misconduct was great and that disbarment was necessary.\

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

COUNSEL FOR PARTIES

For Office of Trials: Gregory B. Sloan

For Respondent: No appearance (default)

HEADNOTES

[1 a, b] **135 Procedure—Rules of Procedure**
165 Adequacy of Hearing Decision
166 Independent Review of Record
Where hearing referee's decision contained virtually no findings of fact and did not relate the conclusions of law either to the facts or to specific counts of the notice to show cause, review department was compelled to exercise its authority to make its own findings and conclusions based on independent review of the record, as authorized by rule 453 of the Transitional Rules of Procedure.

[2] **107 Procedure—Default/Relief from Default**
162.90 Quantum of Proof—Miscellaneous
204.90 Culpability—General Substantive Issues
Where the State Bar chooses to present evidence in a default hearing that undercuts or negates the allegations of the notice to show cause, it is the evidence, and not the allegations, that controls the findings of fact.

[3 a, b] **107 Procedure—Default/Relief from Default**
146 Evidence—Judicial Notice
162.19 Proof—State Bar's Burden—Other/General
165 Adequacy of Hearing Decision
Where hearing referee failed to determine whether respondent's default was properly entered, review department was required to do so, and for that purpose it took judicial notice of respondent's membership records address under Evidence Code section 459; evidence of membership records address is essential in a default case to assess the propriety of the default procedures.

[4] **230.00 State Bar Act—Section 6125**
The mere holding out by a suspended attorney that he or she is practicing or is entitled to practice law constitutes the unauthorized practice of law. Where suspended attorney accepted money to perform legal services, attorney violated probation against law practice by anyone other than active State Bar members.

[5] **199 General Issues—Miscellaneous**
Language used in an opinion is to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.

[6 a-c] **230.00 State Bar Act—Section 6125**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Suspended attorneys are expressly precluded by statute from practicing law. On the other hand, one of the Rules of Professional Conduct requires an attorney to perform the services for which he or she is hired, because the failure to do so can be an intentional or reckless failure to perform competently in violation of the rule. Thus, requiring a suspended attorney to comply with both the

unauthorized practice statute and the rule regarding competent performance would result in incompatible duties. For this reason, the rule regarding failure to act competently has no applicability to attorneys practicing while suspended. The suspended attorney's only duty is to stop practicing until reestablished as an attorney in good standing.

[7] **199 General Issues—Miscellaneous**
A statute should be interpreted so as to produce a result that is reasonable and if two constructions are possible, that construction which leads to the more reasonable result should be adopted.

[8 a, b] **230.00 State Bar Act—Section 6125**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
582.10 Aggravation—Harm to Client—Found
861.20 Standards—Standard 2.6—Disbarment
There is no reason to require suspended attorneys to comply with the rules requiring competent representation and prohibiting prejudicial withdrawal even while they are precluded from practicing because suspended. A full range of discipline is available to protect the public, courts and profession for unauthorized practice alone. Recklessness or incompetence in the unauthorized practice of law, or a precipitous withdrawal, would cause harm to the client and would constitute an aggravating factor which justifies greater discipline than would have been appropriate if no harm had occurred. In order to minimize harm to clients, suspended attorneys should take all steps to avoid foreseeable prejudice, short of practicing law.

[9] **277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]**
277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
The Rule of Professional Conduct which sets forth the duties and obligations of an attorney who withdraws from employment applies when an attorney ceases to provide services, even absent formation of an intent to withdraw as counsel for the client.

[10] **230.00 State Bar Act—Section 6125**
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
The Rule of Professional Conduct which provides that an attorney shall not withdraw until he or she takes steps to avoid foreseeable prejudice to the rights of the client requires, by its express terms, that the attorney continue representing the client until the attorney has taken steps to avoid foreseeable prejudice. This obligation directly contradicts the duty of a suspended attorney to cease practicing law immediately. It is unreasonable to hold an attorney to a duty of having to continue to represent his or her client for a reasonable period of time to avoid prejudice prior to withdrawal, if the attorney has an absolute duty to stop practicing due to a suspension. Thus, the rule against prejudicial withdrawal has no applicability to attorneys while they are suspended.

[11 a-c] **230.00 State Bar Act—Section 6125**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
An attorney must, upon withdrawal, promptly return any unearned fees. An attorney is not required to practice law in order to comply with this rule, and it therefore continues to apply even if an attorney is suspended. Moreover, a suspended attorney is legally precluded from practicing law and therefore, the attorney's agreement to provide legal services in exchange for a fee is illegal. Permitting a suspended attorney to retain any of the money paid him by a client for services rendered while suspended would condone the attorney's unauthorized practice of law and would be contrary to public policy.

[12] **213.10 State Bar Act—Section 6068(a)**
230.00 State Bar Act—Section 6125
231.00 State Bar Act—Section 6126
Charging an attorney with a violation of the duty to support the Constitution and laws, by reason of the attorney's violation of the statutes prohibiting practicing law while suspended, provides the basis for imposition of professional discipline for unauthorized practice.

[13] **220.00 State Bar Act—Section 6013, clause 1**
220.10 State Bar Act—Section 6103, clause 2
230.00 State Bar Act—Section 6125
With the exception of a wilful violation of a court order, section 6103 of the Business and Professions Code does not define a duty or obligation of an attorney but provides only that the violation of the attorney's oath or duties defined elsewhere is ground for discipline. Thus, an attorney can not violate section 6103 unless he or she violated a court order. However, an attorney who is suspended for failure to pay State Bar membership fees is suspended by order of the Supreme Court. Thus, the attorney's continued practice of law after suspension is a violation of the court order suspending the attorney and therefore is a violation of section 6103.

[14] **214.30 State Bar Act—Section 6068(m)**
230.00 State Bar Act—Section 6125
The statute requiring attorneys to communicate with their clients does not require a suspended attorney's continued practice of law, and a suspended attorney thus may be found culpable of violating the statute. It is extremely important for a suspended attorney to continue to communicate with the client so that prejudice to the client is minimized, though such communication must not take the form of legal advice.

[15] **221.00 State Bar Act—Section 6106**
230.00 State Bar Act—Section 6125
The statute providing that any act of moral turpitude by an attorney is cause for discipline applies regardless of whether the act was committed in the practice of law. Hence, a suspended attorney's duty under this statute does not contradict the attorney's duty to cease practicing while suspended.

[16] **221.00 State Bar Act—Section 6106**
An act of concealment can be dishonest and involve moral turpitude that is subject to professional discipline.

[17] **107 Procedure—Default/Relief from Default**
161 Duty to Present Evidence
162.90 Quantum of Proof—Miscellaneous
Where evidence offered by State Bar at default hearing neither established nor controverted or undermined allegations of notice to show cause, such allegations, which were deemed admitted by respondent's default, could properly be relied on to establish attorney's culpability.

[18] **221.00 State Bar Act—Section 6106**
The use of a presigned verification, attesting to the truth of facts set forth in a civil complaint, without first consulting with the client to assure that the assertions of fact are true, constitutes an act of moral turpitude.

[19] **221.00 State Bar Act—Section 6106**
230.00 State Bar Act—Section 6125
A suspended attorney held himself out to a client as entitled to practice law when he discussed her legal problems with the client, accepted a fee and filed a lawsuit on her behalf. This conduct also involved moral turpitude in that the attorney deceived the client by not advising her that he was not entitled to practice law. An attorney's practice of deceit involves moral turpitude.

[20] **220.30 State Bar Act—Section 6104**
230.00 State Bar Act—Section 6125
Requiring a suspended attorney to comply with the statutory prohibition against appearing as attorney for a party without authority would not necessitate the attorney's continued practice of law. The attorney can comply with the unauthorized appearance statute by not practicing while suspended. Accordingly, an suspended attorney who wilfully filed a lawsuit on behalf of a client without her authority could be found culpable of violating the statute.

[21] **214.30 State Bar Act—Section 6068(m)**
230.00 State Bar Act—Section 6125
A suspended attorney's failure to inform his client that he was suspended and that he was nonetheless filing an unauthorized complaint on her behalf, and his failure to communicate with the client in any other way, amounted to a violation of his statutory obligation to keep his client reasonably informed of significant developments with regard to her case.

[22] **106.20 Procedure—Pleadings—Notice of Charges**
204.90 Culpability—General Substantive Issues
214.30 State Bar Act—Section 6068(m)
A notice to show cause which alleged that an attorney was hired by a father to represent his son and that the attorney thereafter failed to perform services for, communicate with, and return unearned fees to, the father was sufficient to put the attorney on notice that he was charged with the specified misconduct in his dual representation of the father and son, because the attorney would not have had a duty to communicate with the father if he were not representing the father.

[23] **161 Duty to Present Evidence**
213.90 State Bar Act—Section 6068(i)
The State Bar failed to establish that an attorney violated his duty to cooperate with the State Bar in a disciplinary investigation, where the evidence showed that letters were purportedly sent to the attorney by State Bar investigators, but no evidence was submitted proving that the letters were properly addressed to, or received by, the attorney.

[24] **515 Aggravation—Prior Record—Declined to Find**
802.21 Standards—Definitions—Prior Record
The payment of State Bar membership fees is only a prerequisite to practicing law. No statute or rule of professional conduct requires payment of the fees unless the attorney intends to practice law in this state. Failure to pay fees is not improper in and of itself. The impropriety occurs when the attorney continues to practice law after suspension. Accordingly, an attorney's previous suspension for failure to pay membership fees is not a prior disciplinary record and is not an aggravating circumstance.

[25] **511 Aggravation—Prior Record—Found**
Even though criminal conduct underlying attorney's prior disciplinary suspension occurred partly at same time as professional misconduct involved in subsequent disciplinary matter, prior suspension was properly considered in aggravation in subsequent matter.

[26] **801.30 Standards—Effect as Guidelines**
1091 Substantive Issues re Discipline—Proportionality
The Standards for Attorney Sanctions for Professional Misconduct serve as guidelines in determining the appropriate degree of discipline to recommend. The review department must also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts.

[27] **230.00 State Bar Act—Section 6125**
861.40 Standards—Standard 2.6—Disbarment
Practicing law while suspended has resulted in a range of discipline from suspension to disbarment, depending on the circumstances of the misconduct, including the nature of any companion charges and the existence and gravity of prior disciplinary proceedings.

[28] **591 Aggravation—Indifference—Found**
611 Aggravation—Lack of Candor—Bar—Found
621 Aggravation—Lack of Remorse—Found
1091 Substantive Issues re Discipline—Proportionality
Where attorney displayed indifference and lack of remorse by failing to participate in past and present disciplinary proceedings, far more severe discipline was required than in other cases involving similar misconduct where attorneys did participate in disciplinary proceedings.

[29] **179 Discipline Conditions—Miscellaneous**
611 Aggravation—Lack of Candor—Bar—Found
691 Aggravation—Other—Found
An attorney is not a good candidate for suspension and/or probation where that attorney has failed to comply with the terms and conditions of a prior criminal probation, and has failed to participate in present and past disciplinary proceedings. These facts reflect the attorney's disdain and contempt for the orderly process and rule of law and clearly demonstrate that the risk of future misconduct is great.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
214.31 Section 6068(m)
220.01 Section 6103, clause 1
220.31 Section 6104
221.11 Section 6106—Deliberate Dishonesty/Fraud
230.01 Section 6125
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]

Declined to Find

213.15 Section 6068(a)
213.95 Section 6068(i)
220.15 Section 6103, clause 2
270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]

Aggravation
Found
541 Bad Faith, Dishonesty
Standards
802.30 Purposes of Sanctions
802.61 Appropriate Sanction
805.10 Effect of Prior Discipline
831.40 Moral Turpitude—Disbarment
831.50 Moral Turpitude—Disbarment
Discipline
1010 Disbarment

OPINION

NORIAN, J.:

We review the recommendation of a hearing referee of the State Bar Court that respondent, Harrison E. Taylor, be disbarred from the practice of law in this state. The referee found, after a default hearing, that respondent was culpable in four separate matters. These involved representing clients while under suspension for failure to pay his State Bar membership fees, failing to perform the services for which he was hired, failing to communicate with clients, failing to return client files, papers and the unearned portion of the fees, deceiving a client, and failing to cooperate with the State Bar in the investigation of the client matters. Based on these findings and on the existence of earlier discipline, the referee recommended disbarment.

No request for review has been filed. However, as part of the transition to the new State Bar Court system, under rules adopted by the State Bar Board of Governors, effective September 1, 1989, this review department, created by Business and Professions Code section 6086.65 and appointed by the Supreme Court, must independently review the record of all State Bar proceedings which were tried prior to September 1, 1989, before former referees of the State Bar Court, but assigned to this department after September 1, 1989. (Rules 109 and 452(a), Trans. Rules Proc. of State Bar.)

We set this matter for briefing and oral argument following our ex parte review of the record because of questions we had concerning the referee's findings of fact, conclusions of law and recommended discipline. We notified the examiner[1] of the areas of our concern by letter dated and filed February 27, 1990. The examiner's brief was filed April 3, 1990, and oral argument occurred on May 1, 1990. Subsequent to oral argument, the Supreme Court disciplined respondent in an unrelated matter. At our direction, the examiner submitted certified copies of the State Bar record of this prior discipline, which we take judicial notice of and make a part of the record of this proceeding.

Based on our independent review of the record, we have concluded that the referee's decision should be modified to expand the findings of fact and to modify the conclusions of law. With these modifications we recommend to the Supreme Court, as did the hearing referee, that respondent be disbarred.

I. BACKGROUND

This proceeding was initiated by a notice to show cause filed January 30, 1989. Counts one through three of the four-count notice alleged that respondent undertook representation of three separate clients while suspended from the practice of law in this state. Thereafter, respondent failed to perform the services for which he was hired, failed to communicate with the clients, and failed to return the unearned portion of his legal fees. Count two further alleged that respondent requested the client sign a verification, concealed the import of the verification from her, and filed a lawsuit on behalf of the client without her knowledge or consent. Count four alleged that respondent failed to cooperate with the State Bar in the investigation of the above three client matters.

On February 2, 1989, the notice to show cause was served on respondent by certified mail. The notice warned respondent that his default could be entered and the allegations admitted if he did not timely file an answer to the notice. On March 2, 1989, the examiner served a notice of application to enter default on respondent (rule 552.1(a), Trans. Rules Proc. of State Bar), informing him that his answer had not been filed and again warning him that his default could be entered if he did not file an answer within twenty days of service of the notice. No answer was filed and the clerk entered the respondent's default on March 28, 1989, and served the notice of entry of default on respondent on the same day. (Rule 552.1(c), Trans. Rules Proc. of State Bar.)

1. Inasmuch as respondent's default had been entered in this proceeding and no timely application for relief from default was filed, he was not entitled to participate further in the proceeding, and no further notices were served on him. (Rule 552.1, Trans. Rules Proc. of State Bar.)

On May 30, 1989, the referee assigned to this matter held a formal hearing on the charges. At the hearing, the referee granted the examiner's motion to have the allegations contained in the notice to show cause deemed admitted as a result of the respondent's default. (Rule 552.1, Trans. Rules Proc. of State Bar.) Documentary evidence and witness declarations under penalty of perjury were received in evidence at the hearing. The referee's one and one-half page decision was filed on August 23, 1989. The referee, without elaboration, found respondent culpable of violating Business and Professions Code sections 6068 (a), 6068 (i), 6068 (m), 6103, 6104 and 6106 (all further section references are to the Business and Professions Code unless otherwise stated) and former Rules of Professional Conduct, rules 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2) (all further references to rules, unless otherwise stated, are to the former Rules of Professional Conduct of the State Bar in effect from January 1, 1975, to May 26, 1989). Finding aggravation in the form of earlier, unidentified, discipline, and no mitigation, the referee recommended disbarment.

[1a] The referee's decision contains virtually no findings of fact and does not relate the conclusions of law to either the facts or the particular count or counts of the notice to show cause to which they apply. (See *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 968; *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 931.)

[1b] Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before the review department, the department shall, like the Supreme Court, independently review the record. (See *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928.) We may adopt findings, conclusions and recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar; *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.) Because of the deficiencies in the referee's decision, we are compelled to exercise our authority to make our own findings of fact and conclusions of law based on our independent review of the record.

As noted above, respondent's default was entered in this matter for his failure to timely file an answer to the notice to show cause. In a default proceeding, the examiner is entitled to rely on the admissions that result from respondent's default. (Section 6088; rule 555(e), Trans. Rules Proc. of State Bar.) However, additional evidence may also be introduced as long as it is reliable. (*Id.*) The examiner introduced additional evidence in the form of witness declarations. Those declarations undermine certain material allegations of the notice to show cause.[2]

[2] Where, as here, an examiner chooses to present evidence in a default hearing that undercuts or negates the allegations of the notice to show cause, it is the evidence, and not the allegations, that controls the findings of fact. (*Conroy* v. *State Bar* (1991) 53 Cal.3d 495, 502, fn. 5; see also *Remainders, Inc.* v. *Bartlett* (1963) 215 Cal.App.3d 295.) Our findings of fact herein are, unless otherwise specified, based on the allegations deemed admitted by respondent's default, supplemented by the additional evidence submitted at the hearing. Where specified, we have relied on the evidence submitted because it undermined or negated the charging allegations.

[3a] Before we turn to the proper conclusions and recommendations, we must decide whether respondent's default was properly entered as the hearing referee failed to do so. No evidence was introduced at the hearing showing respondent's State Bar membership records address.[3] **[3b - see fn. 3]** We notified the examiner of our intent to take judicial

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2. The clerk's letter to the examiner invited him to brief the issue of whether the evidence offered at the hearing was at variance with the allegations in the notice to show cause and if so, should the evidence offered prevail over the allegations deemed admitted. The examiner's brief asserts that the allegations in the notice to show cause should prevail over the evidence offered, and that in any event, any variance is "slight."

3. **[3b]** The records introduced as State Bar exhibit 1 indicate respondent's suspension for nonpayment of fees and his admission date. However, they do not provide us with his membership records address, which is essential in a default case in order to independently assess the propriety of the default procedures.

notice of the State Bar membership records under the provisions of section 459 of the Evidence Code. No objection having been received, we take judicial notice of the State Bar membership records and make them (two-page document attached to the order and notice of intent to take judicial notice filed October 10, 1990) a part of the record of this proceeding.

Those records indicate that respondent was admitted to the practice of law in this state in June 1972 and that since August 1976 his State Bar membership records address was 1833 The Alameda, San Jose, California 95126. The notice to show cause, notice of application to enter default, and notice of entry of default were all served on respondent at his membership records address by certified mail. We conclude these documents were properly served and respondent's default properly entered.

II. FACTS AND CONCLUSIONS

The Supreme Court suspended respondent from the practice of law in this state for failure to pay his State Bar membership fees, effective September 29, 1986, and he remained suspended through at least April of 1989. (Exh. 2; Bus. & Prof. Code, § 6143.)

A. Count I (Tanaka)

1. Facts

Respondent was hired by Steve Tanaka (Tanaka) in May 1987 to represent Tanaka in a federal civil lawsuit in which Tanaka was a defendant. Tanaka paid respondent $300 as advanced attorney's fees. Tanaka had one contact with respondent in June 1987 wherein respondent informed Tanaka "that an amended complaint was being drawn up" (exh. 3) and that respondent would contact Tanaka if any new developments came up in the case. After June 1987, Tanaka had no further contact with respondent. Some time after then, Tanaka received from his bank the canceled $300 check he had written for attorney's fees, indicating that it had been cashed by respondent.

In October 1987, Tanaka contacted the United States District Court for the Northern District of California and learned that a default judgment had been entered against him on August 25, 1987, for $118,132.50, plus post-judgment interest, and that no papers or documents had been filed in the case on his behalf by respondent. Tanaka tried to contact respondent by calling his home telephone number which had been disconnected and his office telephone number, where he was informed that respondent's whereabouts were unknown. After October 1987, Tanaka hired another attorney to defend him in the action.[4]

2. Conclusions

Respondent was charged in this count with violations of rules 6-101(A)(2), 2-111(A)(2) and 2-111(A)(3) and sections 6125, 6103, 6068 (m) and 6068 (a). We conclude that he is culpable of violating rule 2-111(A)(3) and sections 6125, 6103, 6068 (m) and 6068 (a).

[4] Section 6125 provides that only active members of the State Bar may practice law in this state. Respondent was suspended when he was hired by Tanaka in May 1987 and when Tanaka contacted him in June 1987. Respondent accepted money to perform legal services. The "mere holding out by a layman [or a suspended attorney] that he is practicing or is entitled to practice law [citations]" constitutes the unauthorized practice of law. (*In re Cadwell* (1975) 15 Cal.3d 762, 771, internal quotation marks omitted, first bracketed insertion in original.) At the very least, respondent held himself out to Tanaka as entitled to practice law and therefore violated section 6125.

Rule 6-101(A)(2) provides that an attorney "shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently." Our initial concern centered on whether an attorney who is suspended and therefore legally precluded from practicing law can be found culpable of failing to perform services competently.[5] We informed the

4. The record does not reveal whether Tanaka was successful in having the default judgment set aside.

5. Section 6126, as it read during respondent's misdeeds, made it a misdemeanor for a suspended attorney to practice law.

examiner of our concern and requested he brief the issue. The examiner asserts that it is appropriate to find respondent culpable, citing *Chasteen* v. *State Bar* (1985) 40 Cal.3d 586.

The charges in *Chasteen* arose out of conduct which occurred between 1976 and 1981. Chasteen was suspended in November 1978 for nonpayment of State Bar membership dues and the suspension remained in effect until January 1984. (*Id.* at p. 589.) In two out of the three matters on which he was charged, the misconduct commenced two to three years before he was suspended. Only the misconduct in failing to diligently prosecute a personal injury case on behalf of another client, MacNaughton, took place solely while he was under suspension. The hearing referee found that Chasteen violated sections 6125 and 6126, acted in contempt of court in violation of section 6127 and violated rules 8-101 and 6-101. The Supreme Court did not specifically address which statutory or rule violations it was upholding or for which time period, stating generally: "Petitioner's misconduct involved failing to act competently and to perform his duties as an attorney, commingling and misappropriating funds, and the unauthorized practice of law while under suspension by the State Bar." (*Id.* at p. 592.)

It does not appear that in deciding *Chasteen*, the Supreme Court was asked to consider whether an attorney can simultaneously have a duty to refrain from the practice of law while suspended and have a duty, if practicing while unauthorized to do so, to act competently. The issue before the Court was the appropriate degree of discipline. Chasteen did not seek Supreme Court review until he was notified by the Court that it was considering imposing more severe discipline than recommended by the State Bar. (*Id.* at p. 588.) On review, he did not contest most of the hearing panel's findings of fact as amended by the review department. (*Id.* at p. 589.) [5] "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns* v. *Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

It was not necessary to the decision to determine that Chasteen violated rule 6-101(A)(2) while suspended since his pre-suspension conduct qualified as a failure to act competently. The result in *Chasteen* could easily have been based on the failure to act competently prior to his suspension and separately thereafter practicing law while suspended in violation of section 6125. We therefore do not construe *Chasteen* as deciding the issue of whether an attorney can be simultaneously culpable of violating rule 6-101(A)(2) and of practicing law while suspended. Accordingly, we address this issue as one of first impression.

[6a] By its express terms, section 6125 precludes a suspended attorney from practicing law. Rule 6-101(A)(2), on the other hand, requires an attorney to perform the services for which he or she is hired because the failure to do so can be an intentional or reckless failure to perform competently in violation of the rule. (*Baker* v. *State Bar* (1989) 49 Cal.3d 804, 816-817, fn. 5.)

[6b] Requiring compliance with both section 6125 and rule 6-101(A)(2) results in incompatible duties. The suspended attorney must cease practicing immediately, yet continue to render competent legal services. The suspended attorney must choose—commit a criminal offense under section 6126, which as presently enacted could be a felony, by practicing while suspended, or commit a State Bar discipline offense under rule 6-101(A)(2) by failing to perform. [7] "A statute should be interpreted so as to produce a result that is reasonable. [Citation.] If two constructions are possible, that which leads to the more reasonable result should be adopted. [Citation.]" (*Alford* v. *Pierno* (1972) 27 Cal.App.3d 682, 688.)

[8a] We perceive no reason to require simultaneous compliance with the statute and rule. Standard 2.6(d) of the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V; hereafter "standard[s]") provides for suspension or disbarment for attorneys found culpable of violating sections 6125 or 6126, depending on the gravity of the offense or the harm to the victim. Thus, a full range of discipline is available to protect the public, courts and profession for the section 6125 violation alone. Recklessness or incompetence in the unauthorized practice of law would cause harm to the

client and would constitute an aggravating factor which justifies greater discipline than would have been appropriate if no harm had occurred.

[6c] As a matter of statutory and regulatory construction, we therefore interpret section 6125 to prohibit altogether the unauthorized practice of law and we hold that rule 6-101(A)(2) has no applicability to attorneys practicing while suspended. The suspended attorneys' only duty is to stop practicing until they have reestablished themselves as attorneys in good standing. In the case of an attorney suspended for failure to pay membership fees, this is simply cured by immediate payment. As soon as suspended attorneys are returned to good standing, they are responsible for complying with rule 6-101(A)(2).

[9] Rule 2-111 sets forth the duties and obligations of an attorney who withdraws from employment. The requirements of the rule apply "when an attorney ceases to provide services, even absent formation of an intent to withdraw as counsel for the client." (*Baker* v. *State Bar, supra*, 49 Cal.3d at pp. 816-817, fn. 5.) **[10]** Subsection (A)(2) of the rule provides that an attorney shall not withdraw until he or she takes steps to avoid foreseeable prejudice to the rights of the client. By its express terms, this subsection requires the attorney to continue representing the client until he or she has taken steps to avoid foreseeable prejudice. This obligation, like that of rule 6-101(A)(2), directly contradicts the suspended attorney's duty to cease practicing law immediately. It is unreasonable to hold respondent to a duty of having to continue to represent his client for a reasonable period of time to avoid prejudice prior to withdrawal, if he had an absolute duty under section 6125 to stop practicing while under suspension. For these reasons and those discussed *ante* with regard to the rule 6-101(A)(2) violation, we hold that rule 2-111(A)(2) has no applicability to attorneys practicing while suspended.

[8b] Again, this analysis does not insulate attorneys who are engaged in the unauthorized practice of law from discipline for the precipitous withdrawal occasioned by the incapacity to act. All harm suffered by the client is appropriately considered as aggravation of the section 6125 violation and the discipline accordingly enhanced. In order to minimize harm to the client, the attorney should take all steps necessary to avoid foreseeable prejudice to the client, *short* of practicing law.

[11a] Rule 2-111(A)(3) provides that the attorney shall, upon withdrawal, promptly return any unearned fees. Tanaka paid respondent $300 as advanced attorney's fees, which respondent did not return. Respondent was not required to practice law in order to comply with this subsection. His only obligation was to return the unearned advanced fee to the client. We therefore do not find the requirement of compliance with rule 2-111(A)(3) incompatible with the requirement of section 6125.

As noted, rule 2-111(A)(3) obligated respondent to return any *unearned* fee he received. There is no evidence in the record that anything more than negligible efforts were made on the client's behalf. Thus, there is no basis for concluding that any of the $300 was earned. **[11b]** In addition, as respondent was suspended when hired by Tanaka he was legally precluded from practicing law and therefore, his agreement to provide legal services in exchange for a fee was illegal. (See *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 238, fn. 8.) Permitting respondent to have earned any of the money paid him by Tanaka, even a reasonable fee under a quantum meruit theory, would condone his unauthorized practice of law. "It is clearly contrary to the public policy of this state to condone a violation of the ethical duties which an attorney owes to his client. [Citation.]" (*Kallen* v. *Delug* (1984) 157 Cal.App.3d 940, 951.) We conclude that none of the $300 was earned and that respondent's failure to return the advance fee was a wilful violation of rule 2-111(A)(3).

Section 6068 sets forth numerous duties of an attorney. Subsection (a) provides it is the duty of an attorney to support the Constitution and laws of the United States and this state.

[12] We have considered the propriety of culpability under section 6068 (a) with respect to an attorney who had practiced while suspended in violation of sections 6125 and 6126. (*In the Matter of Trousil, supra*, 1 Cal. State Bar Ct. Rptr. at p. 237.)

Our holding there is equally applicable here. We observed that "There is no express provision for professional discipline to be imposed directly as a consequence of a section 6125 or 6126 violation." (*Id.*) As a result, "Charging a respondent with a violation of section 6068 (a) by reason of alleged violation of sections 6125 and 6126 provides the basis for imposition of professional discipline for the crime of practicing law while suspended." (*Id.*)

Section 6103 provides: "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." **[13]** The Supreme Court has recently held that "With the exception of a wilful violation of a court order, 'this section does not define a duty or obligation of an attorney but provides only that violation of [her] oath or duties defined elsewhere is ground for discipline'; thus petitioner could not violate section 6103 unless she violated a court order. [Citations.]" (*Read* v. *State Bar* (1991) 53 Cal.3d 394, 406 [bracketed insertion in original].) Respondent was suspended by order of the Supreme Court. His continued practice of law was a violation of the court order suspending him and was therefore a violation of section 6103.

[14] Section 6068 (m) provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of the client and keep the client reasonably informed of significant developments with regard to the matter the attorney is handling for the client. As with rule 2-111(A)(3), this subdivision does not require the suspended attorney's continued practice. Indeed, it is extremely important for the attorney to continue to communicate with the client if for no other reason than to inform the client of the attorney's incapacity to continue representation aud to facilitate the transition to new counsel so that prejudice to the client is minimized. Naturally, such communication must not take the form of legal advice because the attorney may not practice law. In the present case, respondent failed to advise Tanaka that he was suspended or communicate in any fashion with the client and therefore violated this section.

B. Count II (Ruybalid)

1. Facts

In May 1987, Sandra Ruybalid (Ruybalid) met with respondent to discuss a matter regarding a partnership dispute in which she was involved. She met him again in June 1987, at whicb time she gave him various papers in connection with the matter, which included canceled checks and original letters. At this time she also gave respondent a signed blank check for his fees. Respondent told her he did not know the exact amount he would need to get started on her case. Ruybalid did not know respondent had cashed the check for $2,000 until she received the canceled check from her bank.

In June 1987, respondent gave Ruybalid a blank piece of paper and asked for her signature, which she provided. Respondent informed her that the paper was for the purpose of allowing him to continue with the case. After June 1987, Ruybalid tried on many occasions to contact respondent at both his home and office. She left numerous messages on his answering machine. Her calls were never returned.

In October 1987, Ruybalid hired another attorney to handle the matter for her. At this time she also became aware that respondent had filed a complaint for accounting in the Superior Court of Santa Clara County in August 1987 on her behalf. Ruybalid's verification was attached to the complaint. He filed the complaint without Ruybalid's authority and in fact never discussed the complaint or the wording of the complaint at any time with her. After June 1987, respondent did not contact Ruybalid, or return any of the papers she had given him after he was requested to do so by her new attorney, or return any of the $2,000 she paid him.[6]

6. The record is silent as to the outcome of the partnership dispute matter or the complaint for accounting.

2. Conclusions

Respondent was charged in this count with violating rules 6-101(A)(2), 2-111(A)(2), and 2-111(A)(3) and sections 6125, 6106, 6104, 6103, 6068 (m), and 6068 (a). We conclude that respondent is culpable of violating rule 2-111(A)(3), and sections 6125, 6103, 6104, 6106, 6068 (m) and 6068 (a).

Respondent was suspended for nonpayment of membership fees when he filed the lawsuit in August of 1987. At the very least, respondent held himself out as entitled to practice law and therefore violated section 6125. (*In re Cadwell*, *supra*, 15 Cal.3d at p. 771.)

For the reasons articulated in count I, we hold rules 6-101(A)(2) and 2-111(A)(2) do not apply to the facts in this count.

[11c] Rule 2-111(A)(3) does, however, apply. The services respondent performed in this count are fairly characterized as more than negligible. Nevertheless, for the reasons articulated in count one, respondent was legally precluded from earning any of the money paid him by the client by virtue of his suspension from the practice of law. Accordingly, respondent's failure to return the $2,000 paid him by Ruybalid was a wilful violation of this rule.

[15] Section 6106 provides: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or a misdemeanor or not, constitutes a cause for disbarment or suspension." By its express terms, this section applies regardless of whether the act was committed in the practice of law. Hence, we do not consider respondent's duty under this section as contradicting his duty to cease practicing under section 6125.

The referee's decision, without explanation, found a violation of this section which was only charged in this count. The notice to show cause alleged that respondent had his client sign a verification, concealing its import from her. **[16]** Concealment can be dishonest and involve moral turpitude within the meaning of section 6106. (See *Crane* v. *State Bar* (1981) 30 Cal.3d 117, 122.) Ruybalid's declaration stated that respondent gave her a blank piece of paper, obtained her signature, and informed her that the purpose of her signature was to allow him to continue with her case. The complaint for accounting that respondent filed on Ruybalid's behalf is attached to her declaration. (Exh. 4.) Attached to the complaint is a verification which declares that the document was executed in June 1987 and is purportedly signed by Ruybalid.

[17] While the evidence offered by the examiner does not, in and of itself, establish that Ruybalid signed the verification or that respondent concealed the import of that document from her, it does not controvert or undermine those allegations. (Compare *Conroy* v. *State Bar*, *supra*, 53 Cal.3d at p. 502, fn. 5.) As a result, the allegations in the notice to show cause, deemed admitted by respondent's default, may be properly relied on to establish that respondent had his client sign the verification, concealing its import from her.

[18] The practice of having clients sign blank verifications in discovery proceedings was recently addressed by the Supreme Court in connection with the requirements of section 6106, among other statutes and rules. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090.) The Court found that "The *use* of a presigned verification in discovery proceedings, without first consulting with the client to assure that any assertions of fact are true, is a clear and serious violation of the statutes and rules." (*Id.*, emphasis in original.) We see no basis for distinction between the proscribed use of presigned verifications in discovery proceedings and the use of the verification in this case. In both instances, the attorney used his client's verification, which attested to the truth of facts, without first ascertaining from the client that the facts were true. We conclude respondent violated section 6106.

[19] In addition, respondent held himself out to Ruybalid as entitled to practice law when he met with her and discussed her legal problems, accepted the $2,000 fee and filed the lawsuit on her behalf. (See *Farnham* v. *State Bar* (1976) 17 Cal.3d 605, 612.) This conduct involved moral turpitude and constituted a violation of section 6106 in that respondent

deceived Ruybalid by not advising her that he was not entitled to practice law. "'An attorney's practice of deceit involves moral turpitude.'" (*In re Cadwell, supra*, 15 Cal.3d at p. 772, quoting *Cutler* v. *State Bar* (1969) 71 Cal.2d 241, 252-253.)

[20] Section 6104 provides: "Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." Requiring compliance with this section would not have necessitated respondent's continued practice of law. He could have complied by not practicing while suspended. Instead, respondent wilfully filed the lawsuit on behalf of Ruybalid without her authority. We conclude respondent violated section 6104.

As in count I, respondent's violation of section 6125 is a ground for discipline as a violation of his oath and duty to support the laws of this State. (Section 6068 (a).) In addition, respondent violated section 6103 by wilfully violating the Supreme Court order that suspended him.

[21] Respondent did not inform his client that he was suspended, or that he was nonetheless filing the complaint on her behalf, and did not communicate with the client in any other way. This conduct amounted to a failure to keep his client reasonably informed of significant developments with regard to her case in violation of section 6068 (m).

C. Count III (Quetania)

1. Facts

In September 1987, Francisco Quetania (Quetania) hired respondent to assist him in handling the release of his son from the San Jose County Boys Ranch. At that time, Quetania paid respondent $150 by check dated September 25, 1987, with the understanding that this payment was the initial amount and more would be due after the release of Quetania's son. After October 1987, Quetania received the canceled check from his bank which indicated that respondent had cashed the check. Quetania tried for a number of months to contact respondent without success. Respondent never contacted Quetania after payment of the $150 nor did he do any work on Quetania's behalf, nor did he return any of the money paid to him by Quetania.[7]

2. Conclusions

Respondent was charged in this count with violating rules 6-101(A)(2), 2-111(A)(2) and 2-111(A)(3) and sections 6125, 6103, 6068 (m), and 6068 (a). We conclude that he is culpable of violating rule 2-111(A)(3) and sections 6125, 6103, 6068 (m) and 6068 (a).

Our initial concern in this count focused on whether the notice to show cause charged respondent with representing both Quetania and his son. The notice alleged that respondent was hired by Quetania to represent his son in a juvenile court matter, was paid $150 by the father and thereafter failed to perform the services for which he was hired, failed to communicate with the father and failed to return unearned fees to the father. At trial, the examiner introduced Quetania's declaration stating that he (Quetania) hired respondent to represent him in getting his son released from a boys ranch and that respondent had taken his money and never contacted him. This declaration establishes the abandonment of the father, which if not properly charged, is not an appropriate basis for culpability. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929.)

[22] Though not a model of clarity, the allegations of the notice were sufficient to charge respondent with the specified misconduct in his dual representation of the father and son. The notice specifically alleged that respondent was hired to represent the son and if that were the only allegation, due process issues would exist with regard to imposing discipline based on abandonment of the father. However, the notice also alleged that respondent failed to communicate and return unearned fees to the father. Respondent would not have had a duty to communi-

7. The record does not indicate the outcome of the juvenile matter.

cate with the father if he were not representing him. (See section 6068 (m).) In our view, the allegations of this count were sufficient to place respondent on notice of the specific conduct (abandonment of the father and son) alleged to constitute the misconduct. (*Hartford* v. *State Bar* (1990) 50 Cal.3d 1139, 1154; rule 550, Trans. Rules Proc. of State Bar; section 6085.)

Respondent was suspended for nonpayment of membership fees at the time he was hired by Quetania in September 1987 and at all relevant times thereafter. At the very least, respondent held himself out as entitled to practice law and therefore violated section 6125. (*In re Cadwell, supra*, 15 Cal.3d at p. 771.)

For the reasons articulated in count I, we hold rules 6-101(A)(2) and 2-111(A)(2) do not apply to the facts in this count.

Rule 2-111(A)(3) does apply. As in count I, respondent did not earn, within the meaning of this rule, any of the money paid him by the client. His failure to return the money was therefore a failure to promptly return unearned fees in wilful violation of rule 2-111(A)(3).

Again as in count I, respondent's violation of section 6125 is a ground for discipline as a violation of his oath and duty to support the laws of this state. (Section 6068 (a).) Respondent also violated section 6103 by his wilful violation of the Supreme Court order suspending him.

Respondent failed to inform his client that he was suspended or communicate with the client in any other way. This conduct amounted to a failure to keep his client reasonably informed of significant developments with regard to his case in violation of section 6068 (m).

D. Count IV

1. Facts[8]

On May 11, 1988, April 28, 1988, and April 29, 1988, an investigator for the State Bar mailed respondent three separate letters regarding the complaints of Quetania, Tanaka and Ruybalid, respectively. Each letter asked respondent to reply to the allegations of the specified complaint. The letters were not returned as undeliverable and respondent did not respond to any of them. All three letters were sent to respondent at a post office box address. In addition, all three letters directed respondent's attention to the provisions of section 6068 (i).

2. Conclusions

Respondent was charged in this count with violating sections 6068 (i), 6068 (a) and 6103. We conclude that the State Bar has failed to establish a violation any of these sections.

[23] Section 6068 (i) provides that it is the duty of an attorney to cooperate and participate in any disciplinary investigation or proceeding. No independent grounds exist for the 6068 (a) and 6103 violations other than the 6068 (i) violation. Allegedly, respondent violated these sections by his failure to respond to the three letters. The examiner submitted copies of the three letters. (Exh. 6.) Each of the letters was sent to respondent at a post office box address. The State Bar membership records, of which we took judicial notice, indicate that respondent's address has been a street address since 1976. Thus, the letters were not sent to respondent's State Bar membership address. There is no evidence in the record that the post office address was an accurate address for respondent. Indeed, the examiner indicated at the hearing that he did not know where the

8. Our findings of fact in this count are based on the declaration of A. J. Severino, with attachments, introduced as State Bar exhibit 6, as this declaration undermined the allegations in the notice to show cause.

post office address came from. (R.T. p. 4.) The evidence submitted at the hearing fails to establish that the letters were properly sent to, or received by, respondent and therefore fails to establish that respondent did not cooperate with the investigation.

E. Aggravation and Mitigation

The referee, without explanation or elaboration, found that respondent's culpability in this matter was aggravated by the existence of earlier discipline which resulted in his suspension from practice. At the time the referee rendered his decision, the record did not contain any indication that respondent was suspended other than his suspension for failure to pay his bar membership fees.

The Business and Professions Code sets forth the legislative authorization for the payment of membership fees at sections 6140 through 6145. Section 6143 provides that any member who fails to pay his or her fees after they become due and after two months written notice of the delinquency, shall be suspended from membership in the State Bar until paid. Where an attorney fails to pay the fees, the State Bar recommends his or her suspension from membership to the Supreme Court and that recommendation is treated as a finding of fact and recommendation that the Supreme Court order the attorney's suspension. (*Hill* v. *State Bar* (1939) 14 Cal.2d 732, 734-735.) **[24]** Nevertheless, the payment of membership fees is only a prerequisite to practicing law. No statute or rule of professional conduct requires payment of the fees unless the attorney intends to practice law in this state. Membership in the State Bar is, in this sense, voluntary. We see no valid reason to treat an attorney's "withdrawal" from membership, by failure to pay the fees, as misconduct, for that term implies some impropriety. Failure to pay fees is not improper in and of itself.[9] Indeed, non-payment could be caused by circumstances (e.g., illness or incarceration) beyond the attorney's control. The impropriety occurs when the attorney continues to practice law after suspension. Respondent did so here and we have concluded he thereby violated section 6125. However, respondent's actions after he was suspended do not transform his failure to pay fees into misconduct. Accordingly, we decline to consider respondent's suspension as an aggravating circumstance.[10]

Respondent's misconduct in counts one and three was surrounded by concealment in that he did not inform his clients that he was not entitled to practice. This is an aggravating circumstance under standard 1.2(b)(iii).

Respondent failed to take all steps necessary, short of practicing law, to protect his clients' interests in counts I, II, and III. In addition, as we discuss later, although the record does not clearly demonstrate the harm the clients likely suffered as a result of respondent's unauthorized practice of law in counts I, II, and III, at the very least, the clients paid money for legal services that were never competently performed. These are aggravating circumstances under standard 1.2(b)(iv).

Respondent has been recently disciplined by the Supreme Court (Bar Misc. 5920 and 5921) as a result of his misdemeanor convictions in two separate matters for failing to provide support for his two minor children. (Pen. Code, § 270.) By order filed June 27, 1990, the Court imposed the State Bar's recommended discipline of one year suspension, execution of which was stayed, and probation for a period of two years on conditions, including six months actual suspension. Respondent did not participate in the State Bar proceeding.

Respondent pleaded guilty to both convictions, one in March 1987 and the other in February 1988.

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9. The Supreme Court has, in some cases, referred to an attorney's suspension for non-payment of State Bar dues as "prior discipline." (*Demain* v. *State Bar* (1970) 3 Cal.3d 381, 383; *Farnham* v. *State Bar*, *supra*, 17 Cal.3d at p. 608; *Phillips* v. *State Bar* (1989) 49 Cal.3d 944, 950.) However, in other cases, the Court has sustained the State Bar's finding that the attorney had no prior record of discipline, even though he had previously been suspended for non-payment of State Bar dues. (See, e.g., *Bate* v. *State Bar* (1983) 34 Cal.3d 920, 922.)

10. The clerk's letter asked the examiner to brief this issue. The examiner agrees that suspension for failure to pay fees should not be considered as an aggravating circumstance in this case.

The municipal court imposed three years probation in each case, with conditions, including child support payments. He violated his probation in each case by failing to make the support payments and he was sentenced to concurrent six-month jail terms. **[25]** Although the underlying criminal conduct occurred in January 1986 (Bar Misc. 5920) and November 1987 (Bar Misc. 5921), which somewhat coincides with the misconduct in the present discipline case, these matters are properly considered as aggravation in recommending the degree of discipline in the present proceeding. (*Lewis* v. *State Bar* (1973) 9 Cal.3d 704, 715.)

III. DISCIPLINE

We next turn to the issue of the degree of discipline we are to recommend to the Supreme Court based on our conclusions as to respondent's misconduct in this case. **[26]** In determining the appropriate degree of discipline to recommend, we start with the standards which serve as our guidelines. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We must also consider whether the recommended discipline is consistent with or disproportional to prior decisions of the Supreme Court on similar facts. (See, e.g., *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) In the present case we have concluded that respondent is culpable of practicing law while suspended, failing to communicate and return fees, appearing without authority and deceit.

Standard 2.6 provides for disbarment or suspension for violations of sections 6125 or 6068 (a), depending on the gravity of the offense or the harm, if any, to the victim. Standard 2.3 provides for actual suspension or disbarment for offenses involving moral turpitude, depending on the degree to which the victim was harmed, the magnitude of the misconduct, and the degree to which it relates to the practice of law. Pursuant to standard 1.6(a), if two or more acts of professional misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards, the sanction imposed should be the most severe of the different applicable sanctions. In the present case, standard 2.3 is the most severe applicable standard. In addition, pursuant to standard 1.7(a), the discipline imposed here should be more severe than the discipline ordered by the Supreme Court in respondent's prior disciplinary matter.

Except for count one, the record is, for the most part, silent as to the degree of harm suffered by the victims of respondent's unauthorized practice of law. In count one, respondent took Tanaka's money and failed to take any steps to protect his interest in the lawsuit, which resulted in a default judgment. The record does not indicate whether Tanaka was able to have the judgment set aside. Nor does the record indicate whether Tanaka had any defense to the lawsuit. Nevertheless, suffering a default judgment in excess of $118,000 likely harmed Tanaka significantly even if it only prevented him from settling the claim on more favorable payment terms. Ruybalid lost $2,000, but we do not know the outcome of the partnership dispute or the harm, if any, caused her by the complaint respondent filed. Quetania lost $150, but again, we do not know the outcome of the juvenile matter. We do not know if the son remained in the boys ranch for any period of time which was attributable to respondent's unauthorized practice. We do not know the extent to which the delay attributable to respondent's unlawful practice in counts two and three caused harm to the clients. Respondent did not return the papers and canceled checks given him by Ruybalid. Again, we do not know the extent to which this caused her harm. We do find that respondent's deceit in count two was directly related to the practice of law.

[27] Practicing law while suspended has resulted in a range of discipline from suspension to disbarment, depending on the circumstances of the misconduct, including the nature of any companion charges and the existence and gravity of prior disciplinary proceedings. In *Farnham* v. *State Bar*, *supra*, 17 Cal.3d at pp. 610-612, the attorney had engaged in the unauthorized practice of law by giving legal advice and preparing legal papers for a client during the period of time he was suspended for nonpayment of membership fees. In addition, he wilfully deceived that client and another, avoided their efforts to communicate with him and eventually abandoned their cases. (*Id.*) Farnham had been previously disciplined. (*Id.* at p. 608.) The Supreme Court imposed two years suspension, stayed, two years probation, and six months actual suspension.

In *Chasteen* v. *State Bar*, *supra*, 40 Cal.3d 586, the attorney was found culpable of the unauthorized practice of law as well as deceit of clients, commingling and failure to return fees. (*Id.* at p. 592.) The bulk of Chasteen's misconduct was attributable to his long history of alcoholism. (*Id.* at p. 593.) The Supreme Court imposed a two-month suspension by a four-to-three decision. In a concurring and dissenting opinion, joined by Justices Reynoso and Lew (sitting by special assignment), Justice Lucas indicated he would have imposed greater discipline.

In *Morgan* v. *State Bar* (1990) 51 Cal.3d 598, the attorney engaged in the unauthorized practice of law and, in addition, obtained a pecuniary interest adverse to his client through the use of the client's credit card. Morgan had four prior disciplinary proceedings, one of which also involved the unauthorized practice of law. (*Id.* at pp. 601, 607.) In mitigation, Morgan presented evidence of his various eleemosynary activities. (*Id.* at p. 607.) The Supreme Court ordered disbarment, finding that Morgan's behavior demonstrated "a pattern of professional misconduct and an indifference to this court's disciplinary orders . . . ." (*Id.*)

The present case involves deception in that respondent held himself out to his clients and a court as entitled to practice law when he was not. Farnham's unauthorized practice of law involved only one of the two clients and the suspension for a three-month period during his representation of that client. Here, respondent was suspended from the time he undertook representation of the clients through the time he abandoned them. Respondent undertook representation, accepted substantial sums as advanced fees, then abandoned the clients, all while suspended. Chasteen presented substantial mitigating evidence of his efforts at rehabilitation. Respondent did not present any mitigating evidence. Morgan's misconduct was significantly aggravated by his record of prior misconduct. Nevertheless, he participated in the State Bar proceeding. In addition, both Farnham and Chasteen participated in their respective State Bar proceedings.

[28] In contrast, respondent has displayed total indifference and lack of remorse by ignoring both his present and past discipline proceedings. Respondent's lack of participation substantially distinguishes this case from *Farnham* and *Chasteen* and indicates that far more severe discipline is required to achieve the purposes of attorney discipline set forth in standard 1.3 (protection of the public, courts and legal profession as well as rehabilitation in the proper case).

In *Baca* v. *State Bar* (1990) 52 Cal.3d 294, the attorney had been found culpable of client abandonment in one matter and misappropriation in another matter. In addition, Baca failed to cooperate with the State Bar in the investigation of the client matters and defaulted in the State Bar trial of those matters. In ordering disbarment, the Supreme Court found that "Baca's failure to cooperate until the recommendation of disbarment was made reflects a disdain and contempt for the orderly process and rule of law on the part of an attorney who has sworn to uphold the law." (*Id.* at p. 305.)

In *Barnum* v. *State Bar* (1990) 52 Cal.3d 104, the Supreme Court again ordered disbarment. In one client matter, Barnum collected an unconscionable fee, disobeyed court orders compelling him to explain or return the fee and refused to participate in the disciplinary proceeding. (*Id.* at p. 106.) Barnum had been disciplined on one prior occasion. (*Id.*) The prior discipline imposed a period of probation, which Barnum was subsequently found to have violated. (*Id.* at p. 112.) The Court concluded that Barnum was "not a good candidate for suspension and/or probation. He has breached two separate terms of our prior disciplinary order, leading to the imposition of additional sanctions. He also defaulted before the State Bar here and in one other proceeding." (*Id.* at p. 106.)

[29] In our view, respondent is also not a good candidate for suspension and/or probation. He has failed to comply with the terms and conditions of his criminal probation by disobeying two separate court orders requiring him to provide support to his minor children and has failed to participate in both the present and past disciplinary proceedings. In addition to the other misconduct before us, these facts reflect respondent's disdain and contempt for the orderly process and rule of law and clearly demonstrate that the risk of future misconduct is great.

In conclusion, our analysis of respondent's misconduct, the aggravating circumstances, the lack of mitigating circumstances, the applicable standards

and Supreme Court cases we deem comparable show that disbarment is necessary in this case to protect the public, courts and legal profession, maintain the high professional standards of attorneys and preserve the public confidence in the legal profession. (Std. 1.3.)

IV. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent be disbarred and that his name be stricken from the roll of attorneys in this state. Further, we recommend that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court, and that he perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, of the effective date of the Court's order.

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HOWARD KUEKER

A Member of the State Bar

[No. 85-O-15884]

Filed June 7, 1991

SUMMARY

Respondent was found culpable of misappropriating over $66,000 in client trust funds and repeatedly lying to the client's agent to conceal the theft. In aggravation, respondent was neither cooperative nor candid during the State Bar's investigation of his misconduct. The hearing department recommended a five-year stayed suspension with actual suspension for two years and until restitution was made. (Howard M. Fields, Hearing Referee.)

Respondent sought review, contending that the hearing referee was biased, that there were errors in the findings, and that the recommended discipline was excessive. The review department rejected the contention of bias, but modified the referee's findings and conclusions, particularly with regard to restitution. Based on Supreme Court precedent, the review department recommended that respondent be disbarred. (Pearlman, P.J., dissented and filed a separate opinion.)

COUNSEL FOR PARTIES

For Office of Trials: Dominique Snyder

For Respondent: Howard Kueker, in pro. per.

HEADNOTES

[1 a, b] 103 **Procedure—Disqualification/Bias of Judge**
169 **Standard of Proof or Review—Miscellaneous**
Party claiming judicial bias has burden to clearly establish such bias and to show specific prejudice; disagreement with how referee weighed issues, and showing of immaterial factual errors, did not establish bias on part of referee who acted in patient, fair, and commendable manner during hearing.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Pursuant to Transitional Rules of Procedure 453(a), review department's independent fact finding authority permits it to delete erroneous finding from hearing department's decision.

[3 a-c] **171 Discipline—Restitution**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
290.00 Rule 4-200 (former 2-107)
Attorney who rendered services to client before committing misconduct was entitled to collect fee earned prior to commencement of misconduct.

[4] **822.10 Standards—Misappropriation—Disbarment**
Both under Supreme Court case law and under the standards, an attorney's misappropriation of client funds, being a gross or grievous breach of morality, warrants disbarment in the absence of clearly extenuating circumstances, or unless the amount taken was insignificant or the most compelling mitigating circumstances clearly predominate.

[5] **831.40 Standards—Moral Turpitude—Disbarment**
An attorney's acts of deceit are very serious, and under the standards warrant suspension or disbarment.

[6] **521 Aggravation—Multiple Acts—Found**
541 Aggravation—Bad Faith, Dishonesty—Found
795 Mitigation—Other—Declined to Find
831.20 Standards—Moral Turpitude—Disbarment
831.50 Standards—Moral Turpitude—Disbarment
Attorney's deceit of client's agent on 11 separate occasions over a considerable period was an aggravating factor, and militated strongly against considering attorney's misconduct as one-time or aberrant.

[7] **591 Aggravation—Indifference—Found**
745.39 Mitigation—Remorse/Restitution—Found but Discounted
Attorney's failure to make full restitution was an aggravating factor, where partial restitution was made largely out of attempt to deceive client; client's refusal to accept further restitution after State Bar complaint was filed did not extinguish attorney's moral obligation to complete restitution.

[8] **822.10 Standards—Misappropriation—Disbarment**
831.30 Standards—Moral Turpitude—Disbarment
831.40 Standards—Moral Turpitude—Disbarment
831.50 Standards—Moral Turpitude—Disbarment
Where attorney committed serious offenses including misappropriation of large sum from client and subsequent deceit of client's agent, issue before State Bar Court was whether mitigating circumstances clearly outweighed or predominated in order to warrant recommendation of less than disbarment.

[9] **710.35 Mitigation—No Prior Record—Found but Discounted**
Record of 14 years of practice without prior discipline was mitigating circumstance but could not outweigh seriousness of attorney's misconduct and aggravating circumstances.

[10 a, b] **725.36 Mitigation—Disability/Illness—Found but Discounted**
802.30 Standards—Purposes of Sanctions
Evidence of psychological problems was not compelling mitigation where attorney's expert witness testified that he needed further treatment before he could be considered rehabilitated; primary function of attorney discipline is to fulfill proper professional standards regardless of cause for attorney's failure to do so.

[11] **541 Aggravation—Bad Faith, Dishonesty—Found**
601 Aggravation—Lack of Candor—Victim—Found
822.10 Standards—Misappropriation—Disbarment
Suspension rather than disbarment might be appropriate for isolated misappropriation that is unlikely to be repeated, but was not appropriate where misappropriation was accompanied by lengthy practice of deceit on client's agent and lack of forthrightness during State Bar investigation.

[12] **802.30 Standards—Purposes of Sanctions**
802.69 Standards—Appropriate Sanction—Generally
In determining appropriate discipline, all relevant factors must be considered, including the purposes of imposing discipline, which include: protection of the public, courts, and legal profession; maintenance of high professional standards; and maintenance of integrity of and public confidence in the legal profession.

[13 a, b] **822.10 Standards—Misappropriation—Disbarment**
Disbarment was called for in light of attorney's misappropriation of extremely large sum, extensive and prolonged deceit, lack of extraordinary mitigation, lack of forthrightness in dealing with misconduct, and lack of sufficient evidence of rehabilitation to assure public that offense would not recur.

[14] **2504 Reinstatement—Burden of Proof**
Disbarred attorneys may qualify for reinstatement upon sufficient passage of time and adequate proof of rehabilitation, present moral fitness and learning and ability in the general law.

[15] **802.69 Standards—Appropriate Sanction—Generally**
822.10 Standards—Misappropriation—Disbarment
2402 Standard 1.4(c)(ii) Proceedings—Burden of Proof
2504 Reinstatement—Burden of Proof
Where attorney had committed extremely serious misconduct over long period of time, and questions remained concerning attorney's rehabilitation, requiring standard 1.4(c)(ii) showing in lieu of disbarment would not be sufficient to protect the public and maintain the integrity of the profession.

ADDITIONAL ANALYSIS

Culpability
Found
221.11 Section 6106—Deliberate Dishonesty/Fraud
280.01 Rule 4-100(A) [former 8-101(A)]
280.21 Rule 4-100(B)(1) [former 8-101(B)(1)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2

Aggravation
Found
582.10 Harm to Client
611 Lack of Candor—Bar

Mitigation
Declined to Find
740.51 Good Character
740.52 Good Character
760.53 Personal/Financial Problems

Discipline
1010 Disbarment

OPINION

STOVITZ, J.:

A referee of the former volunteer State Bar Court has recommended that respondent, Howard Kueker, a member of the State Bar since 1975 and with no prior record of discipline, be suspended for five years, stayed on conditions including actual suspension for two years and until he makes restitution. The referee's decision rests largely on stipulated facts and a record in which it was established beyond dispute that respondent misappropriated over $66,000 in trust funds and repeatedly lied to his client's agent over an 18-month period about his mishandling of funds. In aggravation, respondent was neither cooperative nor candid during the State Bar investigation. He admitted his misconduct for the first time at the outset of the State Bar Court hearing, eight years after his misdeeds started.

Before us, respondent seeks review urging that the referee was biased, the findings are incorrect and the referee's suspension recommendation is excessive and that he should be actually suspended for only 30 or 60 days. Upon our independent review of the record, we find no procedural error but will adopt modified findings and conclusions. Considering all relevant factors and principles of our Supreme Court in misappropriation cases, we have concluded that, since respondent's grievous offenses are not outweighed by clear mitigating circumstances, to fulfill the purposes of attorney discipline, respondent should be disbarred as urged below and before us by the State Bar examiner and we shall so recommend to the Supreme Court.

I. FACTS.

A. Introduction.

At trial, respondent was represented by experienced counsel. Respondent admitted all charges in the first amended notice to show cause against him. (1 R.T. pp. 10, 15.)[1] The charges he admitted were that he failed to place his client's funds in a trust account, that he failed to promptly notify his client that the third-party debtor had paid the debt in full, that he failed to promptly deliver to his client his share of funds and misappropriated them and that he misrepresented to his client that he was still negotiating a settlement with the debtor.[2]

Despite respondent's admission of all the charges against him, the parties presented extensive testimonial and documentary evidence found in two volumes of reporter's transcript of testimony and thirty-six exhibits. Nevertheless, the facts of this very serious matter are not complex.

After respondent's admission to practice law in Massachusetts in 1966, he practiced creditors' rights and bankruptcy law with a downtown Boston firm. Seeking better weather, he moved to California in 1975, was admitted to practice that year in this state and started practice also that year with an Anaheim firm doing similar work to what he had done in Boston. (2 R.T. pp. 51-53.) In about 1978, he left the Anaheim firm and started solo practice in Newport Beach, also handling creditors' rights and bankruptcy matters. He did not do well financially in sole practice, estimating that his yearly net income (over office expenses) was between $5,000 and $10,000. (2 R.T. pp. 54-55.) Respondent's misconduct arose while in sole practice.

B. Respondent's Receipt and Misappropriation of Trust Funds.

Sometime prior to September of 1980, an Austrian bank owed one Frank James Lucas of Orange County, California, the sum of *Austrian schillings* 84,875.62 or *US $* 6,730.64 at the then-current exchange rate. However, the Austrian bank's agent,

1. For convenience, the reporter's transcript of the March 10, 1989 hearing before the referee will be referred to as "1 R.T." and the transcript of the March 22, 1989 hearing as "2 R.T."

2. Respondent admitted violating the following rules and statutes charged in the amended notice to show cause: Business and Professions Code sections 6068 (a), 6103 and 6106 and former rules 8-101(A), 8-101(B)(1), and 8-101(B)(4), Rules of Professional Conduct of the State Bar. Unless otherwise noted, all citations to sections are to the Business and Professions Code and citations to rules are to the Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

European American Bank ("Bank"), mistakenly paid Lucas *US $* 84,875.62, thus overpaying him by the exchange rate difference of *US $* 78,144.98. (Exh. 28.) The Bank hired a New York collection agency, Harold Adler, Inc. ("Adler"), to recover the overpayment and Adler hired respondent. Respondent considered the Bank his client. (Exhs. 2, 28.)[3]

By a letter dated August 22, 1980, respondent recommended to Adler that Bank authorize respondent to file suit and apply for a prejudgment attachment against Lucas. If the Bank agreed, respondent asked Adler that he send respondent $285 in costs and have certain documents completed by a Bank officer and returned to respondent. (Exh. 3.) Adler agreed to have respondent file suit against Lucas; but on September 23, 1980, two days before respondent filed the suit, Lucas paid respondent the entire disputed amount, $78,144.98. On that same day, September 23, 1980, respondent gave Lucas a notarized release of Bank's claim. (Compare exhs. 1 and 2 with exh. 28.)

The timing of the suit filing leads to one of the few areas of dispute in this proceeding: whether respondent was entitled to a fee for his services; and if he was, the size of his fee (and therefore the size of the client's share of recovery). As we shall discuss, *post*, we have concluded that respondent is entitled to fees on the amount he recovered before he committed his misconduct. That leaves us with the task of determining the amount of fees respondent earned. Respondent did not introduce in evidence any written fee agreement. Testimony showed that he was to receive a fee of 15 percent of the recovery if no suit were filed and 20 percent if suit were filed. (1 R.T. pp. 31-32; 2 R.T. p. 61.)

At the State Bar Court trial, a dispute arose concerning whether or not respondent knew that Lucas had paid the sum before the suit was filed. To bolster his position that he filed suit before Lucas paid, respondent introduced his office's cover memo to an attorney service dated September 8, 1980, written on the attorney service's form, instructing that service to file the complaint against Lucas. (Exh. H.) Just below a space on this form for its receipt stamp by the attorney service, appeared the stamp, "1980 SEP 25 PM 12:34" and a court filing stamp of "SEP 25 1980." Further, the copies of respondent's complaint and attachment application which he forwarded to the attorney service for court filing bore dates of September 8 and 9, 1980, respectively.

The hearing referee found unconvincing respondent's explanation that the attorney service delayed in filing the suit. Regardless of whether the respondent or the attorney service delayed the filing of suit, it is clear that suit was not filed until after respondent received the full amount of funds due Bank. We conclude, therefore, that respondent is entitled to only a 15 percent fee at best and therefore the client's share of the funds was $66,423.23.

Respondent's explanations of what he did with the Bank's $66,423.23 varied somewhat. During discovery, he stated that he used the sum to pay "ordinary expenses of his law office and household." According to respondent, his income from the practice of law was not sufficient to cover these expenses. (Further response to interrogatories, filed February 21, 1989, p. 7, response to question 22.) In his testimony, he stated that a part-time secretary placed the $78,144.98 check in respondent's general, not trust, bank account and checks for office expenses of an unknown sum were drawn on those funds before respondent was aware of the incorrect deposit of the check. (2 R.T. p. 60.) He also testified that he gave some of Bank's money to one of his secretaries who had deposited Lucas's $78,144.98 check and who had demanded money from respondent, threatening to divulge untrue matters about respondent, and the rest "went to pay bills in the ordinary course of business." (2 R.T. pp. 61, 89.)

C. Respondent's Deceit of Adler Concerning His Misappropriation.

Although Lucas had paid respondent the full amount of Bank's claim on September 23, 1980, starting just seven days later and continuing to March

3. For a somewhat similar fact situation, see *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 118-122.

1982, respondent actively deceived Adler that Lucas had not paid but small amounts which respondent remitted to Adler sporadically. In total, respondent sent 11 letters to Adler perpetuating this deceit. (Exhs. 4-16.) The date and gist of each letter is as follows:

Date	*Gist of Respondent's Letters to Adler*
9/30/80	Debtor demands proof of claim; have sued and will pursue vigorously.
12/4/80	Optimistic we can negotiate with Lucas. If he does not agree, will move suit along.
1/20/81	Negotiating seriously with Lucas to get him to stipulate to full judgment and costs. Will Bank accept $5,000 per month? [$4,000 sent to Adler ($5,000 less $1,000 fees deducted) on 2/24/81.]
6/8/81	Lucas is overdue in payment. Will report further on June 29. [Another $4,000 sent to Adler ($5,000 less $1,000 fees deducted) on 6/29/81.]
7/30/81	Lucas is late on July payment. Continuing to get him to pay.
8/21/81	Lucas is late again. Will continue to press.
10/6/81	Received $1,000 by cashier's check from Lucas. Will remit separately.
11/5/81	Can only communicate with Lucas by mail. Do not have an explanation but Lucas just sent another good faith payment and will remit separately. Believe Lucas will eventually pay. Will keep after him.
12/17/81	Lucas is late again. Will have more to report by 12/31/81.
1/25/82	Pleased to report receipt of $1,000. Will remit on February 25.
3/18/82	Lucas is late again. Pressing for payment and will pursue vigorously.

Adler testified that until about March 1982, he believed respondent's representations that Lucas had paid only partial, sporadic sums. Adler then wrote directly to Lucas to verify payments and Lucas sent a photocopy of his September 1980, $78,144.98 check to respondent. (1 R.T. pp. 38-49; see also Lucas testimony at 1 R.T. p 21.) When Adler received this information from Lucas, he tried to get respondent's explanation. At first, respondent told him that he had finally received the funds from Lucas but an employee had absconded with them. (1 R.T. pp. 58-59.) When Adler pressed respondent in a later telephone conversation, respondent said he would not say what happened. (1 R.T. pp. 60-61.)[4] Respondent feared that if he told Adler what had happened, Adler would send him no more collection matters and his practice would disintegrate. (2 R.T. pp. 63-64.)

The evidence as to the total amount of repayment respondent made to Adler on Bank's behalf differs slightly. According to Adler, between 1981 and 1985, respondent repaid the gross sum of $35,688.58 which included $30,488.66 in cash and the balance in commissions due to respondent from Adler in the Lucas or other collection matters which Adler had referred to respondent. (1 R.T. pp. 63-65.) According to respondent, he repaid a gross sum of $33,935.66, including commissions. (Further response to interrogatories, filed February 21, 1989, p. 7, response to question 23.) Adler's figure was derived by his consulting notes he had prepared of his recoveries by year and we adopt it as the amount of respondent's restitution.

The Lucas claim was by far the largest that Adler had referred to respondent for collection. (1 R.T. pp. 100-101.) In order to permit respondent to repay the Lucas funds, Adler continued to send respondent other small claims for collection on a one-by-one basis and he monitored respondent carefully. The amount of commissions earned by respondent served to reduce slightly the balance in the Lucas matter. (1 R.T. pp. 84-86.) Respondent paid over to Adler all funds collected on these other matters. (1 R.T. p. 100.)

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4. As Adler testified: "He [respondent] indicated he could not tell me what happened. And I questioned him as to how could it be possible that this amount of money could get into his trust account without his being aware of it. He reiterated that he just could not tell me. It was, *to use the words he used, he said it would be like peeling an onion, each layer would lead to another layer* and I asked him to tell me the truth. Tell me what happened. Did it have anything to do with drugs, gambling, women. Did he buy something [?] Maybe we could get something as collateral. *He said he just couldn't discuss it because he was getting into serious other problems and he never would discuss it.*" (1 R.T. pp. 61-62, emphasis added.)

In September 1984, the Bank requested Adler to obtain a promissory note from respondent for the unpaid balance of the Lucas funds plus 10 percent interest. (Exh. B.) On November 14, 1984, respondent signed a promissory note for $34,613.83 plus the 10 percent requested interest. (Exh. D.) Adler did not consider respondent's note satisfactory since it discounted what he was obliged to repay by taking into account his commission on the unpaid balance. (1 R.T. pp. 64-67.) Respondent did make some payments after he signed this promissory note; but at some later time, when Bank filed a complaint with the State Bar about respondent's handling of the Lucas funds, it declined to accept any further payments from respondent on the ground it would not be ethical to do so. (1 R.T. pp. 91, 93.)

D. Respondent's Posture During State Bar Investigation.

Respondent was not charged with failing to cooperate during State Bar investigation (Bus. & Prof. Code, § 6068 (i)), nor was he charged with making misrepresentations to the State Bar during its investigation of Bank's complaint. However, the record shows that a substantial portion of the more than 20-month State Bar investigation into Bank's complaint was expended in the State Bar attempting to obtain from respondent information he promised to furnish about his handling of Bank's funds. Other responses of his during the investigation period were neither complete nor candid.[5]

E. Respondent's Evidence in Mitigation.

Respondent presented testimony of three character witnesses. Gary DePerine, Esq., a lawyer in practice for 15 years, knew respondent since 1976 and saw him in court on appearances. According to DePerine, respondent's skills as an attorney were excellent. After speaking with respondent's counsel, DePerine became familiar with the charges against respondent. Although he could not condone respondent's misconduct, he expressed the view that it was highly out of character. (1 R.T. pp. 111-120.)

Nicholas Zaccheo, a district sales manager for a financial service company, testified he knew respondent since 1976, that he and respondent were friends and he had been a client of respondent. (2 R.T. pp. 120, 122-123.) Zaccheo was familiar with the nature of the misappropriation charges against respondent but not familiar with charges about his deceit of Adler or the Bank. Zaccheo assessed respondent's character as the highest and he would have no hesitation in hiring respondent again to represent him. (2 R.T. pp. 124-127.)

Donald Wayne, owner of a department store for designers and decorators, knew respondent for three or four years as a customer and a client. (2 R.T. pp. 128-130.) Wayne was familiar with most of the charges against respondent but from his knowledge of respondent's moral character, he did not think respondent would do these acts. Wayne had no

5. On February 28, 1986, a State Bar investigator wrote to respondent summarizing the Bank's complaint and seeking respondent's reply. (Exh. 18.) On March 19, 1986, respondent answered by stating the Bank knew about "this situation" (which he did not define) for three or four years and respondent did not understand why the Bank "turned to the Bar after all this time." Respondent accepted responsibility for what happened (which he did not define), and stated that he gave the Bank a promissory note and repaid over $30,000. Respondent wrote the investigator that he would make himself available if it was necessary to pursue the matter further. (Exh. 19.) Two days later, the investigator wrote respondent again, asking for a copy of the promissory note and all checks given in repayment. (Exh. 20.) About two weeks later, respondent replied, stating that he had not had time to respond but would do so after his return from a trip to Chicago. He asked whether the Bank couldn't confirm the note and payments. (Exh. 21.) On September 12, 1986, the investigator wrote respondent asking for additional information concerning the deposit and removal of the Lucas funds and on October 3, 1986, the investigator sent respondent a follow-up letter when he did not reply. (Exhs. 22-23.) On November 18, 1986, respondent replied with a typed note on the foot of the investigator's September 25th letter asking the investigator to call him after November 25th. (Exh. 23.) On August 24, 1987, another investigator again wrote respondent asking for the information earlier requested and cited respondent to section 6068 (i). (Exh. 25.) Two months later, and a year and eight months after the investigator's first letter to respondent, he replied that he was single-handedly running his sole practice and had no time to look for the requested documents. He noted he had cooperated in the past, asked the investigator to bear with him during this "difficult time" and stated that he had deposited the check from Lucas in a regular account, not a trust account and named the bank. (Exh. 26.)

reservation about his continuing to represent him in legal matters. (2 R.T. pp. 131-133.)

Respondent also testified in mitigation. In 1980, he and his wife were beginning to have communication problems and one of his two daughters had a physical and learning disability which placed an added stress on family life. (2 R.T. pp. 56-59.) Respondent first saw a family counselor, Dr. Laura Schlesinger,[6] in March of 1981. (2 R.T. pp. 5-8; exh. G.) Respondent treated only briefly with Dr. Schlesinger in 1981 and 1985 due to financial limits. In 1988, after marital separation, respondent resumed that treatment for a three- to four-month period. In 1981, Dr. Schlesinger administered to respondent the Minnesota Multiphasic Personality Test. He tested quite high in depression and she recalled he was tremendously sad about his marriage, having kept a lot of emotion inside and having displayed low self-esteem. (2 R.T. pp. 9-12.)

Dr. Schlesinger did not consider that respondent had a personality disorder in either 1981 or 1985 but he did have certain personality traits or chronic emotional difficulties. (2 R.T. pp. 12, 18-19.) According to Dr. Schlesinger, respondent is a highly moral, ethical person who expressed remorse over his behavior which she described as out of character. She ascribed respondent's behavior to his life-long difficulties with self-esteem and intimacy and not to criminal intent.[7] Both in her testimony and written report, Dr. Schlesinger opined that respondent needed further treatment. (2 R.T. pp. 23-24; exh. G.) When asked her opinion of the likelihood that respondent would engage in misuse of funds again, Dr. Schlesinger testified, "I would think the likelihood would be nil, *especially if we continued therapy together*, because a lot of the pent-up kinds of feelings and fears which lead to a secretive way of fixing a problem, namely this issue with the money, would not be the only alternative available." (2 R.T. p. 26, emphasis supplied.)

In 1988, respondent closed his Newport Beach practice. He did not accept new cases because he did not want to do so with these State Bar proceedings "hanging over" him. He worked at a swap meet to earn enough money to support his estranged wife and children. In March 1989, he joined a five-attorney law office in the field of mechanics' lien law. (2 R.T. pp. 81-83.) When asked for his feelings on misappropriating the Lucas funds, he stated that it was the "stupidest" thing he had ever done. He regretted doing it because it was something that a person, especially a lawyer, should not do. (2 R.T. p. 84.)

F. The Referee's Findings and Conclusions.

The referee's findings include a great many background and detailed facts. Included therein are the referee's determinations that respondent failed to deposit Lucas's payment into a trust account as required, failed to notify Bank that Lucas had paid the funds, failed to "properly" deliver funds to which the client was entitled and misappropriated those funds. Although the referee did not specifically link those findings to the specified statutes or rules violated, he noted that respondent had stipulated to the notice to show cause charges of violation of rules 8-101(A), 8-101(B)(1), 8-101(B)(4) and sections 6068 (a), 6103 and 6106. (Decision, pp. 4-5.)

Without any discussion, the referee recited that respondent's misappropriation was of the full amount of Lucas's payment of $78,144.98. (*Id.* at pp. 7, 11.) The referee observed that respondent's written response during State Bar investigation was not completely candid or cooperative and that he did not respond to discovery in this proceeding until the examiner filed a motion to compel and a motion to seek compliance with an inspection demand. The referee recited the evidence of domestic difficulties offered by respondent, Dr. Schlesinger's opinion of respondent's maladjustment and therapy and the testimony of respondent's character witnesses. The

6. Dr. Schlesinger testified that she was licensed in California as a marriage and family therapist. She held a Ph.D. degree in physiology and a post-doctoral certificate in marriage and family therapy. She has taught human relations at the University of Southern California and advanced psychology at Pepperdine University. (2 R.T. pp. 6-7, 27-29.)

7. In recounting her understanding of respondent's offense, Dr. Schlesinger focused only on his misuse of client funds. She gave no testimony that showed whether or not she was aware of respondent's practice of deceit. (2 R.T. pp. 20-21, 36-38.)

referee described respondent's demeanor in the proceeding as cooperative but less than candid. The referee also expressed doubts as to the genuineness of respondent's remorse and was troubled by respondent's taking of credits for attorney fees and interest in calculating the amount remaining to be repaid to the Bank. (*Id.* at p. 11.)

The referee noted decisional law of the Supreme Court providing for disbarment for misappropriation of funds absent the most exceptional of cases and noted that there was evidence of mitigation, such as respondent's lack of a prior discipline record, evidence that his offense was an isolated instance and no evidence to doubt whether respondent would conform his conduct to the law in the future. The referee cited three disbarment cases, distinguished one of them, pointed to the mitigating factors but concluded, without explaining how the factor weighed in the balance, that the gravity of respondent's misconduct should "not result in any windfall for respondent." (*Id.* at p. 13.)

II. DISCUSSION.

A. Culpability.

[1a] Before us, respondent urges that the hearing referee was biased against him. However, he fails to sustain his burden to clearly establish such bias and to show how he was specifically prejudiced. (See *Weber* v. *State Bar* (1988) 47 Cal.3d 492, 504; *Rosenthal* v. *State Bar* (1987) 43 Cal.3d 612, 635.) The instances of claimed bias demonstrate no more than respondent's disagreement with the manner in which the referee weighed the evidence and concern mostly issues not material to either culpability or degree of discipline. (Compare *Cannon* v. *State Bar* (1990) 51 Cal.3d 1103, 1107.) **[2]** To the extent that the referee erred in his decision by reciting that respondent lived with one of his character witnesses, we see no prejudice arising therefrom and our independent fact-finding authority permits us to delete that finding. (See rule 453(a), Trans. Rules Proc. of State Bar.) **[1b]** Our independent review of the record shows that throughout the hearing, the referee acted in a manner that was "patient, fair and commendable." (*Morquette* v. *State Bar* (1988) 44 Cal.3d 253, 261.)

Respondent complains next of errors that the referee made in assertedly concluding that he did not make restitution and that he did not give the civil complaint against Lucas to his attorney service before Lucas paid in full the obligation to Bank. Both claims are without merit.

Respondent errs in characterizing the referee's decision as standing for the finding that no restitution was made. The referee's decision recites that respondent paid the Bank $23,000 and attempted no restitution after the Bank had "lost interest" in collecting it. We have earlier determined the amount of respondent's restitution as $35,688.58. (See rule 453, Trans. Rules Proc. of State Bar.) The record shows that respondent did nothing further to aid restitution after the Bank chose to accept no further payments (once it had filed a complaint with the State Bar). We shall discuss this point further when we discuss issues bearing on degree of discipline, *post*.

With regard to the timing of the civil complaint, we have earlier stated that it is clear that that complaint was not filed until two days after Lucas had paid the Bank's claim in full. It is thus immaterial when respondent gave the complaint to the attorney service.

Respondent does not and cannot dispute his culpability of commingling of trust funds with personal funds, his misappropriation of a very large sum of client trust funds and his misrepresentations to Adler. His culpability of those offenses is established by his stipulation to the charges at the outset of the State Bar Court hearing and is further supported beyond any dispute by independent evidence. **[3a]** The only significant point in dispute about respondent's offenses is whether he is entitled to a fee for legal services for recovering the Lucas funds. Resolution of this issne is important to assess the amount of funds misappropriated by respondent. Without resolving that issue, the referee found that respondent had misappropriated the entire sum of $78,144.98. We must disagree.

[3b] The examiner cites *Jeffry* v. *Pounds* (1977) 67 Cal.App.3d 6 to support her contention that respondent should receive no fee at all for his services. Her reliance on that case is misplaced for two rea-

sons. First, the case did not involve an attorney who misappropriated funds but rather one who performed services for a certain time and then engaged in the representation of conflicting interests. Second, the court of appeal reversed the trial court and directed it to allow fees for services up to the start of the conflicting representation. (*Jeffry* v. *Pounds*, *supra*, 67 Cal.App.3d at p. 12.)

[3c] The examiner next seeks to deny respondent's fee entitlement by stating that he recovered the full amount of Bank's claim by sending only one letter to Lucas and the misappropriation was simultaneous with collection of the funds. The examiner's former claim appears to go to the issue of whether respondent charged an unconscionable fee. (See rule 2-107.) Respondent was never charged with such a violation and no evidence was presented as to the appropriateness of his fee. Nor did the examiner present evidence as to the exact timing of the misappropriation. Respondent's testimony at trial suggests that the misappropriation was not immediate but occurred over an unspecified but probably fairly short period of time. There is no evidence that respondent committed any misconduct before he received Bank's funds from Lucas. We therefore follow the customary analysis by the Supreme Court and State Bar Court in similar matters and recognize respondent's fee which, as we noted above, we have determined to be 15 percent of gross recovery before suit was filed. (Compare, e.g., *Boehme* v. *State Bar* (1988) 47 Cal.3d 448, 451; *Weller* v. *State Bar* (1989) 49 Cal.3d 670, 672.)

In our analysis, we start by adopting the appropriate findings and conclusions regarding respondent's culpability. We note at the outset that the hearing referee's decision combines the style of a judicial opinion with recitals of the evidence and does not contain a single, concise set of findings of fact. While we could adopt individual aspects of the referee's decision and while we deem many of the referee's background facts supported by the record, for the convenience of the litigants and the Supreme Court, we set forth the ultimate findings and conclusions which the record supports regarding culpability.

B. Findings of Fact.

1. From a debtor of his client, the Bank, respondent recovered $78,144.98 on September 23, 1980. Respondent recovered this sum for the Bank prior to filing suit and was therefore entitled to a fee of 15 percent of the recovery. After deducting respondent's legal fee, the Bank's share of the recovery was $66,423.23.

2. Respondent failed to promptly report receipt of the $66,423.23 either to the Bank or to the Bank's collection agent, Adler. Further, respondent failed to deposit or maintain that sum in a trust account and he misappropriated the entire $66,423.23, using most of the funds for office or personal expenses.

3. Between September 1980 and March 1982, usually in response to Adler's requests for information and action on the Bank's claim, respondent misrepresented to Adler on 11 occasions the status of payments made by the Bank's debtor. As part of his deceit of the Bank, respondent sporadically remitted small amounts to Adler. Together with some additional restitution after Adler learned that respondent had received all funds from the Bank's debtor in about September 1980, the total amount repaid by respondent was $35,658.58. Respondent owes the Bank the principal amount of $30,764.65.

C. Conclusions of Law.

1. From the facts stated in findings 1 and 2, respondent wilfully violated rule 8-101(A) by failing to deposit and maintain the Bank's share of client trust funds in a proper trust account.

2. From the facts stated in findings 1 and 2, respondent wilfully violated rule 8-101(B)(1) by failing to promptly notify his client as to the receipt of client funds.

3. From the facts stated in findings 1, 2 and 3, respondent wilfully violated rule 8-101(B)(4) by failing to pay the Bank promptly, in response to Adler's requests, the amount of trust funds owing the Bank.

4. From the facts stated in findings 1, 2 and 3, respondent violated section 6106 both by intentionally misappropriating trust funds due his client and by misrepresenting to his client the status of trust funds he had received.

5. Respondent's acts did not constitute a violation of his duties as an attorney under sections 6068 (a) or 6103. (E.g., *Sugarman* v. *State Bar* (1990) 51 Cal.3d 609, 617-618; *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561.)

D. Degree of Discipline.

We now turn to the critical issue in this proceeding, the degree of discipline to recommend.

[4] On innumerable occasions, our Supreme Court has stated that an attorney's misappropriation of client funds, being a gross or grievous breach of morality, warrants disbarment in the absence of clearly extenuating circumstances. (Among many cases, see *Chang* v. *State Bar*, *supra*, 49 Cal.3d at p. 128; *Hitchcock* v. *State Bar* (1989) 48 Cal.3d 690, 708; *In re Demergian* (1989) 48 Cal.3d 284, 293; *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 656.) If we consult the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ["stds."]), we are also guided to recommend disbarment for that offense unless the amount taken was insignificant or the most compelling mitigating circumstances clearly predominate. (Std. 2.2(a).) Far from being an insignificant amount, respondent converted over $66,000 of trust funds—the largest recovery by far he had ever obtained for a matter referred by Adler. Moreover, respondent's serious misconduct was not limited to his grievous money offense but included an extended practice of deceit on Adler over an 18-month period to forestall Adler from discovering respondent's misuse of funds. [5] The Supreme Court has identified the very serious nature of an attorney's acts of deceit. (See *Harford* v. *State Bar* (1990) 52 Cal.3d 93, 102; *Chang* v. *State Bar*, *supra*, 49 Cal.3d at p. 128; *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1147.) If we are guided by the standards cited above, respondent's acts of deceit would by themselves warrant suspension or disbarment. (Std. 2.3.)

Apart from the extremely serious nature of the misconduct before us, we see aggravating circumstances as well. Respondent's misconduct involved multiple acts and was extended. [6] He deceived his client's agent on 11 separate instances over a considerable period. (Std. 1.2(b)(ii).) This militates strongly against considering his offenses as one-time or aberrant. In addition, he deprived his client for years of funds clearly owed it on account of a mistaken overpayment. (See std. 1.2(b)(iv).) [7] Respondent's partial restitution was largely out of his attempt to deceive his client. While his client perhaps acted too conservatively in refusing restitution once a State Bar complaint was filed, that act clearly did not extinguish respondent's moral obligation to complete restitution. Yet the facts show that respondent has taken no steps in recent years even to set money aside to make amends and he owes over $30,000 in restitution. (See std. 1.2(b)(v).) Finally, the record shows that respondent was not candid or cooperative in the nearly two-year State Bar investigation period, failing to acknowledge his misdeeds until the day of the State Bar Court hearing and over eight years after he started committing them. (See std. 1.2(b)(vi).) Indeed the hearing referee recited his concerns in his decision over respondent's lack of candor and the genuineness of his remorse, but inexplicably recommended suspension.

[8] Considering that respondent's offenses were so serious, we believe that the ultimate issue for us is whether mitigating circumstances clearly outweigh or predominate in order to warrant less than a disbarment recommendation. (See *Baca* v. *State Bar* (1990) 52 Cal.3d 294, 306; *Coombs* v. *State Bar* (1989) 49 Cal.3d 679, 697.) We must conclude that they do not.

[9] The record does reveal a mitigating circumstance. Before respondent's misconduct started, he had been admitted to practice law (in Massachusetts and California combined) for a total of 14 years with no prior record of discipline. (See *Levin* v. *State Bar*, *supra*, 47 Cal.3d at p. 1148.) Yet this circumstance cannot outweigh either the seriousness of respondent's offenses or their aggravating circumstances. (See *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *Borre* v. *State Bar* (1991) 52 Cal.3d 1047, 1053.) Although respondent offered

favorable character testimony, it was not of a "wide range" of references and one of his three witnesses was not familiar with all aspects of his misconduct. (Std. 1.2(e)(vi); see also *Seide* v. *Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939.) **[10a]** Similarly, although respondent presented evidence of some family and financial difficulties, it did not seem that they were of a compelling nature that would excuse his dishonest acts; and if the evidence from his therapist is credited, he needs further treatment for his personality problems before he can be considered rehabilitated. (See std. 1.2(e)(iv), (viii); compare *In re Lamb* (1989) 49 Cal.3d 239, 248.)[8] **[10b - see fn. 8]** Respondent's low income from sole practice was unusual but appeared to be of his own making since he had practiced in law firm settings in the past, apparently successfully.

In their respective trial briefs, the examiner urged upon the referee that respondent be disbarred and respondent urged a five-year suspension, stayed on conditions including a one-year actual suspension. For reasons we do not fully understand, the examiner did not seek review from the referee's decision, only the respondent did. Yet before us, in this proceeding where review of the record is independent, the examiner again urges disbarment. **[11]** We have carefully considered and weighed the referee's recommendation of a five-year stayed suspension with actual suspension for two years and until respondent completes restitution. However, we are unable to understand how the referee applied the relevant factors in this case to arrive at his recommendation, particularly after he cited some Supreme Court opinions disbarring attorneys for less serious conduct than occurred here and noted the several aggravating circumstances in opposition to the mitigating ones. By its emphasis in the referee's decision, we can only infer that the referee deemed respondent's offenses isolated and unlikely to be repeated, therefore justifying suspension. That might be true of respondent's single act of misappropriation; but as we noted above, the referee's own decision and our independent record review show that respondent's misconduct was not isolated, but extended by his lengthy practice of deceit on his client's agent, followed by his lack of forthrightness during State Bar investigation.

[12] We acknowledge that all relevant factors must be considered, including the purposes of imposing discipline. Those purposes are several-fold: protection of the public, courts and legal profession, the maintenance of high professional standards and the maintenance of integrity of and public confidence in the legal profession. (Std. 1.3; *Baca* v. *State Bar, supra*, 52 Cal.3d at p. 305; *Cannon* v. *State Bar, supra*, 51 Cal.3d at pp. 1114-1115; *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 822; *In re Basinger* (1988) 45 Cal.3d 1348, 1360.) **[13a]** In our view, the gravity of the misappropriation and accompanying deceit, surrounded by no extraordinary mitigation which could explain the offense, followed by lack of sufficient evidence of rehabilitation to reasonably assure the public that the offense would not recur calls for disbarment both to properly protect the public and to assure the integrity of the profession. (See *Kaplan* v. *State Bar, supra*, 52 Cal.3d at pp. 1071-1073; *In re Basinger, supra*, 45 Cal.3d at p. 1360.)

We are guided significantly by the Supreme Court's recent decision in *Kaplan* v. *State Bar, supra*, 52 Cal.3d 1067, a case very similar to the one before us. Attorney Kaplan had many years of practice without prior misconduct as did respondent. Kaplan's theft of law partnership funds totalling $29,000 occurred on a number of instances over a seven-month period in 1985 and was followed by several instances of deceit to his partner and the State Bar. Respondent's theft of more than twice that amount was from client funds and was followed by 11 instances of deceit over 18 months with an additional 2-year period of lack of forthrightness during State Bar investigation. Kaplan appeared to have offered a stronger character showing than did respondent and appeared to have suffered from perhaps slightly more of an emotional strain than respondent. As in this case, the hearing panel in *Kaplan* recom-

8. **[10b]** The Supreme Court has observed that psychoneurotic problems often "underlie professional misconduct and moral turpitude" but that the Court's primary function must be to fulfil proper professional standards, "whatever the unfortunate cause, emotional or otherwise, for the attorney's failure to do so." (*Grove* v. *State Bar* (1967) 66 Cal.2d 680, 685; *In re Nevill* (1985) 39 Cal.3d 729, 736, and cases cited.)

mended suspension but the majority of the review department, disbarment.

In its unanimous opinion disbarring attorney Kaplan, the Supreme Court rejected the claim made in his behalf that his behavior was sufficiently aberrational to lower the review department's recommendation. We have previously noted the extended nature of respondent's dishonest acts which we submit warrant a similar conclusion. The Court in *Kaplan* also noted that, absent the action of Kaplan's partners, he would not have ceased his misconduct. Here too, not until Adler confronted respondent with the truth Adler learned directly from Lucas did respondent stop deceiving Adler and it appears that respondent never told Adler exactly what he did with Bank's funds.

As in *Kaplan*, we read the record as showing that respondent's rehabilitation is not complete, that additional treatment is needed to assure that there is no risk of reoccurrence. While it does appear that Kaplan's need for the misappropriated funds was less than respondent's, both used the money to foster the appearance of greater financial success.

Although the recommendation of the department is not unanimous in this matter, even the dissent acknowledges the serious nature of respondent's misconduct, including the serious aspects of his deceit. **[13b]** When we look at all the factors in this matter taken together—an extremely large misappropriation,[9] a practice of deceit far more extensive and prolonged than seen in cases cited by the dissent, a lack of forthrightness in dealing with the misconduct until the start of the State Bar Court hearings and a lack of mitigation sufficient to overcome respondent's serious offenses—we must conclude that disbarment, rather than suspension, is the appropriate discipline and is fully proportional to the grave nature of respondent's misconduct. (See *ante*, pp. 594-595.)

[14] We observe that in California, disbarment affords the opportunity to qualify for reinstatement upon sufficient passage of time and adequate proof of rehabilitation, present moral fitness and learning and ability in the general law. (See *In re Lamb*, *supra*, 49 Cal.3d at p. 248; rules 662 et seq., Trans. Rules Proc. of State Bar.)

[15] We do not consider the lesser showing afforded by procedures under standard 1.4(c)(ii) to be sufficient to protect the public and maintain the integrity of the profession, given the extreme seriousness of respondent's offenses, the length of time over which they spanned and the questions we have concerning whether respondent's rehabilitation is complete.

III. RECOMMENDATION.

For the foregoing reasons, we recommend that respondent, Howard Kueker, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state. We also recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order.

I Concur:

NORIAN, J.

PEARLMAN, P.J., dissenting:

I respectfully dissent. The majority characterizes the facts in a way which I do not believe the required deference to the referee's credibility determination permits. I do not see how we can reject the referee's finding that "the 1980 incident was an isolated instance of misappropriation" resulting from "great difficulties in [his] personal and professional life and not indicative of how he conducted himself as an attorney during his legal career." I also disagree

9. Although respondent's misappropriation of funds occurred many years ago, much of the passage of time since can be attributed to his active deceit of his client, forestalling discovery of wrongdoing, followed by his repeated failure to respond openly to requests of State Bar investigators for information when looking into the Bank's complaint.

with the majority's conclusion that a single offense by a practitioner with over 20 years of an otherwise unblemished record does not constitute aberrational misconduct under the controlling case law. Thirdly, I believe we are required by controlling case law to weigh all of the mitigating factors more heavily than the majority has done, particularly in light of the fact that, if not disbarred, respondent was found to pose no threat of repeating the misconduct. Based upon my analysis of the record in light of the Supreme Court precedent, I have concluded that principles repeatedly enunciated by the Supreme Court establish that lengthy suspension is the appropriate discipline in the present case. Neither the guidelines set forth in the standards, nor the case law, mandate disbarment here.

As the Supreme Court explained in *Maltaman* v. *State Bar* (1987) 43 Cal.3d 924, 958, rejecting disbarment for a first offense in favor of five years stayed suspension on conditions, including one year's actual suspension, "The proven misconduct in this case is serious, involves moral turpitude, and is of the kind which undermines public confidence in the legal system. Even where deceit is involved, however, we generally have not ordered disbarment except where there is other serious *and habitual* misconduct. [Citations.]" (*Id.*, emphasis in original; see also *Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074.)

Standard 2.2(a) provides for disbarment absent "the most compelling mitigating circumstances." That standard provides a starting point for analysis of the proffered mitigation under controlling Supreme Court case law. The Supreme Court has repeatedly declined to disbar upon findings of mitigating circumstances comparable to those found by the referee at the hearing below. Thus, disbarment is not warranted where, as here, aberrational misconduct is involved with little or no risk of repetition (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235); where there is a "substantial previous unblemished record" (*In re Kelley* (1990) 52 Cal.3d 487; *Schneider* v. *State Bar* (1987) 43 Cal.3d 784, 798-799); where severe emotional distress from personal pressures which no longer pertain is found to be directly responsible for the misconduct (*Amante* v. *State Bar* (1990) 50 Cal.3d 247, 254; *Bradpiece* v. *State Bar* (1974) 10 Cal.3d 742, 746) and "successful therapeutic rehabilitation or a strong prognosis for future rehabilitation is established." (*Porter* v. *State Bar* (1991) 52 Cal.3d 518, 528; *Ballard* v. *State Bar* (1983) 35 Cal.3d 274, 289.)

For a first offense of misappropriation by a practitioner the more common discipline is one year of actual suspension. (*Hipolito* v. *State Bar* (1989) 48 Cal.3d 621, 628, citing *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, 1367-1368.) There is no question that respondent's serious misconduct merits significantly more than one year's suspension. It involved both a substantial amount of money and the aggravating circumstances of a prolonged cover-up thereafter, albeit in the course of commencing restitution. However, in determining the appropriate discipline our Supreme Court has repeatedly directed that we look at the record in light of the purposes served by discipline. (See, e.g., *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d at p. 958 ["we have no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public. (Citations.)"]; see also *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 316 ["The imposition of attorney discipline does not issue from a fixed formula but from a balanced consideration of all relevant factors, including aggravating and mitigating circumstances. (Citation.)"].)

The majority concludes that respondent's practice of deceit in the course of making restitution for his misappropriation over close to a two-year period renders his conduct non-aberrational and by itself warrants suspension or disbarment. (Maj. opn., *ante*, p. 594, citing standard 2.3, Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V ["standard(s)"]; *Harford* v. *State Bar* (1990) 52 Cal.3d 93, 102; *Chang* v. *State Bar* (1989) 49 Cal.3d 114, 128 and *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, 1147.) While deceit of a client is a serious matter, the majority departs from Supreme Court precedent in treating the deceit as a basis for converting the case from a suspension case to a disbarment case when it was unaccompanied by "other serious *and habitual* misconduct." (*Maltaman* v. *State Bar*, *supra*, 43 Cal.3d at p. 958, emphasis in original; *Rodgers* v. *State Bar*, *supra*, 48 Cal.3d

300;[1] see also *Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 131-132.) In *Levin* v. *State Bar, supra,* 47 Cal.3d at p. 1147, the Supreme Court noted "no aspect of Levin's conduct is more reprehensible than his acts of dishonesty." Yet the result was that the respondent received six months actual suspension.

The Supreme Court has repeatedly recognized the principle that discipline should be consistent with and proportional to that imposed in similar recent cases. (See, e.g., *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1309.) In *Snyder,* the Court concluded that disbarment was inappropriate for misappropriation and commingling and other trust account violations in light of the petitioner's emotional breakdown resulting from severe personal stress and voluntary termination of practice for a period of three years, despite his short period of prior practice and his need for continued psychiatric therapy as part of his discipline. It found the case similar to *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357, and declined to deviate from the hearing panel's recommendation of two years suspension since the panel "had the first-hand opportunity to observe petitioner's demeanor." (*Snyder* v. *State Bar, supra,* 49 Cal.3d at pp. 1309-1310.) Here, as in *Snyder* v. *State Bar, supra,* the referee found that respondent had emotional problems resulting from his foundering marriage, responsibilities for a disabled teenage daughter, and serious financial problems. In some respects, respondent's case differs from Snyder's. While the amount of respondent's misappropriation and his subsequent cover-up were significantly more serious than the misconduct in *Snyder,* unlike Snyder, respondent also had a lengthy period of blemish-free prior practice.

The case most comparable to this one appears to be *Friedman* v. *State Bar, supra,* 50 Cal.3d 235 in which the Supreme Court rejected a disbarment recommendation in favor of three years actual suspension with a standard 1.4(c)(ii) hearing required before the respondent could resume practice. Like Friedman, respondent was found to have committed an aberrational act of misappropriation aggravated by deceit and other misconduct over a period of years.[2] Although the Supreme Court described Friedman's conduct as very serious, it also characterized Friedman's conduct as aberrational because it was in the context of an otherwise unblemished 20-year career and because it was attributable in part to stresses he experienced arising from marital problems. (*Friedman, supra,* 50 Cal.3d at p. 245.)

The Supreme Court did not find disbarment necessary even though Friedman repeatedly lied in the course of the State Bar investigation, committed perjury at the hearing and attempted to manufacture evidence—conduct far more egregious than respondent's initial lack of complete candor and cooperation with the State Bar before he stipulated to culpability at the outset of the hearing below. Here, as in *Friedman* v. *State Bar, supra,* the referee likewise found that the 1980 incident was aberrational and resulted from "great difficulties in [his] personal and professional life." The referee further found that "respondent if he is not disbarred, imposes no threat of repeating the misconduct." The exam-

1. In *Rodgers* v. *State Bar, supra,* 48 Cal.3d 300, as in *Friedman* v. *State Bar, supra,* the Supreme Court rejected a disbarment recommendation despite Rodgers's repeated evasions and deceit of the court and opposing counsel. The Court stated that "No act of concealment or dishonesty is more reprehensible than Rodgers's attempts to mislead the probate court." (*Rodgers* v. *State Bar, supra,* 48 Cal.3d at p. 315.) It noted that the recommendation of disbarment was available for dishonesty in violation of section 6106, but found that it was disproportional to the discipline imposed by the Court under similar circumstances in the past. (*Id.* at pp. 317-318.) Taking into account such cases and Rodgers's prior clean record, it imposed two years actual suspension with five years probation to ensure his rehabilitation. (*Id.* at pp. 318-319.)

2. The Supreme Court compared *Friedman* v. *State Bar, supra,* 50 Cal.3d 235 to *Weller* v. *State Bar* (1989) 49 Cal.3d 670, in which it imposed similar discipline. (*Friedman* v. *State Bar, supra,* 50 Cal.3d at p. 245.) Weller was found to have misappropriated a substantial sum of money from two separate clients over a two-year period. (*Weller* v. *State Bar, supra,* 49 Cal.3d at p. 677.) In addition, Weller had two prior disciplinary proceedings including a separate instance of misappropriation from a third client. The high court noted that absent mitigating evidence, this course of conduct would almost certainly have warranted disbarment. (*Id.*, citing *Chang* v. *State Bar, supra,* 49 Cal.3d at p. 128 and *Kelly* v. *State Bar, supra,* 45 Cal.3d at p. 657.) But the mitigating evidence reduced the discipline for misappropriation from two clients to three years actual suspension, notwithstanding two priors.

iner did not seek review of the ensuing decision recommending two years actual suspension based on such findings.

In rejecting the referee's recommendation of lengthy suspension, the majority gives no deference to the referee's finding, based upon personal observation of respondent and the credibility of his testimony and that of other witnesses, including expert opinion, that his misconduct was the direct result of extreme emotional difficulties and that he poses no threat of repeating the misconduct. (See standard 1.2(e)(iv.) On matters of credibility, the Supreme Court has instructed us to give great deference to the hearing panel. (See *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1056 [reversing the former volunteer review department's substitution of its own credibility determination for that of the hearing referee]; *Snyder* v. *State Bar, supra,* 49 Cal.3d at pp. 1309-1310.)

The majority gives insufficient weight to respondent's 14-year unblemished record prior to 1980. The absence of a prior disciplinary record is in itself an important mitigating circumstance. (*In re Kelley, supra,* 52 Cal.3d at p. 498.)

Also, the Supreme Court takes into account an unblemished record *following* the misconduct when a substantial period of time has passed prior to review. (*Rodgers* v. *State Bar, supra,* 48 Cal.3d at pp. 316-317; *Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 450.) Indeed, in *In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, recommended discipline adopted, orders filed Feb. 14, 1991 (S017683)), we applied that principle in mitigation of an elaborate fraud designed for similar personal gain. The mitigation resulted in two years actual suspension. Here, the eight years following respondent's misconduct have permitted him to obtain psychological treatment and put on evidence of a lengthy period of subsequent rehabilitation to convince the hearing referee that he would not repeat his misconduct. This is specifically recognized by standard 1.2(e)(viii) as an appropriate mitigating factor.

In similar situations where substantial mitigating factors have been found, disbarment has been rejected as clearly inappropriate. (Compare *In re Chernik* (1989) 49 Cal.3d 467, 474 [one year actual suspension for felony conviction (18 U.S.C. § 371), where mitigating factors found, including a 13-year prior blemish-free record] with *In re Crooks* (1990) 51 Cal.3d 1090, 1101 [disbarment for felony conviction (18 U.S.C. § 371) where no mitigating circumstances found].)

As the Supreme Court explained in *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 656-657, the most obvious candidates for disbarment are those who take large sums of money *from several clients*. "Such broad scale wrongdoing suggests that the attorney is likely to repeat his misconduct and is simply not worthy of the public trust. [Citation.]" (*Id.*)[3] The Supreme Court went on to address what other circumstances might also merit disbarment absent broad scale misconduct. In *Kelly* v. *State Bar, supra,* the respondent had only been a member of the State Bar for seven and one-half years. Ordering disbarment for two counts of misconduct including misappropriation of substantial client funds, the Supreme Court noted that "no mitigating factors—compelling or otherwise—were presented" and that respondent's unexcused and unmitigated conduct coupled with no explanation and a self-interest served by his misconduct suggested that he was capable of doing it again. (*Id.* at p. 659.) Similarly, in *Chang* v. *State Bar, supra,* 49 Cal.3d at p. 129, the Supreme Court found no mitigating circumstances whatsoever. Nonetheless, one justice dissented from the disbarment recommendation because the misappropriation involved only one client and one law firm. Here, in contrast, the referee found substantial mitigation and

3. Typical examples of such broad scale wrongdoing are cases such as *Coombs* v. *State Bar* (1989) 49 Cal.3d 679 (13 separate cases of misconduct), *Hitchcock* v. *State Bar* (1989) 48 Cal.3d 690 (six original client matters and grand theft conviction involving hundreds of thousands of dollars), *Cannon* v. *State Bar* (1990) 51 Cal.3d 1103 (misconduct found in five client matters after inactive enrollment for ten other matters), and *Harford* v. *State Bar, supra,* 52 Cal.3d 93 (misappropriation, forgery, concealment and dishonesty in six client matters plus prior record of discipline).

also specifically found that respondent was not a threat to commit similar acts.[4]

The very recent case of *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067, involved more flagrant misconduct. In *Kaplan*, the Supreme Court found that a partner in a major law firm under no financial pressure committed 24 separate acts of misappropriation over several months for no apparent reason except to live beyond his means. (*Id.* at p. 1072.) As the Court observed, the facts indicated that absent action taken by his law partners Kaplan would not have ceased his misappropriations. (*Id.*) In adopting the review department's disbarment recommendation, the Court noted the inapplicability of the line of cases considering financial difficulties and related personal pressures in mitigation (*Amante* v. *State Bar*, *supra*, 50 Cal.3d at p. 254; *Bradpiece* v. *State Bar*, *supra*, 10 Cal.3d at pp. 747-748) because Kaplan's misconduct was not caused by such problems. It also distinguished the line of cases involving "a few isolated incidents." (*Kaplan* v. *State Bar*, *supra*, 52 Cal.3d at p. 1071; see also *ibid.*, fn. 5.) The Court further noted the hearing panel had found no clear and convincing evidence that Kaplan no longer suffered from the emotional difficulties which prompted his two dozen thefts and that there was insufficient demonstration of changed circumstances. (*Id.* at pp. 1072-1073.)[5] Here, in contrast, the referee made express findings in favor of the respondent on all of the mitigating factors which were absent in *Kaplan*.[6]

Indeed, the record shows that respondent acknowledged his misappropriation long before any complaint was made by the client to the State Bar, and that he executed a promissory note for the misappropriated funds and continued to make payments on such note until such time as he was advised by the bank's collection agent that the bank would no longer accept payments. (Decision, p. 7.) Since the bank refused further payments on the promissory note, it appears inappropriate to take the majority's view that his failure to put payments aside thereafter is evidence of indifference toward rectification or atonement under standard 1.2(b)(v), particularly in light of the lack of any evidence of his current financial situation.[7]

Other cases cited by the majority also involved far more egregious circumstances than are present here. In *In re Basinger* (1988) 45 Cal.3d 1348, an attorney with only eight years of practice became romantically involved with a secretary and joined her in perpetuating multiple thefts of over $260,000 to cover his gambling losses and lied to cover his thefts. He made partial restitution only after the

4. The referee reached the conclusion that respondent posed no risk of repetition of his misconduct despite improperly voicing concern about respondent's remorse based on respondent's claim to credit for fees earned prior to the misappropriation. As the majority points out, respondent was entitled to credit for fees earned and his assertion of a claim thereto at the hearing cannot be considered as a sign of lack of remorse.

5. Although the majority quotes the testimony below of Dr. Schlesinger as indicating that continued therapy would "especially" render nil the likelihood of repeated misconduct, such qualification still meets the Supreme Court's requirement of "establishing a strong prognosis for rehabilitation." (*Porter* v. *State Bar*, *supra*, 52 Cal.3d at p. 528.) Indeed, the majority does not directly address the referee's determination that respondent represented no current risk based on the testimony of all the witnesses, including respondent. The findings of the referee in this regard are based on evidence far more reliable than the hearsay belatedly proffered on appeal in *In re Lamb* (1989) 49 Cal.3d 239, 247. Disbarment is clearly not necessary to take care of any lingering concern on this issue. (*Snyder* v. *State Bar*, *supra*, 49 Cal.3d 1302, 1309-1310 [adopting recommendation of two years actual suspension conditioned on prescribed mandatory continuing psychiatric therapy]; cf. *Maltaman* v. *State Bar*, *supra*, 43 Cal.3d at p. 958.) Similarly to *Snyder* v. *State Bar*, *supra*, we could more than adequately protect the public by simply adding to the conditions of the stayed suspension a requirement of either continued therapy or certification of no further need for therapy as a precondition to a standard 1.4(c)(ii) showing.

6. As the majority notes, respondent was a solo practitioner making a below subsistence level $5,000 to $10,000 per year. This factor, by itself, is not entitled to great weight absent clear evidence as to whether these severe financial pressures were reasonably foreseeable or beyond his control. (*In re Naney* (1990) 51 Cal.3d 186, 196.) However, where such factor is combined with great personal stress the combination has been repeatedly recognized as a factor in mitigation. (See, e.g., *Amante* v. *State Bar*, *supra*, 50 Cal.3d at p. 254.)

7. Respondent may be permitted to show that he has made restitutionary payments to the best of his ability and his financial situation has rendered him unable to complete restitution by such time. (Cf. *Galardi* v. *State Bar* (1987) 43 Cal.3d 683, 694-695.)

police intervened. *In re Abbott* (1977) 19 Cal.3d 249, *In re Demergian* (1989) 48 Cal.3d 284, 294, and *In re Ewaniszyk* (1990) 50 Cal.3d 543, 553 all involved grand theft convictions.[8]

The very recent decision in *Grim* v. *State Bar* (1991) 53 Cal.3d 21 is also more egregious than the current case since in aggravation of the charged misappropriation, the record disclosed a number of other instances when the respondent's trust account had been overdrawn over a two-year period; the respondent had a prior record of discipline which included commingling of funds and failure to perform services; restitution commenced only after State Bar proceedings were instituted; there was no sustained period of clean conduct after the charged misappropriation and there was no finding by the referee of no threat of repetition of the misconduct or other harm to the public. (*Id.* at pp. 32, 25.) Even so, one justice dissented on the ground that disbarment was excessive. (*Id.* at p. 36 (dis. opn. of Mosk, J.).)

Thus, even on far more egregious facts with greater risk to the public, the Supreme Court has split on the propriety of disbarment. Where acts of similar seriousness were committed by attorneys with long periods of otherwise unblemished practice, the Supreme Court has repeatedly declined to disbar, often by unanimous vote. Instead, the Court has ordered varying lengths of suspension depending on other mitigating factors. (See, e.g., *In re Chernik, supra,* 49 Cal.3d at p. 474; *Friedman* v. *State Bar, supra,* 50 Cal 3d. at p. 245; *Rodgers* v. *State Bar, supra,* 48 Cal.3d at p. 318.)

Disbarment is not necessary to protect the public here. I would recommend five years stayed suspension and five years probation, conditioned on actual suspension for three years and until respondent makes restitution. During probation, respondent should be required to continue therapy, unless a psychiatrist or qualified psychologist certifies that therapy is no longer necessary. For further protection of the public, I would also require that before respondent is allowed to resume the practice of law, he must prove rehabilitation, fitness to practice law, and learning and ability in the general law at a hearing pursuant to standard 1.4(c)(ii).

8. In *In re Abbott, supra,* the respondent only commenced partial restitution after he was criminally convicted and restitution was made a condition of probation. Also, his prognosis for recovery from manic-depressive psychosis was not uniformly favorable. (19 Cal.3d at p. 254.) The respondents in both *Demergian* and *Ewaniszyk* had cocaine and alcohol abuse problems and periods of prior practice so short that they were not deemed of significance as mitigating factors. Justices Kaufman and Panelli dissented in *In re Demergian* on the basis that Demergian had made an adequate showing of rehabilitation. (*In re Demergian, supra,* 48 Cal.3d at pp. 298, 299 (dis. and conc. opn. of Kaufman, J.).) Justices Mosk and Broussard likewise dissented in *In re Ewaniszyk, supra,* 50 Cal.3d at p. 552 and would have imposed a lengthy suspension instead. (Cf. *Baker* v. *State Bar* (1989) 49 Cal.3d 804 [rejecting a disbarment recommendation and ordering one year suspension of an attorney who committed multiple acts of misappropriation from several clients but who established rehabilitation from alcohol and cocaine dependency to demonstrate that disbarment was not reasonably necessary to protect the public].)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

IRA DAVID HAZELKORN

A Member of the State Bar

[No. 89-O-16758]

Filed June 27, 1991

SUMMARY

Respondent was charged with making a court appearance while on suspension for nonpayment of dues, in wilful violation of Business and Professions Code sections 6106, 6125, 6126 and 6127(b). Respondent's default was entered in the disciplinary proceeding, resulting in the charges against him being admitted. At the default hearing, the examiner introduced the transcript of respondent's improper court appearance. The transcript revealed that when the judge asked respondent about his status with the State Bar, respondent indicated that his records showed that his dues had been paid. The examiner also introduced evidence showing that respondent paid his dues and was reinstated to the practice of law on the same date as his court appearance. No evidence was introduced to establish the *time* of that payment. The hearing judge found that the evidence offered by the examiner negated respondent's admission (by default) that he practiced law while on suspension. The hearing judge therefore dismissed all charges. (Hon. Christopher W. Smith, Hearing Judge.)

The examiner sought review. The review department held that ambiguous evidence which can be interpreted as consistent with the allegations of the notice to show cause does not negate the admission of the charges by default. Because respondent's remarks were more consistent with his having paid his dues after his court appearance than with his having done so before, the review department held that although the evidence introduced by the examiner fell below clear and convincing proof of practicing law while suspended, the evidence was not inconsistent with the charging allegations which had been admitted. The review department therefore found respondent culpable of violating sections 6125 and 6126 of the Business and Professions Code, though it upheld the hearing judge's findings of no culpability of violating sections 6106 and 6127(b). The matter was remanded for further proceedings as to appropriate discipline.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: No appearance (default)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **106.10 Procedure—Pleadings—Sufficiency**
106.20 Procedure—Pleadings—Notice of Charges
230.00 State Bar Act—Section 6125
231.00 State Bar Act—Section 6126
Notice to show cause properly charged respondent with practicing law while suspended, in violation of sections 6125 and 6126(b), despite language in notice describing respondent as having made court appearance while "on inactive . . . status," when respondent was actually suspended for nonpayment of dues.

[2] **107 Procedure—Default/Relief from Default**
135 Procedure—Rules of Procedure
162.19 Proof—State Bar's Burden—Other/General
A respondent's default results in the admission of the facts alleged in the charging allegations of the notice to show cause, and no further proof is required to establish the truth of those charges. (Trans. Rules Proc. of State Bar, rules 552.1(e), 555(e).)

[3 a, b] **107 Procedure—Default/Relief from Default**
159 Evidence—Miscellaneous
162.11 Proof—State Bar's Burden—Clear and Convincing
204.90 Culpability—General Substantive Issues
In a default proceeding, ambiguous evidence that can be interpreted as consistent with allegations of the notice to show cause does not negate the deemed admissions of the notice to show cause. Where evidence introduced at default hearing fell short of clear and convincing proof of charged violations, but was not inconsistent with charging allegations, defaulting respondent should have been found culpable of violations properly charged.

[4] **231.50 State Bar Act—Section 6127**
Business and Professions Code section 6127(b) does not apply to a member of the State Bar practicing law while suspended.

[5] **221.00 State Bar Act—Section 6106**
Evidence that respondent practiced law while on suspension by making one court appearance prior to paying dues and being reinstated, did not establish culpability of moral turpitude, dishonesty or corruption, where hearing judge found credible respondent's statement during said court appearance that respondent believed his dues had been paid.

[6 a, b] **125 Procedure—Post-Trial Motions**
Examiner's belated post-trial motion seeking to introduce evidence of additional acts of misconduct was properly denied, where examiner failed to explain why motion was not made until after trial even though evidence was brought to examiner's attention prior to trial.

[7] **106.20 Procedure—Pleadings—Notice of Charges**
204.90 Culpability—General Substantive Issues
Evidence of additional uncharged acts of misconduct could not constitute an independent basis for culpability.

[8 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
107 Procedure—Default/Relief from Default
565 Aggravation—Uncharged Violations—Declined to Find
Uncharged facts cannot be relied upon for evidence of aggravation in a default matter because the respondent is not fairly apprised of the fact that additional uncharged facts will be used against him. The use of uncharged aggravating factors in contested proceedings presents a different question.

[9] **125 Procedure—Post-Trial Motions**
Examiner's post-decision motion for reconsideration and request for receipt of additional evidence of culpability was properly denied, where there was no showing why the proffered additional evidence could not have been presented at the time of the original hearing.

ADDITIONAL ANALYSIS

Culpability
Found
230.01 Section 6125
231.01 Section 6126
Not Found
221.50 Section 6106
231.55 Section 6127

OPINION

PEARLMAN, P.J.:

This case presents a very simple issue regarding the interplay in a default proceeding of deemed admissions of allegations in the notice to show cause and evidence adduced by the examiner at the default hearing. The hearing judge dismissed the proceeding on a finding that the proof at the hearing undercut or negated the essential allegations of the notice to show cause. The hearing judge also denied a post-trial motion to augment the record and a motion for reconsideration based on additional proffered evidence. The examiner requested review. While we agree with the hearing judge that the post-trial motions were not well taken, we conclude that the original evidence was not inconsistent with the deemed admissions and that culpability was established of violations of Business and Professions Code sections 6125 and 6126.[1] We remand for determination of the appropriate discipline.

DISCUSSION

Upon the examiner's request for review pursuant to rule 450, Transitional Rules of Procedure of the State Bar, we now conduct our own independent review of the record of the proceedings below. (Trans. Rules Proc. of State Bar, rule 453.) The one-count notice to show cause charged respondent Hazelkorn with wilfully making a court appearance on October 5, 1989, while on "inactive" [sic] membership status for failure to pay 1989 State Bar membership dues "in wilful violation of sections 6106, 6125, 6126 and 6127 (b)."[2] **[1 - see fn. 2]** The notice to show cause and subsequent notices with respect to entry of default were found by the hearing judge to have been properly served on the respondent's most recent membership address. Respondent made no effort to set aside the default.

[2] Respondent's default resulted in the admission of the facts alleged in the charging allegations. (Trans. Rules Proc. of State Bar, rules 552.1(e) and 555(e).) As a consequence, no further proof was required to establish the truth of those charges. (Trans. Rules Proc. of State Bar, rule 552.1(e).) At the default hearing below, the examiner introduced the transcript of a criminal proceeding in *People* v. *James Lee Penner, Cherokee Construction Co. and Clyde Ewing*, case number 88-T-02888 (State Bar exhs. 1 and 5) showing that respondent appeared at 10 a.m. on October 5, 1989, in Division 4 of the Municipal Court, Antelope Judicial District in Los Angeles. Respondent represented defendant Clyde Ewing at that hearing.

During the course of the October 5, 1989, hearing the deputy district attorney brought to the court's attention the issue of respondent's suspension for nonpayment of State Bar membership fees. The transcript reflects that a colloquy ensued as to whether respondent was, in fact, suspended with respondent indicating that he had received notice from the State Bar of his nonpayment of membership fees, but he stated that "my records show that I have paid it." (Exh. 1, p. 5.) The examiner introduced documentary evidence at the hearing below (exh. 3) proving that respondent paid his State Bar membership fees on October 5, 1989, and his membership was restored on that date with all privileges, duties and responsi-

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1. Unless otherwise noted, references to sections are to the sections of the Business and Professions Code.

2. [1] The notice to show cause alleged that: "[¶] 1. By certified letter to you dated July 14, 1989, you were served with a copy of the order of the Supreme Court of California advising you of your suspension from active membership status in the State Bar of California for nonpayment of 1989 State Bar membership fees. [¶] 2. Thereafter, on October 5, 1989, while still on inactive membership status with the State Bar, you wilfully appeared in the Municipal Court, Antelope Judicial District, County of Los Angeles, on behalf of Defendant Clyde Ewing, in that matter entitled *People* v. *James Lee Penner, Cherokee Construction Co. and Clyde Ewing*, Case No. 88-T-02888." While the failure to pay State Bar membership fees when delinquent results in suspension of a member by the Supreme Court (Bus. & Prof. Code, § 6143) and not inactive enrollment, the Supreme Court has authorized the charge of violating section 6125 in cases where an attorney was suspended. (*Morgan* v. *State Bar* (1990) 51 Cal.3d 598, 604.) We also see no problem under section 6126 (b) posed by the language of the notice to show cause in light of the prohibition of section 6126 (b) of practicing law by anyone inactively enrolled or suspended and the recitation in the notice that respondent had been suspended. (Cf. *Brockway* v. *State Bar* (1991) 53 Cal.3d 51, 63.)

bilities incident thereto. The time of payment was not established by any evidence in the record.

The hearing judge interpreted the evidence offered at the default hearing as undercutting or negating respondent's admission by default of the charging allegation that he practiced law on October 5, 1989, while under inactive enrollment for nonpayment of State Bar membership fees. In so ruling, the hearing judge relied on the review department's analysis of evidence offered in a default proceeding. (See *Conroy* v. *State Bar* (1991) 53 Cal.3d 495, 502, fn. 5.) However, *Conroy* v. *State Bar* involved evidence at the hearing which in fact contradicted the charging allegation that Conroy had made numerous misrepresentations to the superior court and the State Bar investigator. **[3a]** As we have recently held in *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, ambiguous evidence that can be interpreted as consistent with allegations of the notice to show cause does not negate the deemed admissions of the notice to show cause. Indeed, respondent's remarks at the hearing appear more consistent with the examiner's contention that the respondent checked with the State Bar after the morning hearing on October 5, 1989, and paid his State Bar membership fees that afternoon than that he paid them before the hearing. While the evidence introduced at the hearing below falls short of clear and convincing proof of practicing law while suspended, it is not inconsistent with the charging allegations.

[4] The examiner does not challenge the decision below that respondent did not violate section 6127 (b). She agrees that the charge was inappropriate because section 6127 (b) was not intended to apply to the offense of a member practicing law while suspended. (Decision at p. 7, citing *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229.) **[5]** The examiner also acquiesces in the finding of no culpability under section 6106 because the admitted charged allegation of "wilfully making a court appearance" and the evidence offered at trial in support thereof fell short of evidence proving moral turpitude, disbonesty or corruption. Indeed, the evidence offered at trial indicated that respondent believed he had paid his fees and the examiner does not dispute that the hearing judge acted within his discretion in finding such evidence credible.

[6a] At the hearing below, the examiner belatedly offered additional evidence that respondent practiced law on other occasions while suspended. (See exh. 5 and attachments to motion to augment record.) The motion to augment the record was made on November 16, 1990, and recited that the information was new information received after trial on June 2 [sic], 1990. The trial in fact occurred on August 29, 1990, and the record was held open until September 12, 1990, for receipt of a certified copy of exhibit 5. The moving papers in the motion to augment the record stated that the information of other acts of practicing law while suspended was contained in an additional complaint received by the State Bar on or about July 18, 1990, and reported by an investigator to the examiner on August 1, 1990. The examiner did not explain why she waited until November to seek to augment the record after learning of the existence of other alleged acts of practicing law while suspended. The hearing judge denied her motion and also refused to consider making findings in aggravation based on exhibit 5 which consisted of evidence of uncharged instances of other alleged acts of practicing law while suspended. **[7]** This evidence could not constitute an independent basis for culpability because it was uncharged. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929.) **[8a]** It was also rejected as grounds for a finding in aggravation based on our decision in *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 213 (uncharged facts cannot be relied upon for evidence of aggravation in a default matter because the respondent is not fairly apprised of the fact that additional uncharged facts will be used against him). (Decision at pp. 4, 8, fns. 4, 5.) **[6b]** The examiner does not challenge that ruling and on our independent review we agree with the hearing judge's rulings.[3] **[8b - see fn 3]**

The hearing judge also denied the examiner's subsequent motion for reconsideration and request

3. **[8b]** The use of uncharged aggravating factors in contested proceedings presents a different question. (See *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 775; *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 36.)

for receipt of additional evidence of culpability on the single charged count because there was no showing why the proffered additional evidence could not have been presented at the time of the original hearing. The examiner also does not challenge that ruling, and we again see no basis for disturbing the ruling of the hearing judge in this regard.

CONCLUSION

[3b] For the reasons stated above, we agree with the dismissal of charged violations of sections 6106 and 6127 (b) but conclude, contrary to the court below, that respondent was culpable of violating sections 6125 and 6126 on the charged offense of practicing law while suspended on October 5, 1988. Having found respondent culpable of violating two statutes by virtue of his October 5, 1989, court appearance, we remand for determination of the appropriate discipline.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DANIEL G. MEZA

A Member of the State Bar

[No. 90-C-16535]

Filed July 16, 1991

SUMMARY

An attorney was convicted of violating Penal Code section 288.5 (engaging in three or more acts of substantial sexual conduct with a child under age 14), a felony and a crime of moral turpitude per se. The attorney was placed on interim suspension by the Acting Presiding Judge of the State Bar Court pursuant to Business and Professions Code section 6102(a) and rule 951(a), California Rules of Court.

Prior to the effective date of the interim suspension order, the attorney petitioned to set it aside under the "good cause" provision of section 6102(a). The basis for the petition was the leniency of petitioner's criminal sentence, evidence of his rehabilitation, and claimed financial hardship to his family. The review department concluded that the contested factual basis for the petition did not support a finding of good cause to vacate the order of interim suspension, as required by Business and Professions Code section 6102(a). The review department therefore denied the petition on the ground that petitioner's showing was insufficient for the relief requested.

COUNSEL FOR PARTIES

For Office of Trials: Janet S. Hunt

For Respondent: Arthur L. Margolis, Susan L. Margolis

HEADNOTES

[1] **162.20 Proof—Respondent's Burden**
1549 Conviction Matters—Interim Suspension—Miscellaneous
There is no statutory or case law definition for the type of showing necessary to support the setting aside of an interim suspension order of an attorney convicted of a felony or of a crime of moral turpitude. Generally, "good cause" is dependent on the particular facts of each case.

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[2 a-c] **1549 Conviction Matters—Interim Suspension—Miscellaneous**
Interim suspension of an attorney following a criminal conviction is provisional and temporary, and one of its purposes is to preserve the respect and dignity of the court until a final judgment is entered. Consideration of the integrity of the legal profession has also been incorporated into the balancing test for determination of whether the interest of justice is served by setting aside an order of interim suspension. The purpose of interim suspension is to protect the public, the courts and the legal profession until all facts relevant to a final disciplinary order are before the court.

[3] **1549 Conviction Matters—Interim Suspension—Miscellaneous**
Present fitness to practice law and the concomitant question of public protection are factors to be considered in determining whether good cause exists to decline to impose an interim suspension.

[4 a, b] **139 Procedure—Miscellaneous**
162.20 Proof—Respondent's Burden
191 Effect/Relationship of Other Proceedings
1549 Conviction Matters—Interim Suspension—Miscellaneous
1691 Conviction Cases—Record in Criminal Proceeding
1699 Conviction Cases—Miscellaneous Issues
One distinction between an interim suspension order and a final order of discipline is the type of record before the court. At the interim suspeusion stage, the court has the criminal conviction and a statutory mandate to order interim suspension absent a showing of good cause. The petitioner has the burden of showing good cause to set aside an order of interim suspension, and no evidentiary hearing has occurred to test alleged mitigating factors. Thus, contested facts cannot be relied upon as a basis for vacating the order of interim suspension.

[5] **1521 Conviction Matters—Moral Turpitude—Per Se**
1549 Conviction Matters—Interim Suspension—Miscellaneous
Where a criminal conviction is for a felony and involves moral turpitude per se, these are strong factors militating in favor of interim suspension since felons convicted of crimes involving moral turpitude are presumptively considered unsuitable legal practitioners. Interim suspensions for such crimes have rarely been vacated, but the governing statute does permit the court to set aside orders of interim suspension based on such convictions, and it has been done on occasion.

[6] **191 Effect/Relationship of Other Proceedings**
793 Mitigation—Other—Found but Discounted
1549 Conviction Matters—Interim Suspeusion—Miscellaneous
1691 Conviction Cases—Record in Criminal Proceeding
While the leniency of an attorney's criminal sentence might be relevant in assessing final discipline, punishment by the criminal court serves a fundamentally different purpose than the provisions of the State Bar Act, and leniency of the criminal sentence therefore is not relevant to the determination whether there is good cause to vacate the attorney's interim suspension.

[7 a, b] **113 Procedure—Discovery**
750.59 Mitigation—Rehabilitation—Declined to Find
1549 Conviction Matters—Interim Suspension—Miscellaneous
Evidence of convicted attorney's efforts toward rehabilitation would be relevant at the hearing on final discipline, but could not be relied upon in proceedings seeking to vacate interim suspension because of lack of opportunity for pretrial discovery and full development of facts.

[8] **1514.20 Conviction Matters—Nature of Conviction—Sex Offenses**
Case law indicates a wide range of available discipline for cases involving sexual conduct toward children depending on the circumstances.

[9 a-c] **162.20 Proof—Respondent's Burden**
760.59 Mitigation—Personal/Financial Problems—Declined to Find
1521 Conviction Matters—Moral Turpitude—Per Se
1549 Conviction Matters—Interim Suspension—Miscellaneous
Every attorney convicted of a felony or crime of moral turpitude can anticipate an order of interim suspension and attendant hardships, but hardship to the attorney's family does not outweigh the need to protect the public and maintain the integrity of the legal profession pending a full hearing on the merits. Where, due to delay in transmittal of conviction, attorney had had several months to make alternative employment arrangements, and attorney had given no details of his current income, recent earnings, or efforts to seek other employment, attorney's showing of hardship was insufficient in light of all factors to constitute good cause to vacate interim suspension.

ADDITIONAL ANALYSIS

Other

1541.10 Conviction Matters—Interim Suspension—Ordered
1541.20 Conviction Matters—Interim Suspension—Ordered

OPINION

PEARLMAN, P.J.:

Petitioner Daniel G. Meza was admitted to membership in the State Bar of California in 1983.[1] On March 11, 1991, Acting Presiding Judge Stovitz ordered petitioner interimly suspended pursuant to Business and Professions Code section 6102 (a)[2] upon receipt of evidence of petitioner's felony conviction in November 1990 for violation of Penal Code section 288.5, engaging in three or more acts of substantial sexual conduct with a child under age 14, a crime involving moral turpitude. The interim suspension was ordered to commence April 10, 1991.

On March 26, 1991, the instant petition to set aside order for interim suspension pursuant to Business and Professions Code section 6102 (a) and California Rules of Court, rule 951(a) was filed. Petitioner asserted that good cause was shown for vacating the interim suspension order on the grounds that the criminal proceeding resulted in no jail time; he has been rehabilitated since the criminal conduct; the crime was unrelated to his law practice; no clients were harmed and interim suspension would result in financial harm to himself and his family. The petition was supported by numerous letters and exhibits including psychiatric reports. The Presiding Judge referred the petition to the review department pursuant to subdivision (c) of rule 1400 of the Provisional Rules of Practice. Upon receipt of evidence of finality of the conviction, the Presiding Judge ordered a proceeding to commence in the hearing department to determine appropriate discipline. The Presiding Judge also granted the late filing of the Office of Trial Counsel's opposition to the petition to set aside the order of interim suspension and temporarily stayed the effective date of the interim suspension in order to give the review department sufficient opportunity to set the matter specially for oral argument on petitioner's petition and issue an opinion disposing thereof. Oral argument was ordered because the petition involved an issue for which there appeared to be no published Supreme Court opinion for guidance.

After hearing oral argument and receiving posthearing briefs from both parties, the review department has concluded that petitioner has failed at this stage of the proceedings to demonstrate that the interests of justice would be served by setting aside the order of interim suspension. His petition is therefore denied.

DISCUSSION

Business and Professions Code section 6102, subdivision (a) provides that: "Upon the receipt of the certified copy of the record of conviction, if it appears therefrom that the crime of which the attorney was convicted involved or that there is probable cause to believe that it involved moral turpitude or is a felony[3] under the laws of California or of the United States, the Supreme Court *shall suspend* the attorney until the time for appeal has elapsed, if no appeal has been taken, or until the judgment of conviction has been affirmed on appeal, or has otherwise become final, and until the further order of the court. *Upon its own motion or upon good cause shown the court may decline to impose, or may set aside, the suspension when it appears to be in the interest of justice to do so, with due regard being given to maintaining the integrity of and confidence in the profession.*" (Emphasis supplied.)

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1. Petitioner has no prior record of discipline although a separate proceeding is now pending before the hearing department on a referral order from the Supreme Court with respect to a 1987 Vehicle Code section 23152, subdivision (b) conviction (driving with a greater blood alcohol content than the law allows). (Case No. 89-C-10463-CWS.)

2. Effective December 1, 1990, subdivision (a) of rule 951, California Rules of Court, authorizes the State Bar Court to ". . . exercise statutory powers pursuant to Business and Professions Code sections 6101 and 6102 with respect to the discipline of attorneys convicted of crimes. . . . The power conferred upon the State Bar Court by this rule includes, but is not limited to, the power to place attorneys on interim suspension . . . and the power to vacate, delay the effective date of, and temporarily stay the effect of the orders."

3. Prior to January 1, 1986, interim suspension was mandated only for conviction of crimes of moral turpitude.

[1] There is no statutory or case law definition for the type of showing necessary to support the setting aside of an interim suspension order of an attorney convicted of a felony or of a crime involving moral turpitude. In general, it has been well established that "good cause" is dependent on the particular facts of each case. (See, e.g., *Ex Parte Bull* (1871) 42 Cal. 196, 199; *R.J. Cardinal Co.* v. *Ritchie* (1963) 218 Cal.App.2d 124, 144-145.) The Supreme Court has also from time to time commented on the purposes of interim suspension from which a balancing test can be formulated.

[2a] Prior to the enactment of Business and Professions Code section 6102, in *Shafer* v. *State Bar* (1932) 215 Cal. 706, the Supreme Court articulated the purpose of interim suspension following a felony criminal conviction as follows: "The first order of suspension is provisional and temporary, awaiting the affirmance or reversal of the judgment of conviction. [Citation.] It does not purport to satisfy the charge against a petitioner or to settle his fitness to remain a member of the bar. *Its purpose is to preserve the respect and dignity of the court* until the facts . . . mature into a final judgment." (*Id.* at p. 708, emphasis added.) This "preservation of respect and dignity of the court" rationale justifying interim suspension was also expressed in *In re Jacobsen* (1927) 202 Cal. 289.[4]

The goal of protecting the reputation of the legal profession and the courts was again stated in *In re Rothrock* (1940) 16 Cal.2d 449, 458-459 (declining to interimly suspend an attorney convicted of assault with a deadly weapon, holding that the crime did not involve moral turpitude). The Court reasoned that "[t]he commission of such lesser offenses by an attorney in the heat of anger or as the result of physical or mental infirmities does not, without more, cast discredit upon the prestige of the legal profession or interfere with the efficient administration of the law . . . ." (*Id.* at p. 459.)

[2b] These decisions all predated the enactment of Business and Professions Code section 6102 (a) which incorporates consideration of the integrity of the legal profession into the balancing test for determination of whether the interest of justice is served by setting aside an order of interim suspension. The Supreme Court has more recently stated that "The purpose of interim suspension—like that of disbarment—is to protect the public, the courts, and the profession against unsuitable legal practitioners (see, *In re Conflenti* (1981) 29 Cal.3d 120), and present fitness to practice is the controlling consideration (*In re Petty* [1981] 29 Cal.3d 356)." (*In re Strick* (1983) 34 Cal.3d 891, 902.)

Very recently, the Supreme Court addressed the effect of interim suspension upon a final disciplinary order of suspension, noting "Whether a suspension be called interim or actual, of course, the effect on the attorney is the same—he is denied the right to practice his profession for the duration of the suspension. [¶] We conclude that under the unusual facts and circumstances of this case a further period of suspension is not required for the protection of the public, the profession, or the courts." (*In re Leardo* (1991) 53 Cal.3d 1, 18.)

[3] Thus, present fitness to practice law and the concomitant question of protection of the public are clearly factors which must be given consideration in determining whether good cause exists to decline to impose an interim suspension just as such considerations are relevant in imposing final discipline. [4a] One major difference, however, between an interim order such as the one before us and a final order of discipline is the type of record before us. At this stage we have the criminal conviction and a statutory

4. In *In re Jacobsen*, *supra*, 202 Cal. 289, the attorney, who was convicted of an unspecified felony involving moral turpitude, objected to the Supreme Court's imposition of interim suspension because he had submitted his resignation from the bar. The Supreme Court entered the temporary suspension order, reasoning that "[a]n attorney convicted of a felony involving moral turpitude, the nature of which is calculated to injure his reputation for the performance of the important duties which the law enjoins, should not be permitted to escape punishment. If the court permits it, *such act tends to lessen the respect which the public should have for members of the legal profession.*" (*Id.* at p. 290, emphasis added.)

mandate to order interim suspension absent a showing of good cause.

[4b] Not only does the petitioner have the burden of showing good cause, the procedural posture is such that no evidentiary hearing has yet occurred to test alleged mitigating factors. Contested facts therefore cannot be relied upon as a basis for vacating the suspension order. That is what the disciplinary hearing following petitioner's conviction is for.

[2c] The examiner aptly states that the purpose of interim suspension is to protect the public, the courts and the legal profession until all facts relevant to a final disciplinary order are before the court, citing *In re Bogart* (1973) 9 Cal.3d 743, 748; *Shafer* v. *State Bar, supra*, 215 Cal. at p. 708.

We therefore consider the instant petition in light of this test. [5] Petitioner was convicted of a felony involving moral turpitude. These are strong factors militating in favor of interim suspension since felons committing crimes of moral turpitude are presumptively considered unsuitable legal practitioners. (See *In re Higbie* (1972) 6 Cal.3d 562, 573; *In re Strick* (1983) 34 Cal.3d 891, 898.) Rarely has the Supreme Court vacated interim suspension for crimes of this nature. Nonetheless, Business and Professions Code section 6102 (a) provides for the court to vacate an interim suspension order even for felony convictions involving moral turpitude and the Supreme Court has on occasion set aside an interim suspension order for a felony involving moral turpitude. (See, e.g., *In re Kristovich* (1976) 18 Cal.3d 468 [perjury and preparation of false documentary evidence]; *In re DeMassa*, Supreme Ct. order filed April 8, 1986 (Bar Misc. 5100) [harboring a fugitive].)

[6] Petitioner contends that his showing here constitutes the good cause necessary to entitle him to relief. Among other things, petitioner points to the leniency of the sentencing judge's action, including no jail time. While that factor might bear some relevance in assessing final discipline, the punishment of petitioner by the criminal court serves a fundamentally different purpose than the Supreme Court's concerns and ours in administering the provisions of the State Bar Act. (See *In re Nevill* (1985) 39 Cal.3d 729, 737; *In re Hanley* (1975) 13 Cal.3d 448, 455.)

[7a] Petitioner also points to extensive evidence of rehabilitation. The Office of Trial Counsel has indicated the need for discovery to test the facts relied upon in the petition. We agree that petitioner's efforts toward rehabilitation are more appropriately offered as evidence at the hearing on the issue of the ultimate discipline. Their offer here causes us to speculate as to the specific facts and circumstances surrounding petitioner's offense and his subsequent conduct when those facts are not yet fully developed.

[7b] Certainly evidence of rehabilitation is relevant to the ultimate degree of discipline warranted when all of the facts are before the court. [8] Case law indicates a wide range of available discipline for cases involving sexual conduct toward children depending on all of the circumstances. (Compare *In re Safran* (1976) 18 Cal.3d 134 [indecent exposure; court imposed three years stayed suspension conditioned on three years probation] with *In re Duggan* (1976) 17 Cal.3d 416 [contributing to the delinquency of a minor; respondent was disbarred]. See also *In the Matter of X, An Attorney at Law* (1990) 120 N.J. 459, 461 [577 A.2d 139, 140] [second-degree sexual assault; attorney was disbarred]; *In re Yurman*, Supreme Ct. order filed March 29, 1979 (Bar Misc. 3750) [exciting the lust of a child under 14; two years suspension, stayed, and two years probation].)

[9a] Petitioner's claim of financial hardship toward his family evokes sympathy, but every attorney convicted of a crime of moral turpitude or of a California or federal felony can anticipate an order of interim suspension with attendant and very real hardships. (Cf. *In re Jones* (1971) 5 Cal.3d 390, 392-393;

In re Lamb (1989) 49 Cal.3d 239, 248.)[5] Petitioner's claim does not outweigh the need to protect the public and maintain integrity of the legal profession pending a full hearing on the merits.

[9b] For reasons unknown to us, petitioner's conviction was not transmitted promptly to us and he has had several months between the date of conviction and the effective date of interim suspension to make alternative employment arrangements. While asserting hardship, petitioner has given us no details of the income he currently earns and has recently earned from law practice or of the efforts he has undertaken to seek other employment in the extended time period he has had since his conviction.

[9c] Considering all of the factors, we deem petitioner's showing insufficient for relief, but do request that the State Bar Court hearing take place expeditiously so that the appropriate order regarding final discipline can be entered without undue delay.

IT IS ORDERED that Daniel G. Meza be interimly suspended effective thirty days after service of this opinion upon his counsel. He is further ordered to comply with subdivisions (a) and (c) of rule 955, California Rules of Court, within 30 and 40 days, respectively, after the effective date of his interim suspension.

We concur:

NORIAN, J.
STOVITZ, J.

5. Other states follow a similar practice. As stated in a leading case concerning interim suspension, *Mitchell* v. *Association of the Bar of the City of New York* (1976) 40 N.Y.2d 153, 156 [351 N.E.2d 743, 745, 386 N.Y.S.2d 95, 97] (summarily disbarring former U.S. Attorney General John Mitchell following his conviction of Watergate-related felonies): "[t]o permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law." (Cases supporting this rationale in imposing interim or temporary suspension include *United States* v. *Jennings* (5th Cir. 1984) 724 F.2d 436, 450 [upholding federal district court's suspension order imposed immediately following an attorney's conviction for making false claims to a federal agency]; *In re Stoner* (N.D.Ga. 1981) 507 F.Supp. 490, 492-493 [suspending attorney following his conviction for setting off dynamite dangerously near or in an inhabited building]; *United States* v. *Friedland* (D.N.J. 1980) 502 F.Supp. 611, 614-616 [denying defendant/attorney's motion to vacate the interim suspension imposed immediately following his conviction for conspiracy, obstruction of justice, tax violations, and receiving illegal kickbacks]; *Mississippi State Bar* v. *Nixon* (Miss. 1986) 494 So.2d 1388, 1389 [granting state bar's request that attorney, a former U.S. District Court Judge, be temporarily suspended following his conviction for perjury]; *Carter* v. *Romano* (R.I. 1981) 426 A.2d 255, 255-256 [granting disciplinary counsel's request to temporarily suspend an attorney following his conviction for conspiracy, perjury, injury to communications lines, and receiving stolen property]; *In the Matter of Stoner* (1980) 246 Ga. 581, 582 [272 S.E.2d 313, 313-314] [granting special master's request that attorney be temporarily suspended following his conviction for illegal use of explosives]; *Attorney Grievance Commission* v. *Reamer* (1977) 281 Md. 323, 330-336 [379 A.2d 171, 176-178] [granting state bar's request to interimly suspend an attorney following his conviction for mail fraud]; *Florida Bar* v. *Prior* (Fla. 1976) 330 So.2d 697, 702, 704 [holding that attorney had not shown good cause sufficient to avoid interim suspension following an attorney's conviction for making false statements before a federal grand jury].)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HENRY JAMES KOEHLER, IV

A Member of the State Bar

[No. 84-O-16139]

Filed July 26, 1990; as modified, August 6, 1991

SUMMARY

A hearing judge found that respondent had improperly used his trust account as a personal account; failed to refund unearned cost advances promptly in two instances; failed to perform legal services competently in one matter; and committed an act of moral turpitude by concealing from the California Franchise Tax Board personal funds which he improperly maintained in a client trust account. Respondent was found not culpable on other charges. The hearing judge recommended that respondent be suspended from the practice of law for three years, stayed on conditions of five years probation, six months actual suspension, probation monitoring, trust account auditing, law office management and psychiatric treatment. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Respondent requested review, challenging certain findings and contending that the recommended discipline was excessive. The review department adopted most of the hearing judge's findings, but deleted the finding of culpability regarding concealing funds from the Franchise Tax Board, because respondent had not been properly charged with such conduct. However, it used the same conduct as the basis for a finding in aggravation.

The review department adopted the hearing judge's discipline recommendation with the exception of the psychiatric treatment requirement, based on the court's holding that such a requirement should not be imposed absent expert testimony or other clear evidence of psychiatric problems.

COUNSEL FOR PARTIES

For Office of Trials: Teresa Schmid

For Respondent: David A. Clare

HEADNOTES

[1] **280.00 Rule 4-100(A) [former 8-101(A)]**
An attorney wilfully violated the rule against commingling by placing his personal funds into his client trust account and issuing checks from that account to pay business expenses, even though at times there were no trust funds in the improperly used client trust account.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2 a, b] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
192 Due Process/Procedural Rights
221.00 State Bar Act—Section 6106
Respondents have a right to reasonable notice of the charges against them and they may not be disciplined for a violation not alleged either in the original or a properly amended notice to show cause. Where the notice to show cause charged respondent with dishonest acts with regard to non-payment of tax monies withheld from an employee's wages, respondent could not, based on that notice, be held culpable of improperly concealing personal money from the tax authorities by putting it in a client trust account.

[3] **162.11 Proof—State Bar's Burden—Clear and Convincing**
165 Adequacy of Hearing Decision
213.10 State Bar Act—Section 6068(a)
Where hearing judge accepted respondent's testimony that respondent's prolonged failure to file personal income tax returns resulted from problems with respondent's accountants, and examiner did not object to hearing judge's determination that there was no clear and convincing evidence of misconduct in connection with respondent's failure to file tax returns, review department adopted judge's findings and conclusion of non-culpability.

[4] **191 Effect/Relationship of Other Proceedings**
213.10 State Bar Act—Section 6068(a)
An attorney may be found culpable of professional misconduct, based on charges of failing to obey state law by failing to file tax returns, even if the attorney has not been convicted of a crime based on that conduct.

[5] **280.00 Rule 4-100(A) [former 8-101(A)]**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Where respondent treated advanced costs as essentially part of a retainer package which could be used to satisfy fees if the retainer fee portion was used up, such treatment was contrary to the requirement that client funds, including advanced costs, be held in trust, and the failure to return the unused portion of such funds promptly when requested violated the rule requiring prompt payment of client funds on demand.

[6] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
The duty of an attorney to act competently requires the attorney to take timely positive, substantive action on a client's behalf, or, if appropriate, to withdraw from employment; if an impasse develops between the attorney and the client, the attorney cannot simply fail to take action.

[7 a, b] **148 Evidence—Witnesses**
165 Adequacy of Hearing Decision
166 Independent Review of Record
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
Where there is a conflict in the evidence, the hearing judge is in a particularly appropriate position to resolve it, and the Rules of Procedure require the review department to afford great weight to the hearing judge's findings in such matters, absent a good reason for reaching a different result. Where the hearing judge accepted respondent's client's testimony regarding the timing of a request for a refund of advanced costs, and explained why the client's testimony was given greater weight than respondent's contrary testimony, the review department adopted the hearing judge's findings and conclusions on that issue.

[8 a-c] **204.10 Culpability—Wilfulness Requirement**
273.00 Rule 3-300 [former 5-101]
A transaction whereby a client signs a promissory note secured by the client's property to serve as security for the payment of an attorney's fees is subject to the provisions of the rule regulating business transactions with clients. However, where the failure to comply with the requirements of that rule resulted from the negligence of the attorney's employee, and the evidence clearly and convincingly established that the attorney had taken appropriate actions to guide office personnel as to proper steps to comply with the rule, the attorney was properly found not culpable of violating the rule.

[9] **162.90 Quantum of Proof—Miscellaneous**
204.90 Culpability—General Substantive Issues
While attorneys have a duty to reasonably supervise their staffs, they cannot be held responsible for every event which takes place in their offices.

[10 a-e] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
280.00 Rule 4-100(A) [former 8-101(A)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
511 Aggravation—Prior Record—Found
802.61 Standards—Appropriate Sanction—Most Severe Applicable
824.10 Standards—Commingling/Trust Account—3 Months Minimum
844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension
Where respondent repeatedly misused his trust account as a personal account, twice failed to return unearned advanced costs promptly on request, and failed to perform services competently in one matter, the gravest aspect of the misconduct was that relating to respondent's violation of the rule governing trust accounts and client funds, and this misconduct warranted at least a three-month actual suspension. Where such misconduct was aggravated by prior discipline for neglect of four client matters, and aggravating circumstances predominated over mitigating circumstances, it was appropriate to recommend a three-year stayed suspension, six months actual suspension, and five years of monitored probation for the protection of the public.

[11] **801.30 Standards—Effect as Guidelines**
To consider the proper discipline, the review department looks first to the Standards for Attorney Sanctions for Professional Misconduct as guidelines.

[12] **511 Aggravation—Prior Record—Found**
802.21 Standards—Definitions—Prior Record
Where respondent had received a reproval for four separate instances of misconduct which had occurred seven years prior to the instant misconduct, the reproval was not too remote in time and was properly considered an aggravating circumstance.

[13] **106.20 Procedure—Pleadings—Notice of Charges**
221.00 State Bar Act—Section 6106
561 Aggravation—Uncharged Violations—Found
Although it was improper to find respondent culpable of misconduct on the basis of his freely given evidence that he concealed funds from the Franchise Tax Board, because such conduct fell outside the proper scope of the charges, such evidence could be used to form the basis of an aggravating circumstance.

[14] **172.50 Discipline—Psychological Treatment**
Where no clear or expert evidence was presented that respondent had a specific mental or other problem requiring psychiatric treatment, the review department declined to adopt the hearing judge's recommendation of such treatment as a condition of respondent's disciplinary probation.

ADDITIONAL ANALYSIS

Culpability
Found
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
221.50 Section 6106
273.05 Rule 3-300 (former 5-101)
277.25 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
Mitigation
Found
715.10 Good Faith
735.10 Candor—Bar
765.10 Pro Bono Work
Found but Discounted
740.33 Good Character
Declined to Find
755.59 Prejudicial Delay
Discipline
1013.09 Stayed Suspension—3 Years
1015.04 Actual Suspension—6 Months
1017.11 Probation—5 Years
Probation Conditions
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management
1026 Trust Account Auditing
Other
1091 Substantive Issues re Discipline—Proportionality

OPINION

STOVITZ, J.

We review a recommendation of a hearing judge ("judge") of the State Bar Court that respondent Henry J. Koehler, IV be suspended from the practice of law for three years and that the execution of suspension be stayed on conditions of a five-year probation, six months actual suspension, probation monitoring, trust account auditing, law office management and psychiatric treatment.

The judge's recommendation rests on her findings and conclusions that in one matter, respondent improperly used his trust account as a personal account, that in two attorney-client matters, the respondent failed to promptly refund to clients, when requested, unearned cost advances; and, in one of those two matters, respondent failed to perform legal services competently. In another matter, the judge found that respondent committed an act of moral turpitude by concealing from the California Franchise Tax Board ("FTB") personal funds which he improperly maintained in a client trust account.

The judge found respondent not culpable of several charges in several of the six matters. In aggravation, the judge considered respondent's 1977 private reproval showing his failure to perform services in four client matters in 1974 and 1975.

Respondent requested our review contending that some of the judge's findings are unsupported and the recommended discipline is excessive. Upon our independent review of the record, we adopt most of the judge's findings but delete her conclusion that respondent committed moral turpitude by secreting funds and concealing them from the FTB because respondent was not properly charged with that conduct. Although we delete that conclusion, we find that respondent's concealment of funds from the FTB is properly considered an aggravating circumstance in addition to his prior discipline and we find that the record supports additional mitigating circumstances as well. Nevertheless, upon our balance of all relevant factors in this matter we adopt the judge's suspension recommendation with the exception that we do not find sufficient basis to recommend that respondent be required to seek psychiatric treatment.

I. RESPONDENT'S BACKGROUND AND PRIOR DISCIPLINE

Respondent was admitted to practice law in Ohio in 1965. After completing a court appointment as trustee of a large business bankruptcy, he spent two years in private practice with an Ohio law firm. During the second of those years, he was also an attorney with the law department of the City of Akron (similar to a city attorney) where he worked in governmental reform cases involving organized crime. (R.T. pp. 554, 764-766; 897-899.)

On January 1, 1967, respondent moved to California. (R.T. p. 899.) After doing non-legal work running a tax preparation service, he was admitted to practice law in California on June 2, 1972.[1] (R.T. p. 900; exh. 28.) In this state, his practice was mostly as a sole practitioner; although in 1972 and in the 1980's, he took on one or more associate attorneys. (R.T. pp. 554-555, 767, 901.) From 1972 through 1981, respondent's law practice was general. He did everything from "admiralty to zoning." (R.T. pp. 556, 767, 901.)

Respondent had no record of discipline in Ohio where he served on a bar disciplinary committee (R.T. pp. 896-897); but in 1977, based on his stipulation, he was privately reproved in California for four matters of client inattention arising between 1974 and 1975. (Exh. 36.)

In brief, the admitted facts leading to that private reproval show: 1) In a business incorporation matter, respondent willfully failed: to perform needed services to complete the incorporation, to turn over the

1. We correct the hearing judge's finding that respondent was admitted to practice in this state on December 14, 1972. (Decision p. 2, line 9.)

client's papers to new counsel and to return the client's unearned fees. 2) After becoming attorney of record for the wife in a marriage dissolution action, he willfully failed to: perform all the services, communicate with her and advise her of the status of the matter and refund unearned fees. 3) In another marriage dissolution matter in which respondent represented the husband, he willfully failed: to serve the wife with a summons, to complete the services needed, to communicate with the client or to refund unearned fees. 4) After accepting $100 to prepare wills for a couple, respondent willfully failed to perform the services for nine months (five months after learning of a State Bar complaint in the matter). He stipulated that he violated these Business and Professions Code sections: 6067-6068, 6103, 6106.[2] No Rule of Professional Conduct violations were charged. (Exh. 36.)

The parties' stipulation in that prior matter took into account mitigating circumstances that, in each of the matters, respondent performed partial but untimely services, he made "fair and reasonable restitution" to each client and at the time of the misconduct, he was operating under an emotional, psychological disability arising from his own traumatic marriage dissolution which overwhelmed him. (*Id.*)

In 1981, largely as a result of his own successful struggle for custody of the son of a former marriage, respondent altered his law practice dramatically from general to highly specialized, representing non-custodial parents in seeking joint or shared custody. (R.T. pp. 556, 903-904.) In 1982, respondent became a State Bar certified specialist in family law and also became very active in a national fathers' rights organization. Although respondent handled the early custody cases himself, by late 1982, others active in the same rights organization urged respondent to delegate his legal work to associates so that respondent could speak publicly and lobby legislatures around the country for change from a system heavily biased in favor of placing custody in one parent (usually the female) to one which gave the child frequent and continuing custodial contact from both parents. Respondent did so and claimed credit for having brought legislative change to a number of states including California. (R.T. pp. 556-559; 905-907; see also Civ. Code, § 4600.)

II. THE CHARGES, EVIDENCE AND FINDINGS IN THE PRESENT RECORD

The six counts charged in the first amended notice to show cause which we now review can be divided into two categories: 1) Trust Account Commingling/Tax Problem Matters; and 2) Attorney-Client Matters.

A. Trust Account Commingling/Tax Problem Matters (Counts One, Two and Six)

1. Commingling Matters—Counts One and Two

Count one charged respondent with paying his legal secretary's salary in 1985 from his trust account as well as withholding her wages for payroll and unemployment taxes but not paying them. He was charged with violating rule 8-101(A)[3] and sections 6068 (a), 6103 and 6106. Count two charged that between May and December 1985, respondent deposited attorney fees into his client trust account, commingling them with client funds in that account. He was charged with violating rule 8-101(A) and sections 6068 (a) and 6103.

In a written stipulation of facts ("Stipulation"), filed prior to the start of trial, the parties stipulated to facts which established respondent's culpability in this count. Specifically, respondent stipulated that in July 1985, his law office paid his secretary her salary from his client trust account; and, in that same month, respondent kept his business funds in his client trust account. He also deposited his fees into his trust account and issued checks from that account for business purposes. Respondent placed all of his personal funds in his client trust account in about July

2. Unless noted otherwise, all references to "sections" are to the Business and Professions Code.

3. Unless noted otherwise, all references to "rules" are to the Rules of Professional Conduct in effect from January 1, 1975, through May 26, 1989.

1985 to avoid a levy on his bank accounts by the FTB. Respondent also stipulated that from about May to December 1985, he deposited his attorney fees into his client trust account. (Stipulation pp. 2-3.)

The judge treated count two as subsumed within count one. In essence, she found that in October 1984, respondent's personal banker told him that a tax levy by the FTB was about to be executed on his bank accounts, he withdrew the funds and put them into a single account at another bank labelled a client trust account into which he deposited all monies, both client and personal funds. During part of 1984, respondent placed his own attorney fees in the account, issued checks from it for business expenses and placed personal funds in it for business expenses. At least once in 1985, respondent paid his secretary's salary from the trust account. (Decision p. 3.) The judge found no clear and convincing evidence that respondent failed to properly pay taxes on withheld wages. (*Id.* at p. 10.) However, the judge did find that respondent committed a dishonest act by concealing his funds from the FTB. (*Id.*) Based on her findings, she concluded that respondent violated section 6106 by concealing monies from the FTB and violated rule 8-101(A) by commingling his own money with that of clients. Following *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815, the judge concluded that respondent did not violate sections 6068 (a) or 6103. (Decision pp. 16-17.)

2. Count Six—Failure to File Tax Returns.

Count six charged respondent with having violated sections 6068 (a) and 6103 by willfully failing to pay his California personal income tax for the years 1974 through 1981 and 1984 as required by the Revenue and Taxation Code.

The State Bar presented no affirmative case on this count. Most of the evidence came from respondent's own testimony. Respondent freely admitted in his testimony that he did not file his state tax returns for the years 1974 through 1983. (R.T. p. 807.) He blamed this on negligence on his part, on inattention to the problem, combined with a problem of delegation to several different accountants over time, one of whom he was suing for negligence. (*Id.*) He was aware of the problem that he had not filed tax returns for those years and was aware of dealings he had with the FTB over the years about taxes he owed. In 1985, he resolved his state tax obligations under an "amnesty" program. (See *post.*)

The judge found that respondent did not timely file his personal state tax returns for the charged period but concluded that there was no clear and convincing evidence to establish misconduct in respondent's failure to pay taxes. She dismissed this count and on review the examiner does not dispute the propriety of her action.

B. Attorney-Client Matters
(Counts Three, Four and Five)

1. Olson Matter—Count Three

Count three charged respondent with misconduct after he accepted a $2,500 advance retainer and $300 in advance costs from client Carl Olson who was seeking child custody. The notice charged violations of sections 6068 (a), 6103, and 6106 and rules 2-111(A)(2), 2-111(A)(3), 6-101(A)(2) and 8-101(B)(4).

In brief, Olson, president and CEO of a consulting engineering firm, hired respondent on April 26, 1984. (Exhs. 6, 9 and 10.) He told respondent he needed action quickly as he wished to have a change of custody of his children, who were due to accompany his former wife to Utah. (R.T. pp. 99-101.) According to respondent, Olson's case presented a "double-barreled problem" because Utah was not a signatory to the Uniform Child Custody Jurisdiction Act, was seen as a sanctuary for parents wanting to defeat custody change motions and only six months of Utah residence was needed to shift the custody forum state to Utah. (R.T. pp. 646-649.)

Respondent accepted a $2,500 non-refundable retainer fee per his standard written agreement in such matters and also obtained $300 in advance costs. (Stipulation p. 3.) Since respondent no longer personally handled cases, he assigned this case to an associate, Schulte, for follow-up work. According to respondent, Olson did not cooperate with Schulte, insisting that respondent personally handle the matter. According to Olson, respondent agreed to handle

the case personally and respondent testified he ultimately agreed to do so about four to five weeks after he accepted the employment and after about nine or ten calls from the Olsons demanding that he take action on the custody case. (R.T. pp. 120, 667-673.) About this same time, Olson discharged respondent since he had not performed any services. He then demanded a full refund. Respondent refused in view of his non-refundable retainer.

In August 1984, Olson was awarded $2,800 in a non-binding, mandatory fee arbitration in which respondent participated. (Stipulation p. 3; exh. 17.) Fearful that the arbitrator's award would threaten respondent's non-refundable fee agreement which he used in almost every custody case, respondent engaged in extended litigation with Olson's attorney over jurisdictional points. This litigation resulted in court-ordered sanctions of $6,100 against respondent. (Stipulation pp. 4-5.)

Meanwhile, in May of 1985, respondent had returned to Olson the $300 in costs. Respondent testified that there was no issue remaining as to the costs. (R.T. pp. 676, 922.) In August 1989, he paid Olson over $11,000 representing the $2,500 fee plus all the sanctions and interest. (Stipulation p. 5.)

The judge concluded that respondent willfully violated rule 6-101(A)(2) by failing to perform services for which he was retained. She also found respondent culpable of willfully violating rule 8-101(B)(4) by failing to promptly return to Olson the $300 he had advanced for costs. Respondent's violation of rule 6-101(A)(2) rested on the judge's findings that respondent failed either to withdraw from employment if he could not perform services promptly as Olson needed or to ensure that services were performed. The judge did not find that respondent violated rule 2-111(A)(2) and 2-111(A)(3) and also concluded that respoudeut did not violate sections 6068 (a), 6103 or 6106.

2. Gordon Matter—Count Four

Count four charged respondent with violations of sections 6068 (a) and 6103 and rules 2-111(A)(3) and 8-101(B)(4) in representing another client, Harry Gordon, in a marriage dissolution and child custody matter.

In August 1983, Gordon, a high voltage transmission technician employed in Saudi Arabia, was on leave in the United States and represented by counsel in Visalia, California. He was frantic to resolve a divorce action filed against him and to obtain joint custody of his daughter. He learned of respondent through a "Joint Custody Association" as the best counsel there was for his type of case. He hired respondent, paid his $2,500 non-refundable retainer fee and advanced $300 in costs. (Stipulation p. 5.) Although Gordon read the non-refundability clause in the retainer agreement, he testified he did not understand it and he was at the time frantic about the custody problem. (R.T. pp. 20-26.) On the Friday respondent was retained, respondent planned to take action immediately by seeking an order to show cause hearing in Visalia that Monday. To that end, he dispatched an associate, who was spending the weekend in Las Vegas, to drive from there to Visalia. When the associate had driven at least half-way, Gordon agreed there would not be enough time to prepare for the hearing. That Monday, respondent and Gordon conferred with Gordon's earlier-hired attorney, Pamela Stone. It was agreed that respondent would do nothing at this time, but Stone would continue to represent him. According to Gordon, respondent agreed to refund his fee by transmitting it to Stone. Respondent disputed this.

Gordon testified that he contacted respondent the following spring (1984), again frantic because Stone had left private practice and his custody situation was still unresolved. Respondent's secretary told Gordon to make an appointment to meet respondent. Gordon spoke to his parents and concluded he had made a mistake by hiring respondent as he could have the same legal services performed in the Visalia area at a more reasonable price. Gordon decided not to have respondent do further work. Instead, he telephoned respondent's office and asked for his money back but received no refund. In January 1985, Gordon wrote to respondeut requesting a refund. (R.T. pp. 32-37.) On February 1, 1985, respondent returned the $300 in costs (Stipulation p. 6) but no part of the $2,500 fee. According to respondent, he

stood ready to assist Gordon at a later time and did not recall receiving any request for refund until Gordon's January 1985 letter seeking refund of the $2,500 fee, but not of the costs. Respondent pointed to the non-refundability of the retainer fee and testified he had expended 10.8 hours of time at his hourly rate of $150 per hour for total fees earned of $1,620 on Gordon's matter. (R.T. pp. 622-628.)

The judge concluded that respondent willfully violated rule 8-101(B)(4) by failing to promptly return to Gordon the $300 he had advanced for costs. However, the judge concluded that respondent did not violate sections 6068 and 6103 nor did he refuse to promptly refund unearned fees in violation of rule 2-111(A)(3).

3. Fuller Matter—Count Five

Count five charged respondent with violations of sections 6068 (a) and 6103 and the violation of rule 5-101 (entering into an adverse interest or business transaction with a client without complying with all disclosure requirements). Finding that an employee was negligent, the judge dismissed the count and the examiner has not objected.

In April 1985, George Fuller hired respondent to represent him in a child custody matter. He was aware of respondent's fee and wanted to be able to work out an arrangement. After some time had passed and Fuller had received no billings, respondent told him that if he had property, he would have to arrange the fees by signing a note secured by Fuller's property. Fuller felt pressured but understood the consequences of the note. Respondent told Fuller that an associate or one of his employees would draft up the note. Fuller signed the note but testified that no one had given him the disclosures required by rule 5-101. (R.T. pp. 215-216, 262-263, 284-285.)

According to testimony of respondent and his associates, in 1982 or 1983, respondent devised a package of instructions to comply properly with rule 5-101 if a secured interest was to be taken on a client's property for legal fees. Neither respondent nor his associates could explain why respondent's instructions were not followed in Fuller's case.

From the evidence, the judge concluded that respondent did not willfully violate rule 5-101.

III. OTHER EVIDENCE IN THE RECORD AND THE HEARING JUDGE'S RECOMMENDATION

As discussed above, the judge found the respondent culpable of some professional misconduct in four of the six counts.[4]

As aggravating circumstances, the judge considered respondent's prior private reproval, that the present record showed multiple acts of misconduct over a three-year period; and, based on the judge's observation of respondent during his testimony, he presented grave concerns that his attitude or his actions were somewhat arrogant and combative, reflecting an egocentric view of the world in which respondent rationalized his own position to the exclusion of objective consideration of needs and rights of others. (Decision p. 19.)

In mitigation, the judge considered only one circumstance, that as to count one, respondent dealt with the FTB in good faith and his failure to pay state taxes resulted from neglect and inattention and was not an intentional evasion.

In addition to the foregoing factors, respondent testified as to the following events. Respondent discontinued use of a trust account in December 1985. He started to advance all costs himself and he testified that if he is required to hold funds by court order, he would arrange for an escrow company to act as stakeholder. (R.T. pp. 638, 912-913, 927.) In 1985, he resolved his tax affairs, taking advantage of an amnesty to pay less than $2,000 to settle tax lien claims about 60 times that amount. (R.T. pp. 914-915; exh. Z.)

4. Although the judge did not explicitly find respondent culpable in count two, she deemed the activities charged in count two subsumed in count one and, as noted, respondent stipulated to his culpability of the misconduct charged in count two.

There is no dispute that respondent worked very hard in his practice. He worked and expected associates to work so many long hours, weekends and holidays that his associates generally left after about six months. Respondent had no time for any family life. He seemed almost consumed by the cause of the joint or shared custody movement and he kept active in that movement nationwide, taking very quick trips, often on "red-eye" flights so that he would be able to be in the office as much as possible. Respondent thought it very important to interview personally each client at the outset to insure that no "unacceptable" client's cause (a client too polemic or extreme in custody aims) would jeopardize the joint custody movement. (R.T. pp. 576-578, 815, 818-820.)

Respondent generally kept very good records of client matters and had sought legal advice from his current counsel, David Clare, in setting forth his non-refundable retainer agreement.

Respondent testified as to his civic and community service activities. For 18 years, he served as unpaid trustee of bonds issued by the City of Westminster (Orange County) and since 1980, he had served 12-15 times as judge pro tem in the Orange County courts. (R.T. pp. 909-912.) For the past six years he has coached his son's little league team and has served as a trustee of his son's school. (R.T. p. 903.)

In addition, three character witnesses testified in respondent's favor. Two were clients who had known respondent two and six years, respectively. A third witness was an Illinois attorney who had worked with respondent periodically and was in contact with him yearly. All witnesses praised respondent's moral character and integrity. All seemed generally familiar with the judge's findings of culpability, but that knowledge did not change their opinion of respondent's character. (R.T. pp. 876, 880-881, 890-892, 946-949.)

Finally, respondent cooperated extensively with the State Bar. He gave a two-day interview to a State Bar investigator, reviewing his files in detail with the investigator and he stipulated to many of the facts in these matters including to his culpability in counts one, two and three. (R.T. pp. 762-763, 926-927.)

In reaching her recommendation of discipline, the judge considered the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ["standards"]) applicable to each matter in which culpability was found, and then noted that the standards are not mandatory and that the Supreme Court has stated that each case must rest on its own facts as to appropriate discipline. (Decision pp. 20-22.) The judge concluded that from weighing and balancing the myriad factors present, significant discipline was called for. The judge concluded that respondent's prior discipline was not sufficient to make him aware of his duties as a lawyer and that respondent for many years had been cavalier in his ethical responsibility to clients and careless in adhering to the proper rules of attorney conduct. The judge noted that the examiner urged two years of actual suspension and that respondent urged that no actual suspension be recommended. The judge concluded that "as is frequently the case, the appropriate level [of discipline] lies in the mid-range." Further, she concluded that strict conditions of probation are warranted, over a long period of time, both to educate and sensitize respondent to his duties and to protect the public. Accordingly, as noted, she recommended a three-year suspension stayed on conditions of a five-year probation with six months actual suspension. (Decision pp. 22-23.)

IV. DISCUSSION

A. Culpability

We review the appropriate findings and conclusions in the same order in which we discussed the evidence concerning each of the respective counts.

1. Non Attorney-Client Counts

[1] With respect to counts one and two, we adopt the judge's findings of fact contained in sections III.B and III.C of her decision. (Decision pp. 2-4.)[5] Respondent's own stipulation established that he failed to operate his trust account properly by placing his personal funds in that account, during at least part of 1984, and issuing checks from that account for business (non-trust) expenses. During 1985, respondent also used his trust account improperly to pay the salary of one of the secretaries in his law office. The judge's findings and associated conclusion that respondent thereby willfully violated rule 8-101(A), which conclusion we also adopt (see decision p. 16, lines 20-24) are grounded beyond dispute in respondent's pretrial stipulation and his own trial testimony. (R.T. pp. 631, 637.) Before us, respondent concedes his improper trust account practices between October 1984 and December 1985. His misuse of his trust account as found by the judge was a clear violation of rule 8-101(A) (e.g., *Arm* v. *State Bar* (1990) 50 Cal.3d 763, 776-777) even if at times he had no trust funds in this improperly used account. (*Hamilton* v. *State Bar* (1979) 23 Cal.3d 868, 876.)

Conversely, the evidence is cloudy on any impropriety of respondent as to payment of payroll taxes and the judge's findings of respondent's non-culpability in that regard are equally correct.

We also adopt the judge's conclusion (decision p. 17, lines 3-8) that respondent did not willfully violate sections 6068 (a) or 6103. (E.g., *Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 815.)

[2a] Finally, in count one, the judge concluded that respondent committed moral turpitude in violation of section 6106 by intentionally secreting his own funds in a client trust account in order to conceal them from the FTB. (Decision pp. 16-17.) Respondent objects to this conclusion as outside the charges, thus depriving him of fair notice of those charges. We have concluded that respondent's point is well taken.

[2b] Respondent had a right to reasonable notice of the charges against him (Bus. & Prof. Code, § 6085) and he may not be disciplined for a violation not alleged either in the original or a properly amended notice to show cause. (*Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 35, and cases cited.) Nothing in the charges put respondent on notice that concealment from the FTB was the gist of an alleged violation. The record shows that both parties understood the section 6106 charge in count one to accuse respondent of dishonest acts with regard to non-payment of tax monies earlier withheld from an employee's wages. (R.T. pp. 781-785.) The judge found no support for any misconduct with regard to failing to pay over monies withheld from employees for payroll taxes and in view of the parties' understanding that this was the focus of the section 6106 charge, we cannot sustain culpability on a different charge. However, as we shall explain, *post*, under our discussion concerning the appropriate degree of discipline, *Edwards* v. *State Bar*, *supra*, 52 Cal.3d at p. 30 permits the use of evidence that respondent concealed funds from the FTB in aggravation.

[3] After an independent review of the record, we have determined to adopt the judge's findings and conclusion as to respondent's non-culpability in count six (failure to pay California personal income taxes for about a 10-year period). We note that the judge correctly found that respondent did not timely file these tax returns for about 10 years and our independent review of respondent's testimony showed that he was aware of his duties to file tax returns. Nevertheless, considering the lack of objection by the examiner, the necessary deference we accord resolution of issues of testimony by the judge (rule 453(a), Trans. Rules Proc. of State Bar) and respondent's testimony that he had a repeated problem with several different accountants with whom he had delegated his tax return preparation over a period of time, we conclude that the judge's

5. We regard the judge's reference to findings in section III.A as referring instead to section III.B (See decision p. 4, lines 1-2.)

determination that the evidence fell short of the clear and convincing standard required for culpability on the charge of failing to pay taxes due is adequately grounded.[6] [4 - see fn. 6]

2. *The Attorney-Client Counts.*

In count three, the Olson matter, respondent admits his culpability of willfully violating rule 8-101(B)(4) by failing to pay promptly to Olson as requested by him, Olson's $300 unused advance for costs. Although respondent disputes the conclusion, we find clear and convincing evidence supporting the judge's conclusion that respondent willfully violated rule 6-101(A)(2).

[5] Respondent does not dispute his culpability of the rule 8-101(B)(4) violation and the evidence supporting the judge's conclusion is clear. Respondent never explained satisfactorily why he did not separate from his retainer fee and refund to Olson the unused cost amounts in a timely manner. Respondent's testimony shows that during the time he represented the clients involved in various family law proceedings, he treated costs as essentially part of the retainer "package" which could be used to satisfy fees if the retainer fee portion were used up. As he was preparing to appeal the arbitration award confirmation ruling won by Olson, he realized otherwise. (R.T. pp. 922-923.) Manifestly, respondent's earlier treatment of advance costs was contrary to the explicit terms of rule 8-101(A).

The judge expressly dismissed the charges of violation of oath and duties, committing an act of moral turpitude and violating rules 2-111(A)(2) and 2-111(A)(3), citing to her discussion in subsection IV.C of her decision. Her actions are supported by the record and applicable law.

[6] Respondent disputes strongly the judge's conclusion that he violated rule 6-101(A)(2). He contends that he performed fully the terms of his retainer agreement which allowed him to associate others to represent Olson, that he promptly assigned the case to an associate but that Olson refused to cooperate with respondent's associate. Respondent's argument is not well taken. As soon as respondent was retained, he knew that Olson's child custody matter was time sensitive. He accepted a measurable non-refundable advance retainer fee to make his time available and he did tell Olson that an associate would work on the case. When this was unacceptable to Olson, respondent allowed a four- to five-week impasse with Olson to develop in this time sensitive case. Respondent's own retainer agreement and duties as an attorney to act competently required him either to take timely positive, substantive action on Olson's behalf to perform legal services required by the custody matter; or if appropriate to withdraw from legal employment. (See rule 2-111(A).) Respondent could not simply fail to take action because an impasse had developed with Olson. (See *Segal* v. *State Bar* (1988) 44 Cal.3d 1077, 1084.)

To summarize, we adopt all of the findings of fact of the judge in count three (decision pp. 4-5) with the following two changes:

1) The first line of finding D.1 (decision p. 4, line 4) we change to read: "On April 26, 1984, respondent was hired by Carl Olson . . ."; and

6. [4] Since the judge's findings and conclusion on count six were favorable to respondent, he has understandably not chosen to brief the matter before us, although our review of the record is independent. Likewise, the examiner does not dispute the judge's findings and conclusion with regard to count six. Although we adopt those findings and conclusions, we do not agree with respondent's position at trial that there could be no basis for culpability on this charge because respondent was not convicted of the crime of willfully failing to file tax returns or pay taxes. We agree with the hearing judge's determination that respondent's position at trial on this issue was not meritorious. (See *In re Rohan* (1978) 21 Cal.3d 195, 201 in which the Court noted that an attorney's conviction of willful failure to file federal income tax returns could violate section 6068 (a) (duty to support the laws).) This was the identical subdivision of section 6068 of which respondent was charged. Moreover, see our recent decision in *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr.476, 487, in which we pointed out that an attorney's breach of a duty stated elsewhere in a statute could constitute a violation of section 6068 (a). Recently, the Supreme Court of New Jersey also determined that a member of the bar of that state could be found culpable in an original disciplinary proceeding for willfully failing to file tax returns although not convicted of such a criminal offense. (See *In re Garcia* (1990) 119 N.J. 86 [574 A.2d 394].)

2) In finding D.7 on page 5, line 18 of the decision, we add the word "not" just prior to the word "performing" to remedy what appears to be a typographical error.

From these findings we conclude that respondent willfully violated rule 8-101(B)(4) by failing to return to Olson his unused cost advance as requested by him and failing to return that advance when withdrawing from employment. We also conclude that respondent willfully violated rule 6-101(A)(2).[7]

[7a] In the Gordon matter, respondent disputes the sole basis for the judge's determination of respondent's culpability. Before us he advances his version of the evidence that Gordon did not request a refund of the $300 in advance costs until early 1985 and respondent returned it almost immediately upon Gordon's request. In this matter, we adopt the judge's findings and conclusions. The judge received contrary testimony from Gordon that many months before February 1985, he telephoned respondent and requested the return of his funds but did not receive them until February 1985. Since there was a conflict in the evidence, the judge was in a particularly appropriate position to resolve that conflict. (See *Segal* v. *State Bar*, *supra*, 44 Cal.3d at pp. 1084-1085.) She chose to do so by crediting Gordon's testimony over that of respondent. As noted, our rules on review require that we give great weight to the judge's findings in such a matter and we are given no good reason to reach a different result. Coincidentally, respondent returned Gordon's $300 in costs simultaneously in time with his return of Olson's cost advance. Both occurred after respondent was made aware by another attorney that cost advances cannot be considered an undistinguished part of the advance retainer fees.

[7b] Moreover, the judge explained her assessment of the testimony and why she gave greater weight to Gordon's testimony than respondent's. Under the circumstances, we accept and adopt the judge's findings in the Gordon matter (decision pp. 6-8) as well as her conclusions flowing from that matter on page 18 of her decision. We agree with the judge that the evidence does not show violations of rule 2-111(A)(3) or of section 6068 (a) or 6103.

[8a] With regard to count five, the Fuller matter, in which respondent was charged with failing to disclose to Fuller that which is required by rule 5-101, when receiving from Fuller a security interest in property, we agree with the judge's findings that clear and convincing evidence was not presented to establish respondent's culpability.

[8b] At the outset, we observe that the transaction which respondent entered into with Fuller was subject to the provisions of rule 5-101. (*Brockway* v. *State Bar* (1991) 53 Cal.3d 51, 64.) **[9]** The Supreme Court has also observed that an attorney cannot be held responsible for every event which takes place in a lawyer's office although the attorney does have a duty to reasonably supervise his staff. (*Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 857.) **[8c]** In discussing the evidence presented, the judge noted that respondent proved clearly and convincingly that he had taken appropriate actions to guide office personnel as to proper steps to comply with rule 5-101. The judge concluded that the negligence of an employee caused proper procedures not to be followed in Fuller's case. Given the convincing nature of respondent's testimony on this point, we agree with the judge and we adopt her findings and conclusion of no culpability—a result undisputed by the examiner.

B. Degree of Discipline

[10a] We have concluded that respondent is culpable of violating rule 8-101(A) by repeatedly

7. The notice to show cause charged and the stipulation of facts and the hearing judge's findings recited that respondent had been sanctioned, respectively, by the superior court and the court of appeal for his frivolous attack on Olson's order confirming an arbitration award in Olson's favor. Close examination of the charges indicates that they are more in the nature of factual recitals and not of substantive allegations of misconduct that respondent engaged in frivolous or bad faith actions and section 6068 (c) and (g) violations were not alleged. (Contrast *Sorenson* v. *State Bar* (1991) 52 Cal.3d 1036.) The judge's decision does not find unethical respondent's actions in litigating Olson's award and the examiner does not seek review in that regard.

misusing his trust account in 1984 and 1985, that he willfully violated rule 8-101(B)(4) in two matters (Olson and Gordon), and that he failed to perform services competently in Olson's time sensitive matter. (Rule 6-101(A)(2).)

[11] To consider the proper discipline we look first to the standards as guidelines. (*Drociak* v. *State Bar* (1991) 52 Cal.3d 1085, 1090.)

Standard 2.2(b) provides for at least a three-month actual suspension irrespective of mitigating circumstances for respondent's violations of rule 8-101. Respondent's violation of rule 6-101(A)(2) in the Olson matter warrants either reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client. Respondent's violations of rule 8-101 were repeated and showed either his lack of understanding of the rule or his unwillingness to comply with its dictates. It is difficult to assess how much harm respondent's inaction in the Olson matter caused Olson as Olson apparently let many months go by before authorizing any further legal action to be taken by his new counsel.

[10b] The standards guide that if two or more acts of misconduct are found in a single disciplinary matter each with different sanctions, the sanction imposed shall be the more severe of those applicable. (Std. 1.6.) Clearly, the gravest aspect of respondent's misconduct is his failure to abide by the terms of rule 8-101.

[10c] Frequently our Supreme Court has described the important function of rule 8-101 in serving to protect client's funds and property from the more severe consequences which could accidentally or intentionally result if trust property is attached, lost or misappropriated. (See *Arm* v. *State Bar, supra* 50 Cal.3d at pp. 776-777, and cases cited.) Considering respondent's disregard of his duties, we believe that it is appropriate in this case to follow standard 2.2(b) and recommend at least a three-month actual suspension irrespective of mitigating circumstances.

We must also consider the balance of aggravating and mitigating circumstances to determine whether a longer suspension is appropriate.

[12] We agree with the judge that respondent's prior private reproval is an aggravating circumstance. Although the reproval was imposed fourteen years ago, it was imposed but seven years prior to his commission of misconduct in the present matter. Resting on four separate instances of misconduct, respondent's prior record manifestly showed his failure to abide by his duties of proper client representation in 1974 and 1975. Under the circumstances, that reproval was not too remote in time and was properly considered to be an aggravating circumstance. (Compare *Grim* v. *State Bar* (1991) 53 Cal.3d 21, 32; *Marquette* v. *State Bar* (1988) 44 Cal.3d 253, 266.)

[13] We also consider an aggravating circumstance the evidence freely given by respondent that he was seeking to conceal funds from the FTB. Although we determined that such matter was outside the proper scope of charges and could not form the basis of culpability (see *ante*), such evidence can form the basis of an aggravating circumstance. (See *Edwards* v. *State Bar, supra*, 52 Cal.3d at p. 35.)

As the only mitigating circumstance, the judge found that with regard to respondent's payment of taxes, he was acting in good faith. We agree with respondent that additional mitigating circumstances have been established. In particular respondent's candor and cooperation with the State Bar and his performance of a variety of pro bono and community services deserve recognition. (See *Porter* v. *State Bar* (1990) 52 Cal.3d 518, 529; *In re Larkin* (1989) 48 Cal.3d 236, 243, 244.) We also consider respondent's favorable character evidence but we note that it was not extensive.

Citing delay in initiating formal proceedings in this case, respondent urges it as a mitigating circumstance. We disagree. We see no evidence of any delay which could be considered mitigating. (See *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 774.)

While we find no recent decision of the Supreme Court presenting very similar factors to the present, recent cases less serious than the present show that the discipline we recommend here is fairly proportional. In *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317,

the Court suspended the attorney for one year, stayed on conditions including a 30-day actual suspension. Sternlieb, who had been admitted for nine years prior to her misconduct had no prior record of discipline and was found culpable of misappropriation involving only a violation of rule 8-101. Extremely favorable character testimony was presented including from judges and opposing counsel in the case underlying her misconduct.

In our decision of *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, we recommended a five-year suspension stayed on conditions including a 45-day suspension. We found the attorney culpable of commingling of trust and personal funds in one count, repeated failure to perform services competently in another count, failure to communicate with his client in a third count and failure to cooperate with the State Bar in a fourth count. Whitehead had a prior private reproval but presented extensive mitigation which had led the hearing referee to recommend no actual suspension.

The only Supreme Court case cited by respondent is the seven-year-old case of *Fitzsimmons* v. *State Bar* (1983) 34 Cal.3d 327. By a five-to-two vote the Supreme Court publicly reproved Fitzsimmons for violating the predecessor to rule 8-101 in failing to keep proper records of trust funds in one matter and for failing to obtain written direction from his client in handling trust funds. He had been publicly reproved seven years earlier for violating a court order in one matter directing he repay funds he had taken without court approval. The two dissenting justices would have imposed the 60-day actual suspension and three-year stayed suspension recommended by the State Bar.

[10d] We believe that actual suspension and extended terms of monitored probation are needed for adequate public protection in light of respondent's earlier discipline in four client matters followed by his violation of more serious provisions of rule 8-101 in three additional matters.

[10e] Balancing all relevant factors, we believe that aggravating circumstances predominate over mitigating circumstances and we therefore determine that the judge's disciplinary recommendation of three years suspension, stayed, on conditions of a five-year probation with six months actual suspension is well grounded in the standards, proportional to recent decisions and fairly reflective of the balance of mitigating and aggravating circumstances present in this record. With the exception of the requirement that respondent seek psychiatric treatment, we adopt the judge's disciplinary recommendation.

[14] The judge apparently deemed psychiatric treatment an appropriate condition of probation because of the troublesome attitude which respondent displayed to her at the hearing concerning his justification for his actions. Since respondent's attitude was undoubtedly mirrored in his demeanor at the hearing which the judge was in the better position to assess than are we with only a cold record to review, we are reluctant to disagree with her. Nevertheless, to support a condition of psychiatric treatment in a criminal case, expert or other clear evidence of psychiatric problems is required. (See *In re Bushman* (1970) 1 Cal.3d 767, 777, disapproved on other grounds, *People* v. *Lent* (1975) 15 Cal.3d 481, 486.) While this proceeding is not a criminal one, we believe the foregoing safeguard is appropriate in disciplinary proceedings. (See *Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 228-230.) Here, no clear or expert evidence was presented that respondent had a specific mental or other problem requiring psychiatric treatment and we therefore modify the judge's recommendation to eliminate such treatment requirement.

V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court of California that respondent be suspended from the practice of law in this state for a period of three (3) years, that execution of that suspension be stayed and that respondent be placed on probation for a period of five (5) years on the following conditions:

1) That for the first six (6) months of the period of probation, respondent be suspended from the practice of law in this state; and

2) That respondent comply with conditions 2 through 4 and 6 through 12 of the conditions of

probation recommended by the judge in her decision on pages 23-28.

We also recommend that the Supreme Court order that respondent take and pass the California Professional Responsibility Examination within one (1) year from the effective date of the Supreme Court's order.

Finally, we recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court and that he comply with subparts (a) and (c) of that rule within 30 and 40 days, respectively, from the effective date of the Supreme Court's order.

We concur:

PEARLMAN, P.J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN NICHOLAS BACH

A Member of the State Bar

[No. 88-O-10872]

Filed August 8, 1991

SUMMARY

Respondent was found culpable by the hearing department of the former volunteer State Bar Court of two counts of client abandonment. The referee dismissed one client-related count in its entirety. He also found respondent not culpable of failing to cooperate with the State Bar, despite respondent's failure to reply to the investigator's letters, because respondent did participate in the disciplinary proceeding. On the counts where culpability was found, the referee declined to find culpability of prejudicial withdrawal in the absence of an intent to withdraw. The referee recommended that respondent be suspended for five years, stayed, with probation for five years, on conditions including actual suspension for three years and until restitution was made to clients. (Hon. Denver C. Peckinpah (retired), Hearing Referee.)

Respondent requested review, contending that the referee's procedural and evidentiary rulings deprived him of due process and equal protection and that there was insufficient evidence to sustain culpability on the violations found by the referee.

The review department made a number of modifications to the referee's decision. It found respondent culpable of additional misconduct, holding that prejudicial withdrawal may occur even in the absence of an intent to withdraw, and that cooperation in the formal proceeding is not a defense to failure to cooperate in the investigation. However, the referee's recommended discipline was found to be excessive. The review department recommended that respondent be suspended for two years, stayed, with probation for two years and actual suspension for nine months and until restitution was made.

COUNSEL FOR PARTIES

For Office of Trials: Gregory B. Sloan

For Respondent: John N. Bach, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **135 Procedure—Rules of Procedure**
162.20 Proof—Respondent's Burden
166 Independent Review of Record
Where the testimony of the State Bar's witnesses was in conflict with that of respondent, and the referee resolved those conflicts against respondent, respondent could not show error in the findings merely by repeating his own version of the facts, and respondent's generalized challenge to the complainant's credibility was not sufficient to persuade the review department to reject the referee's findings. In the absence of a strong showing that the referee was mistaken, the review department is required to defer to the referee's determinations as to credibility, and it is reluctant to deviate from the referee's credibility-based findings in the absence of a specific showing that they were in error. (Rule 453, Trans. Rules Proc. of State Bar.)

[2] **274.00 Rule 3-400 [former 6-102]**
It was not improper for an attorney to request written confirmation from a client that the attorney had been discharged as counsel. Such a letter was not a release from liability of the type prohibited by the Rules of Professional Conduct.

[3] **139 Procedure—Miscellaneous**
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act
Where respondent did not agree in writing that statutory attorney-client fee arbitration would be binding, arbitration award was not binding even though it recited that it was. However, the award became binding when respondent failed to seek a post-arbitration trial within the statutory time limit.

[4 a-c] **101 Procedure—Jurisdiction**
171 Discipline—Restitution
191 Effect/Relationship of Other Proceedings
The State Bar Court, as an arm of the Supreme Court in attorney disciplinary matters, does not sit as a collection board for clients aggrieved over fee matters, nor is its jurisdiction derivative of fee arbitration proceedings. The administration of attorney discipline, including such remedial orders as restitution, is independent of any remedy that an aggrieved client may pursue. In a disciplinary proceeding to protect the public, the alleged flaws in a fee arbitration proceeding and resulting judgment have little relevance. Accordingly, the State Bar Court has jurisdiction over a disciplinary matter even though there has already been a factually related fee arbitration.

[5 a, b] **191 Effect/Relationship of Other Proceedings**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
A finding of failure to return the unearned portion of an advanced fee upon termination of employment was legally independent of the validity of a related fee arbitration award. Where respondent took an advance fee, failed to complete the work, was discharged by the client, agreed to return the unearned portion of the fee, and then failed to do so, respondent was culpable of misconduct notwithstanding alleged defects in a subsequent fee arbitration proceeding.

[6] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Even if respondent's advanced fee originally was a non-refundable "true retainer," respondent's subsequent oral agreement to refund the unearned balance modified the retainer agreement to make the unearned portion of the fee refundable.

[7 a, b] **164 Proof of Intent**
204.20 Culpability—Intent Requirement
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
The rule regarding prejudicial withdrawal from representation applies when an attorney ceases to provide services, even absent formation of an intent to withdraw as counsel. Whether or not an attorney's ceasing to provide services amounts to an effective withdrawal depends on the surrounding circumstances. Where time is of the essence, failure to provide services constitutes an effective withdrawal even if the attorney's period of inaction is relatively brief.

[8] **214.30 State Bar Act—Section 6068(m)**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Where client needed immediate action, and respondent recommended that client seek a temporary restraining order, respondent's failure to bring TRO application to hearing for over two months constituted reckless incompetence, and respondent's inaccessibility to the client, even though not as severe or protracted as in many disciplinary cases, violated the statutory duty to communicate with clients.

[9] **164 Proof of Intent**
204.20 Culpability—Intent Requirement
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
An attorney's total cessation of services to a client for a period of two years, standing alone, and even though unintentional, was clear and convincing evidence that the attorney effectively withdrew from employment without taking steps to protect the client's interests.

[10] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Failure to perform competently, with reckless disregard, was demonstrated by respondent's failure to take any steps whatsoever to bring a client's case to trial, or to pursue it at all, prior to the expiration of the five-year statute, causing the client to lose a cause of action irrevocably.

[11] **204.90 Culpability—General Substantive Issues**
214.30 State Bar Act—Section 6068(m)
Where respondent failed to inform a client that the five-year statute was about to run on the client's case, respondent violated the statutory duty to keep clients reasonably informed of significant developments in their cases; the fact that the failure to communicate resulted from the loss of the client's file did not render respondent any less culpable.

[12 a, b] **213.90 State Bar Act—Section 6068(i)**
The statute requiring cooperation in State Bar disciplinary proceedings contemplates that attorneys may be found culpable of violating that duty if they fail to cooperate either in the investigation or in the formal proceedings. An attorney may be found culpable of violating the statute by failing to respond to a State Bar investigator's letter, even if the attorney subsequently appears and fully participates in the formal proceeding.

[13] **120 Procedure—Conduct of Trial**
144 Evidence—Self-Incrimination
193 Constitutional Issues
In a disciplinary action, an attorney does not have a privilege not to be called to testify, but may refuse to answer specific questions on the grounds that answering the question may subject the attorney to criminal prosecution.

[14] **143 Evidence—Privileges**
144 Evidence—Self-Incrimination
193 Constitutional Issues
213.90 State Bar Act—Section 6068(i)
If an attorney wishes to invoke statutory or constitutional privileges which the attorney contends make a substantive response to a State Bar investigator's letter unnecessary, the attorney must nevertheless respond to the investigator's letter, if only to state that the attorney is claiming a privilege; otherwise, the attorney not only violates the statutory duty to cooperate, but also risks waiving the claimed privilege.

[15 a, b] **101 Procedure—Jurisdiction**
102.20 Procedure—Improper Prosecutorial Conduct—Delay
105 Procedure—Service of Process
106.10 Procedure—Pleadings—Sufficiency
119 Procedure—Other Pretrial Matters
Respondent's fundamental objections to disciplinary proceeding, based on lack of personal service, expiration of the statute of limitations, lack of jurisdiction, and failure of the notice to show cause to state grounds for discipline, should have been presented to the State Bar Court at the trial level by motion.

[16] **105 Procedure—Service of Process**
Personal service is not required in State Bar proceedings, and actual notice is not an element of proper service.

[17] **102.20 Procedure—Improper Prosecutorial Conduct—Delay**
139 Procedure—Miscellaneous
There is no statute of limitations in attorney disciplinary proceedings.

[18] **101 Procedure—Jurisdiction**
State Bar Court jurisdiction was confirmed by evidence establishing the sole requisite fact, i.e., respondent's membership in the State Bar.

[19] **103 Procedure—Disqualification/Bias of Judge**
Where record contained numerous evidentiary rulings favorable to respondent, and showed courteous treatment of respondent by the referee; referee's evenhandedness was also shown by dismissal of two out of four charged counts in their entirety, and referee's handling of hearing was in accord with proper judicial temperament and demeanor, record did not show evidence of bias or prejudice.

[20 a, b] **120 Procedure—Conduct of Trial**
139 Procedure—Miscellaneous
167 Abuse of Discretion
194 Statutes Outside State Bar Act
Even if the procedure for a motion for judgment at the close of the moving party's case, as set forth in Code of Civil Procedure section 631.8, does apply in State Bar proceedings, it was not error for the hearing referee to take respondent's motion under submission and rule on it after respondent had presented the defense case, and the motion was impliedly ruled on when the referee made initial rulings as to culpability.

[21] **135 Procedure—Rules of Procedure**
139 Procedure—Miscellaneous
194 Statutes Outside State Bar Act
In general, State Bar disciplinary proceedings are governed exclusively by the State Bar's rules of procedure, and the provisions of the Code of Civil Procedure do not apply unless expressly incorporated by reference.

[22] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
162.20 Quantum of Proof—Miscellaneous
193 Constitutional Issues
It is not clear that the doctrine of selective prosecution applies in State Bar disciplinary proceedings, in which respondents do not enjoy the full panoply of procedural protection afforded to criminal defendants. But even if it does, there are several threshold procedural and evidentiary hurdles to be overcome before a case of selective prosecution can be established, and where respondent did not even attempt to make the requisite showing, respondent's claim of selective prosecution was without merit.

[23] **146 Evidence—Judicial Notice**
802.21 Standards—Definitions—Prior Record
Review department took judicial notice that respondent's prior discipline became final after subsequent matter was submitted on review.

[24 a, b] **513.10 Aggravation—Prior Record—Found but Discounted**
805.10 Standards—Effect of Prior Discipline
Although respondent's prior misconduct was similar to the misconduct in a second matter, the aggravating force of respondent's prior disciplinary record was somewhat diluted where the misconduct in the second matter occurred before the notice to show cause in the prior matter was served, because it did not reflect a failure on respondent's part to learn from the prior misconduct. Nevertheless, the prior was a factor in aggravation, and it was appropriate for the discipline in the second matter to be greater than in the previous matter.

[25] **582.10 Aggravation—Harm to Client—Found**
Even where respondent's client could not reasonably have expected to receive a substantial award of damages had the client's case settled or gone to trial, where respondent's conduct deprived the client of the ability to receive any damages at all, this harm was significant and was an aggravating factor.

[26] **521 Aggravation—Multiple Acts—Found**
535.10 Aggravation—Pattern—Declined to Find
While two matters of misconduct might not be considered multiple acts, the addition of a finding of culpability of another count of misconduct made a finding of multiple acts appropriate; however, the three instances of misconduct did not amount to a pattern or practice even when coupled with the additional misconduct involved in respondent's prior disciplinary matter.

[27] **591 Aggravation—Indifference—Found**
621 Aggravation—Lack of Remorse—Found
Respondent's use of specious and unsupported arguments in an attempt to evade culpability in his disciplinary matter revealed respondent's lack of appreciation both for his misconduct and for his obligations as an attorney, and his persistent lack of insight into the deficiencies of his professional behavior, and constituted an independent aggravating factor.

[28] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
795 Mitigation—Other—Declined to Find
An attorney's being busy with other personal and client-related matters at the time of the attorney's misconduct does not constitute mitigation; if the attorney is too busy to handle a matter competently and complete the necessary work within an appropriate time frame, the attorney should not take on the case.

[29 a, b] **765.31 Mitigation—Pro Bono Work—Found but Discounted**
Respondent's having performed a substantial amount of pro bono work for indigents and minorities, at considerable personal sacrifice due to hostility engendered on the part of local press and elected officials, constituted legitimate mitigation. However, where respondent's testimony was the only evidence on the subject, and meaning of "substantial" was not clear from record, respondent's pro bono record could not be given as much weight in mitigation as in some other cases.

[30] **745.51 Mitigation—Remorse/Restitution—Declined to Find**
An offer of restitution made in response to litigation by the client, and long after the initiation of State Bar proceedings, does not constitute proper mitigation.

[31 a, b] **844.14 Standards—Failure to Communicate/Perform—No Pattern—Suspension**
Where respondent abandoned two clients; had been previously disciplined for a third abandonment occurring at roughly the same time; failed to return the unearned portion of an advance fee; failed to cooperate with the State Bar; harmed clients; and evidenced a lack of understanding of professional obligations, but had a record of pro bono work and a long discipline-free record prior to the first misconduct, two years stayed suspension, two years probation, and actual suspension for nine months were necessary to ensure the protection of the public and the maintenance of high professional standards.

[32] **171 Discipline—Restitution**
191 Effect/Relationship of Other Proceedings
Where restitution was appropriate, but record reflected that client might have filed Client Security Fund claim, review department recommended that respondent be ordered to pay restitution either to client, or to Client Security Fund if client's claim had been paid.

[33] **171 Discipline—Restitution**
It is inappropriate to use restitution as a means of awarding unliquidated tort damages for malpractice.

ADDITIONAL ANALYSIS

Culpability
Found
213.91 Section 6068(i)
214.31 Section 6068(m)
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2

Mitigation

Found but Discounted

725.32 Disability/Illness

Discipline

1013.08 Stayed Suspension—2 Years
1015.05 Actual Suspension—9 Months
1017.08 Probation—2 Years

Probation Conditions

1021 Restitution
1030 Standard 1.4(c)(ii)

Other

1091 Substantive Issues re Discipline—Proportionality
1092 Substantive Issues re Discipline—Excessiveness

OPINION

NORIAN, J.

Respondent, John Nicholas Bach, was admitted to the practice of law in California in 1964, and has previously been disciplined for misconduct. In this matter, the notice to show cause charged respondent with four counts of misconduct. The hearing referee, a retired superior court judge, found respondent culpable of two counts of client abandonment (counts two and three), and dismissed the remaining two counts (counts one and four). The referee recommended that respondent be suspended for five years, stayed, with probation for five years, on conditions including actual suspension for three years and until restitution is made to the clients involved in counts two and three.

Respondent requested review, arguing that: (1) the referee's procedural and evidentiary rulings deprived him of due process and equal protection; (2) the evidence was insufficient to sustain a culpability finding on count two; (3) the evidence was insufficient to sustain a culpability finding on count three, and (4) the referee failed to consider mitigating circumstances adequately in recommending discipline. Counsel for the State Bar (the examiner), though he did not request review, asks that the review department reverse the dismissal of count four, and find respondent culpable of failing to cooperate with the State Bar's investigation of his misconduct.[1]

Upon our independent review of the record, we make a number of modifications to the referee's decision as to the facts and findings in aggravation. We also change the recommended discipline. Although we hold respondent culpable of additional misconduct not found by the referee, we find the referee's recommended discipline excessive. We recommend that respondent be suspended for two years, stayed, with probation for two years, on conditions including actual suspension for the first nine months of the probationary period and until restitution is made to respondent's client Dunsmoor or to the Client Security Fund of the State Bar.

DISCUSSION

[1a] The testimony of the State Bar's witnesses was in conflict with that of respondent in numerous respects. With regard to counts two and three, the referee resolved those conflicts against respondent. We must give deference to the referee's determinations as to credibility, and we are reluctant to deviate from his credibility-based findings in the absence of a specific showing that they were in error. (See rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 274.) Our review of the record discloses ample evidence to support the referee's factual findings on counts two and three, and we hereby adopt them. The factual statements below are based on these findings, with additional details supplied based on the record.

A. Count Two (Dunsmoor).

1. Facts.

Gary Dunsmoor consulted respondent on November 6, 1987, regarding a paternity claim being made against him by Jeannine Griffith on behalf of her 15-year-old son. (Decision p. 3 [finding of fact 6]; R.T. pp. 7-8.) On November 11, 1987, Dunsmoor met with respondent again, this time accompanied by his then-fiancee, Lori Poffenbarger (who shortly thereafter became his wife [R.T. p. 6]). Dunsmoor and Poffenbarger told respondent that Griffith was harassing them with telephone calls, and respondent advised them to obtain a temporary restraining order (TRO) forbidding Griffith from contacting Dunsmoor. (Decision pp. 3-4 [finding of fact 7]; R.T. pp. 10-11, 15-17, 59.) Dunsmoor indicated that the

1. Neither party has requested that we reexamine the referee's decision not to find culpability on count one. Nonetheless, we have independently reviewed the record as to this count. (See rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 9. Our review confirms the facts and reasoning underlying the referee's decision to dismiss this count. We adopt the referee's findings and conclusions as to count one, and affirm the dismissal.

TRO was urgent, because the stress caused by the harassment was aggravating his fiancee's poor state of health. (R.T. pp. 48-49.) Respondent indicated he would have the TRO in place within about a week. (R.T. p. 17.) The next day, Dunsmoor and Poffenbarger gave respondent a signed retainer agreement and a $3,000 retainer. (Decision p. 4 [finding of fact 8]; exhs. 2, 3, A; R.T. pp. 11, 13-15, 17.)

Due to delay in the preparation of the application for the TRO, and the initial preparation of a version Dunsmoor felt was inaccurate and inflammatory, the final version of the TRO papers was not approved by the client until December 8, 1987, nearly a month after respondent suggested seeking a TRO. (Decision pp. 4-5 [findings of fact 9-13]; R.T. pp. 18-21, 60-61, 65-66.) During that time, Dunsmoor experienced some difficulty in contacting respondent. (Decision pp. 4, 5 [findings of fact 10, 12]; R.T. pp. 18-19, 20, 77-78.)

Both at the time and at the hearing, respondent gave an explanation for his failure to return Dunsmoor's calls during this period which the referee expressly found not to be credible. (Decision p. 4 [finding of fact 10]; see R.T. pp. 17-19, 42-44, 59-60, 542.) On December 7, 1987, in response to Dunsmoor's expression of dissatisfaction with respondent's services, respondent offered to withdraw from the matter and refund the unearned balance of the retainer, but Dunsmoor instructed him to proceed with the TRO. (R.T. pp. 20, 77-78.)

On January 7, 1988, Dunsmoor began a series of attempts to reach respondent to find out what had occurred with regard to the TRO. Respondent did not return Dunsmoor's calls, so on January 15, Dunsmoor went to respondent's office, where he learned that the TRO still had not been obtained. (Decision p. 5 [finding of fact 14]; R.T. pp. 21-22.) Respondent admittedly never obtained a TRO. (R.T. p. 315.)

On January 18, 1988, Dunsmoor spoke with respondent, and told him that he wished to terminate respondent's services and to receive a bill for services to date, and a refund of the unearned balance of the retainer. Respondent agreed, but requested that Dunsmoor first send him a letter confirming that Dunsmoor was releasing respondent from his role as counsel.[2] **[2 - see fn. 2]** Dunsmoor delivered such a letter to respondent on the following day. At that time, respondent promised to send a bill the next day, after his bookkeeper returned to work. (Decision p. 5 [finding of fact 15]; exh. 4; R.T. pp. 24-26, 84-87.) However, respondent did not instruct his bookkeeper to prepare the bill, never sent Dunsmoor a bill, never refunded any portion of the retainer, and did not return Dunsmoor's repeated telephone calls. (Decision p. 6 [findings of fact 16-18]; R.T. pp. 26-27, 29; see also R.T. pp. 292-297.)

Dunsmoor and his wife thereafter initiated fee arbitration and received an award, characterized by the arbitrators and by the referee as binding, in the amount of $1,725. (Decision p. 6 [finding of fact 19]; exh. 7; R.T. pp. 31-32, 34.) Respondent participated in the arbitration. (See R.T. pp. 71, 559-560.) As of the date of the hearing in this matter, respondent had not paid any portion of the award, despite Dunsmoor's request that he do so. (Decision p. 6 [finding of fact 19]; exh. 12; R.T. pp. 35-36.) The award was not reduced to judgment, nor did respondent petition to set it aside. (R.T. pp. 89-90, 313.)

2. Discussion.

Count two of the notice to show cause charged respondent with violating Business and Professions Code sections 6068 (a), 6068 (m), and 6103, and former Rules of Professional Conduct 2-111(A)(2), 2-111(A)(3), and 6-101(A)(2).[3] The referee found culpability only as to section 6068 (m) and rules 2-111(A)(3) and 6-101(A)(2). He properly rejected

2. **[2]** The release letter that respondent requested and received from Dunsmoor was simply a written confirmation that respondent had been discharged as counsel, and as such was not improper. It was not a release from liability of the type prohibited by rule 3-400 of the Rules of Professional Conduct (former rule 6-102; see fn. 3, *post*).

3. Unless otherwise noted, all further statutory references are to the Business and Professions Code, and all further references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

culpability as to sections 6068 (a) and 6103 on the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 814-815, and *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 931. (See *Read* v. *State Bar* (1991) 53 Cal.3d 394, 406; *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 483, 486-487.)

Respondent contends that the evidence presented in support of the allegations of count two of the notice to show cause was insufficient to support the referee's findings of culpability. Respondent bases this contention primarily on an attack on the credibility of Dunsmoor, claiming that Dunsmoor was a sophisticated witness whose testimony was internally inconsistent. However, respondent failed to provide any specific references to the record regarding the alleged internal inconsistencies in Dunsmoor's testimony. As for Dunsmoor's sophistication, even if true we fail to see how this contention renders his testimony less worthy of belief.

The referee explicitly found Dunsmoor to be a credible witness. In testifying as to the sequence of events in his relationship with respondent, Dunsmoor was aided by contemporaneous notes which refreshed his recollection. **[1b]** In the absence of a strong showing that the referee was mistaken, we must defer to the referee's determinations as to the credibility of a witness's testimony, because the referee was in the best position to make that determination. (See rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Kennon*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 274.) Where the testimony was in conflict, respondent cannot show error in the findings merely by repeating his own version of the facts. (*Read* v. *State Bar*, *supra*, 53 Cal.3d at p. 406.) Respondent's generalized challenge to Dunsmoor's credibility is not sufficient to persuade us to reject the referee's findings. (Cf. *Bach* v. *State Bar* (1991) 52 Cal.3d 1201, 1207.)

Respondent also argues that the allegations in count two are a "deceptive effort and abuse of process to use the State Bar Association [sic] as a collection and enforcement agency regarding an unenforceable arbitration proceeding." (Respondent's opening brief on review, at p. 7.) **[3]** On the issue of the binding nature of the arbitration award, section 6204 (a)[4] provides that statutory attorney-client fee arbitration is binding only if both parties agree in writing that it shall be binding. Respondent did not so agree. Thus, the arbitration award, contrary to its recital, was not binding at the time it was rendered. However, it *became* binding, under section 6203 (b), when respondent failed to seek a post-arbitration trial under section 6204 within 30 days after service of the award.[5] Thus, the arbitration award was and is binding, and the referee was correct in so characterizing it.

[4a] Respondent's contention that the State Bar cannot serve as a collection board for arbitration awards, and accordingly has no jurisdiction over this matter, was expressly rejected by the Supreme Court in a decision handed down after respondent had briefed and argued this matter on review. In *Bach* v. *State Bar*, *supra*, 52 Cal.3d 1201 (another disciplinary matter involving respondent), in answer to the same argument made by respondent here, the Supreme Court stated that respondent's argument "fundamentally misapprehends the source and objective" of the attorney discipline system. (*Id.* at p. 1206.) The Supreme Court added that "This court does not sit in disciplinary matters as a collection board for clients aggrieved over fee matters; nor is our jurisdiction derivative of fee arbitration proceedings. The administration of attorney discipline, including such remedial orders as restitution, is independent of any remedy that an aggrieved client may pursue. We reject as frivolous petitioner's argument to the contrary." (*Id.* at p. 1207.)

4. Business and Professions Code section 6204 (a) provides that "The parties may agree in writing to be bound by the award of the arbitrators. In the absence of such an agreement, either party shall be entitled to a trial after arbitration. Either party shall be entitled to a trial after arbitration if sought within 30 days, pursuant to subdivisions (b) and (c)."

5. Business and Professions Code section 6203 (b) provides in pertinent part that "Even if the parties to the arbitration have not agreed in writing to be bound, the arbitration award shall become binding upon the passage of 30 days after mailing of notice of the award, unless a party has, within the 30 days, sought a trial after arbitration pursuant to Section 6204."

[4b] The Supreme Court's statements concerning the purpose of its jurisdiction over attorney discipline apply equally to the State Bar Court, which acts as an arm of the Supreme Court in attorney disciplinary matters. (See *Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300-301.) Accordingly, we reject respondent's challenge to the State Bar Court's jurisdiction of this matter.

Respondent makes a related argument in support of his contention that the referee erred in finding respondent culpable of violating rule 2-111(A)(3). Respondent contends that the finding of a violation of rule 2-111(A)(3) was in error because it was necessarily predicated upon the finding that the arbitration award was binding, which was also erroneous. Both of the premises of this argument are incorrect. As already noted, the arbitration award was indeed binding. [5a] But even if it had not been, the finding of a violation of rule 2-111(A)(3) would still stand, because that finding is legally independent of the validity of the arbitration award.

[5b] In the Dunsmoor matter, respondent took an advance fee, failed to complete the work he was hired to do, was discharged by the client, agreed to return the unearned portion of the advance fee, and then failed to do so.[6] [6 - see fn. 6] On essentially identical facts, the Supreme Court held in *Cannon* v. *State Bar* (1990) 51 Cal.3d 1103, 1106-1109, that the attorney's failure to return the unearned portion of the advance fee violated rule 2-111(A)(3) notwithstanding alleged procedural defects in a subsequent arbitration over the fee. [4c] "Because this is a disciplinary proceeding to protect the public, the alleged flaws in the arbitration proceeding and resulting judgment have little relevance." (*Id.* at p. 1109.) Here, as in *Cannon* v. *State Bar*, *supra*, respondent's culpability of violating rule 2-111(A)(3) rests on clear and convincing evidence establishing his failure to return the unearned portion of his advance fee, which is entirely independent of the arbitration award.

Although we adopt the referee's legal conclusions on this count in most respects, our independent review of the record leads us to make one modification therein.[7] The referee rejected culpability as to rule 2-111(A)(2) on the basis of lack of evidence of any intent to withdraw on respondent's part. In so doing, the referee relied on *Guzzetta* v. *State Bar* (1987) 43 Cal.3d 962, 979, and *Baker* v. *State Bar*, *supra*, 49 Cal.3d at pp. 816-817, fn. 5.

[7a] In our view, these cases do not support the referee's conclusions. *Baker* v. *State Bar* held that rule 2-111(A)(2) "may reasonably be construed to apply when an attorney ceases to provide services, even *absent* formation of an intent to withdraw as counsel for the client." (*Baker* v. *State Bar*, *supra*, 49 Cal.3d at p. 817, fn. 5, emphasis added.) *Guzzetta* v. *State Bar* held that where, after the alleged withdrawal, the attorney "continued to advise [his client]," recommended action for his client to take, and reviewed papers for his client, the attorney did not violate rule 2-111(A)(2). The reason for this holding, however, was that the attorney had not in fact ceased to provide services, *not* that he had not intended to withdraw. (*Guzzetta* v. *State Bar*, *supra*, 43 Cal.3d at p. 979; see also *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 348-349.)

[7b] Whether or not an attorney's ceasing to provide services amounts to an effective withdrawal depends on the surrounding circumstances. Here, respondent's failure to provide services spanned a period of only approximately three months. The circumstances, however, were such that time was

6. The referee found, based on clear and convincing evidence and on the referee's determinations as to credibility, that respondent promised Dunsmoor that he would provide an accounting of what was owed, and that he would refund the unearned balance of the substantial advance fee he had received. Thus, we need not address respondent's contention that the advance fee paid by Dunsmoor was a non-refundable "true retainer." [6] Even if the payment originally was a non-refundable retainer, respondent's subsequent oral agreement to refund the unearned balance modified the retainer agreement so as to make the unearned portion of the advance fee refundable.

7. It is the duty of this review department to conduct an independent review of the record. As a result of our independent review, we may adopt findings, conclusions and a decision or recommendation at variance with the hearing department. (Rule 453, Trans. Rules Proc. of State Bar; *In the Matter of Mapps*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 9; cf. *Bernstein* v. *State Bar* (1972) 6 Cal.3d 909, 916.)

plainly of the essence to the services requested (a TRO to protect respondent's client from harassment). Under these circumstances, respondent's failure to provide the necessary services constituted an effective withdrawal for purposes of rule 2-111(A)(2), even though his period of inaction was relatively brief. (Cf. *Cannon* v. *State Bar*, *supra*, 51 Cal.3d at pp. 1106-1108 [attorney effectively withdrew from employment when he had not obtained urgently needed immigration documents three and a half months after the client retained him].) Respondent's failure to take any reasonable steps to avoid foreseeable prejudice to his client prior to his withdrawal was a wilful violation of this rule.

[8] Based on the same facts, we adopt the referee's conclusions that respondent violated rule 6-101(A)(2) and section 6068 (m) as to this count. Given the client's need for immediate action, which respondent apparently recognized when he advised his client to seek a TRO, it was reckless incompetence for him still not to have brought the TRO application to hearing over two months after his client requested that he file it. Similarly, while respondent's inaccessibility to Dunsmoor was not as severe or protracted as in many disciplinary cases, it did constitute a culpable failure to communicate under the particular circumstances of this case, given the need for prompt action and attorney responsiveness in a TRO situation.

B. Count Three (Sampson).

1. Facts.

Christine Sampson hired respondent on January 19, 1983, to represent her in a personal injury case arising out of an accident that had occurred on February 7, 1982. (Decision p. 6 [finding of fact 20]; exh. 39; R.T. pp. 328, 331.) Respondent filed a complaint on February 7, 1983, but failed to propound any discovery or send a demand letter. (Decision pp. 6-7 [findings of fact 21-22]; R.T. pp. 331-334, 355, 360.) He did not file an at-issue memorandum.[8] In December 1984, one of the defendants made a settlement offer under section 998 of the Code of Civil Procedure. (Exh. 45; R.T. p. 409.) Respondent did not respond in writing to this offer, though he testified he made an oral response which the defendant's attorney did not recall. (Decision p. 7 [finding of fact 23]; R.T. pp. 355, 409-410, 422-426, 590-593.)[9]

Respondent made a settlement demand on the same defendant, but not until after the expiration of the statutory five-year time limit to bring the case to trial (February 7, 1988). (R.T. pp. 356-358, 410-411.) The demand was accordingly rejected, and the case was subsequently dismissed due to respondent's failure to bring it to trial within five years. (Decision p. 7 [findings of fact 24-25]; exh. 44; R.T. pp. 336-337, 429-430, 433, 520-521.) Respondent admitted that Sampson's file had been lost when he moved his office in October 1986, and that the case "fell through the cracks" in his office calendar system. (R.T. pp. 331, 356-359, 362-363, 498, 517-519.)

2. Discussion.

Count three of the notice to show cause charged respondent with violating sections 6068 (a), 6068 (m), and 6103, and former rules 2-111(A)(2) and 6-101(A)(2). The referee found culpability only as to section 6068 (m) and rule 6-101(A)(2). The section 6068 (a) and 6103 charges were correctly dismissed on the authority of *Baker* v. *State Bar*, *supra*, 49 Cal.3d 804 and *Sands* v. *State Bar*, *supra*, 49 Cal.3d 919.

8. Respondent did attempt to file an at-issue memorandum in municipal court instead of superior court where the case was pending. When this was rejected, he sent another at-issue memorandum to counsel for one of the defendants, along with a stipulation to transfer the action to municipal court. The defendant's counsel refused to sign the stipulation, and respondent made no further effort to file an at-issue memorandum. (R.T. pp. 334, 361-362, 379-381, 414-417; exhs. 42, Q.)

9. The referee's decision recites that respondent testified he made the oral response and that the defendant's attorney testified he could not recall any such response. (Decision p. 7 [finding of fact 23].) The decision does not indicate whether the referee believed respondent's testimony that he did make a response. As shown by the discussion below, even if we accepted respondent's testimony that he did respond orally to the Code of Civil Procedure section 998 offer, this would not affect our determinations as to culpability on this count.

Respondent argues that the evidence offered in support of the allegations contained in count three—in particular, the testimony of Robert Davis, who was defense counsel in Sampson's case—was unsubstantiated and inadequate to support the referee's findings of culpability. Specifically, respondent contends that Davis's testimony was entirely incredible and that his recollection of the events involved was inaccurate. However, even if the challenged portions of Davis's testimony were disbelieved, the facts established by documentary evidence and by respondent's own testimony, as recited above, still would be sufficient to sustain respondent's culpability for violating rule 6-101(A)(2). We therefore reject respondent's contention with regard to this rule.

In this count, the referee again rejected culpability under rule 2-111(A)(2) on the basis of lack of intent to withdraw, based on the same authority cited in connection with the parallel holding in count two. For the reasons stated *ante* in connection with that count, the referee should have sustained the 2-111(A)(2) charge. [9] Respondent's total cessation of services for a period of approximately two years, standing alone, and even though unintentional, is clear and convincing evidence that he effectively withdrew without taking steps to protect his client's interests. (See *Baker* v. *State Bar, supra*, 49 Cal.3d at pp. 816-817, fn. 5.) Thus, we reverse the finding of the referee and hold that respondent's conduct in the Sampson matter was a wilful violation of rule 2-111(A)(2).

[10] The referee's conclusion holding respondent culpable of violating rule 6-101(A)(2) is supported by clear and convincing evidence. Failure to perform competently, with reckless disregard, is demonstrated by respondent's failure to take any steps whatsoever to bring Sampson's case to trial, or to pursue it at all, prior to the expiration of the five-year statute, thereby causing his client to lose her cause of action irrevocably. Respondent admitted that he had lost the file and that the case had been omitted from his calendaring system. Even if respondent did, as he claimed, respond orally to the defendant's Code of Civil Procedure section 998 offer, and even though he undisputedly did make a belated settlement demand after the five-year statute had expired, these activities fall far short of constituting sufficient prosecution of the case to excuse respondent's total failure to pursue the matter after sometime in early 1986 (or, at the very least, after October 1986 when he admittedly lost the file).

[11] We also concur with the referee's conclusion that the section 6068 (m) charge was sustained by clear and convincing evidence. Section 6068 (m), effective January 1, 1987, requires attorneys to respond to clients' reasonable status inquires and to keep clients reasonably informed of significant developments in their cases. Respondent violated section 6068 (m) by failing to contact Sampson in late 1987 or early 1988 to inform her of an imminent critical development in her matter, i.e., the running of the five-year statute. The fact that this failure to communicate was the result of respondent's loss of Sampson's file does not render him any less culpable. Based on this fact, we adopt the finding of the referee that respondent's conduct in the Sampson matter violated section 6068 (m).

C. Count Four (Noncooperation).

1. Facts.

An investigator for the State Bar sent a total of six letters to respondent regarding the client complaints reflected in counts one, two and three of the notice to show cause in this matter. (Exhs. 14-19; decision p. 8 [findings of fact 26-28].) Respondent admitted that he did not respond in writing to any of these letters. (Decision p. 8 [findings of fact 26-28]; R.T. pp. 110-113, 565.) Respondent did not deny receiving the investigator's letters; on the contrary, he testified that he deliberately refrained from responding to them for numerous reasons. These included his belief that section 6068 (i) is unconstitutional; his concern that the State Bar would use against him any information that he provided; and his desire not to provide information until he had an opportunity to confront and cross-examine the complaining witnesses. (Decision pp. 8-9 [finding of fact 29]; R.T. pp. 319-324, 565-567.)

2. Discussion.

Count four of the notice to show cause charged respondent with violating sections 6068 (a), 6068 (i), and 6103. Notwithstanding respondent's admitted

failure to respond to any of the six letters he received from State Bar investigators, the referee dismissed this count in its entirety. The referee's rationale was that respondent ultimately did cooperate with the State Bar by participating fully in the formal disciplinary proceedings after the notice to show cause was filed and served.

[12a] On review, the examiner contends that respondent should have been found culpable of violating section 6068 (i).[10] Section 6068 (i) makes it an attorney's duty "to cooperate and participate in any disciplinary investigation *or* other regulatory or disciplinary proceeding pending against the attorney." (Emphasis added.) Thus, the statute contemplates that attorneys may be found culpable of violating their duty to cooperate if they fail to participate *either* in the investigation *or* in the formal proceedings. Indeed, the Supreme Court, though without addressing the question expressly, has sustained culpability for failing to cooperate at the investigation stage even where, as here, the respondent subsequently appeared and participated in the formal proceeding. (See, e.g., *Friedman* v. *State Bar* (1990) 50 Cal.3d 235.)[11]

The statute goes on to provide that the duty to cooperate does not override any constitutional or statutory privileges an attorney may have. Respondent argues that he failed to answer any of the investigator's inquiries precisely because he was relying on his constitutional privileges. Without deciding whether respondent's privilege claims ultimately would have been upheld,[12] **[13 - see fn. 12]** we may assume for the sake of argument that respondent would not have violated section 6068 (i) if he had replied to the investigator's letters by expressly asserting claims of privilege. However, respondent made no such response; rather, he simply ignored the investigator's letters.

[14] Section 6068 (i) requires attorneys to respond in some fashion to State Bar investigators' letters. If an attorney wishes to invoke statutory or constitutional privileges which the attorney contends make a substantive response unnecessary, the attorney must nevertheless respond to the investigator's letters, if only to state that the attorney is claiming a privilege. If the attorney simply remains silent, the attorney not only violates section 6068 (i), but also risks waiving the very privilege upon which the attorney's silence is predicated. (Cf., e.g., *Inabnit* v. *Berkson* (1988) 199 Cal.App.3d 1230, 1239 [patient's failure to claim psychotherapist-patient privilege constituted waiver of right to bar disclosure of records of treatment]; *Brown* v. *Superior Court* (1986) 180 Cal.App.3d 701, 708-709, 711-712 [privilege against self-incrimination was waived by failure to make timely objection to discovery request in a civil matter].) **[12b]** We therefore reverse the finding of the referee on this point, and hold that respondent's failure to respond to the investigator's letters, even by making a claim of privilege, violated section 6068 (i), notwithstanding respondent's full participation in the proceedings after the filing of the notice to show cause.

D. Respondent's Other Contentions.

[15a] Respondent complains that his fundamental objections to this proceeding were never ruled on. Respondent's answer to the notice to show cause pleaded that he was never personally served with the notice to show cause; that the statute of limitations had run on the counts in the notice to show cause; that the State Bar did not have jurisdiction over any of the matters alleged in the notice to show cause; and that the counts in the notice to show cause failed to state grounds upon which a disciplinary proceeding could be held.

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10. The examiner does not contend that the referee should have sustained the section 6068 (a) and 6103 charges, and we concur with the referee's dismissal thereof.

11. The examiner cites this review department's opinion in *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73 for the proposition that an attorney may be found culpable of noncooperation based only on the failure to respond to investigators' letters. However, *In the Matter of Peterson, supra*, was a default case, and thus did not involve the question whether (as the referee found here) such noncooperation may in effect be cured by full participation after the filing of formal charges.

12. **[13]** See generally, e.g., *Black* v. *State Bar* (1972) 7 Cal.3d 676, 688 (in a disciplinary action, an attorney does not have a privilege not to be called to testify; an attorney may refuse to answer specific questions on the grounds that answering the question may subject the attorney to criminal prosecution).

[15b] These objections were not properly presented to the State Bar Court at the trial level by motion, but in any event, they are all without merit as a matter of law. **[16]** Personal service is not required in State Bar proceedings. (See *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 558-559 [actual notice is not an element of proper service in disciplinary actions; proper service is completed upon mailing].) **[17]** There is no statute of limitations in attorney disciplinary proceedings. (See *Rhodes* v. *State Bar* (1989) 49 Cal.3d 50, 60; *Rodgers* v. *State Bar* (1989) 48 Cal.3d 300, 310-311.) **[18]** The notice to show cause adequately pleaded State Bar Court jurisdiction, which was confirmed by evidence at the hearing (exh. 20) establishing the sole requisite fact, *i.e.*, respondent's membership in the State Bar. (See *Jacobs* v. *State Bar* (1977) 20 Cal.3d 191, 196 [State Bar has jurisdiction to conduct attorney discipline hearings to assist Supreme Court].) The notice to show cause adequately pleaded the commission of disciplinary offenses sufficient to justify the initiation of the formal proceedings. (See *Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 929 [notice to show cause need only fairly apprise attorney of precise nature of charges].)

[19] Respondent also complains that the referee showed impatience with him, and made rulings that were "unclear and caustic." The record has numerous evidentiary rulings favorable to respondent, and shows courteous treatment of respondent by both the referee and the examiners, including a week's continuance of the aggravation/mitigation hearing at respondent's request. (See, e.g., R.T. pp. 6, 19, 25, 34, 93, 118, 386, 552, 557; 9/14/89 R.T. pp. 4-5.) The referee's evenhandedness was also demonstrated by his dismissal of two of the four charged counts in their entirety. The referee's handling of the hearing was in accord with proper judicial temperament and demeanor, and does not show evidence of bias or prejudice. (See *Marquette* v. *State Bar* (1988) 44 Cal.3d 253, 261.)

[20a] Respondent complains that the referee failed to rule on his motion under Code of Civil Procedure section 631.8 for judgment at the close of the State Bar's case. **[21]** In general, State Bar disciplinary proceedings are governed exclusively by the State Bar's rules of procedure, and the provisions of the Code of Civil Procedure do not apply unless expressly incorporated by reference. (See *Younger* v. *State Bar* (1974) 12 Cal.3d 274, 285-286; *Schullman* v. *State Bar* (1973) 10 Cal.3d 526, 536, fn. 4, disapproved on another point in *Stitt* v. *State Bar* (1978) 21 Cal.3d 616, 618.) **[20b]** We need not determine whether Code of Civil Procedure section 631.8 is an exception to that general rule, because even if there is a right to make such a motion, we reject respondent's contention that the motion was never ruled on. Respondent invited the referee to defer ruling on the motion until after he presented his defense case. (R.T. pp. 449-451.) It was not error for the judge to take the motion under submission and proceed with the hearing. (*People* v. *Mobil Oil Corp.* (1983) 143 Cal.App.3d 261, 275.) Eventually, the motion was impliedly ruled on—granted in part and denied in part—when the referee made his initial rulings on the record as to culpability. (R.T. pp. 611, 623.)

[22] Respondent's final contention is in the nature of a claim of selective prosecution.[13] It is by no means self-evident that this doctrine applies in State Bar disciplinary proceedings, in which respondents do not enjoy the full panoply of procedural protection afforded to criminal defendants. (See, e.g., *Goldman* v. *State Bar* (1977) 20 Cal.3d 130, 140.) But even if selective prosecution were a valid defense in State Bar proceedings, respondent's claim could not succeed. The leading case on the defense of selective prosecution in criminal proceedings is *Murgia* v. *Municipal Court* (1975) 15 Cal.3d 286. (See also 1 Witkin, California Criminal Law (2d ed. 1988), Defenses, §§ 381-386, pp. 440-447.) As established in *Murgia* v. *Municipal Court, supra*, there are several threshold procedural and evidentiary hurdles to be overcome before a case of selective prosecution can be established. (See *Murgia* v. *Municipal Court, supra*, 15 Cal.3d at pp. 293-294, fn. 4, 297, 299-300 [claim of selective prosecution must be

13. Respondent also contends that the referee did not consider all relevant mitigating factors. Respondent has not set out any reasons or bases for this claim. In any event, we have independently reviewed the record with respect to mitigation, and our conclusions in that regard are set forth later in this opinion.

based on specific allegations of constitutionally impermissible discrimination and must be presented by pretrial motion].) Respondent did not even attempt to make the requisite showing, and his contention is accordingly without merit.

E. Aggravation.

The referee found that respondent's prior disciplinary record, which was not yet final at the time of his decision, was a factor in aggravation. (See standard 1.2(b)(i), Stds. for Atty. Sanctions for Prof. Misconduct, Trans. Rules Proc. of State Bar, div. V [standard(s) or std.].) **[23]** We concur, and also take judicial notice that the recommended prior discipline became final after this matter was submitted on review, by virtue of the Supreme Court decision in *Bach* v. *State Bar*, *supra*, 52 Cal.3d 1201, which was filed on February 26, 1991.

Respondent's prior misconduct involved activities which were quite similar to the misconduct of which he has been found culpable in this matter. In the prior matter, respondent was retained by a client in August 1984, and accepted a non-refundable fee of $3,000. Thereafter, respondent could not be reached by his client on a number of occasions. Two years later, respondent had taken no action in the case. In August 1986, respondent's client obtained her file from respondent's office and requested that she be refunded any unearned fees. No refund was made. The client subsequently was awarded $2,000 in a fee arbitration proceeding, which award had not yet been satisfied by respondent as of the date of the disciplinary hearing.

On review, the Supreme Court adopted the former, volunteer review department's discipline recommendation and ordered that respondent be suspended for one year, stayed, with probation for one year on conditions including actual suspension for thirty days and until restitution was made to the client. (*Bach* v. *State Bar*, *supra*, 52 Cal.3d at p. 1209.)

[24a] Although respondent's prior misconduct was similar, the aggravating force of his prior disciplinary record is somewhat diluted because the misconduct in the present case occurred before the notice to show cause in the prior case was served. As we have explained previously, "While the first matter was indeed the imposition of prior discipline [citation], it does not carry with it as full a need for severity as if the misconduct in the [prior] matter had occurred after respondent had been disciplined and had failed to heed the import of that discipline." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

[24b] Thus, respondent's misconduct in the present matter, even though it is similar to the misconduct in the prior matter, does not reflect a failure on the part of respondent to learn from his prior misconduct. Nevertheless, the prior should be considered as a factor in aggravation, and the discipline in this matter should be greater than in the previous matter. (Stds. 1.2(b)(i), 1.7(a).)

The referee also found that respondent's misconduct had caused harm to his clients. (Std. 1.2(b)(iv).) With respect to Dunsmoor, the harm was somewhat alleviated by the fact that Dunsmoor apparently was able to obtain at least some relief from Griffith's harassment simply by changing his home telephone to an unlisted number. Nonetheless, the record reflects that respondent's failure to procure the TRO did cause Dunsmoor and Poffenbarger considerable distress. **[25]** As to Sampson, the record reflects that her injuries were not severe, and that her case on liability was weak, so that she could not reasonably have expected to receive a substantial award of damages had her case settled or gone to trial. Still, respondent's conduct deprived her of the ability to receive any damages at all, and this harm was certainly significant even if the amount of damages would have been relatively modest. Accordingly, we affirm the referee's finding of harm to clients as an aggravating factor.

[26] The referee also found that respondent engaged in multiple acts of misconduct. (Std. 1.2(b)(ii).) This finding was based on the record of this proceeding which, at the point the referee made his decision, consisted of two matters of misconduct. While these two matters of misconduct may or may not be considered multiple acts, we believe a finding of multiple acts of misconduct is now appropriate given the addition of our finding that respondent was culpable of violating section 6068 (i). Respondent's

three instances of misconduct in this matter do not amount to a pattern or practice (even when coupled with the additional client matter involved in his prior disciplinary matter), but are sufficient to support a finding that respondent engaged in multiple acts of misconduct. (See *Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074, 1079-1080.)

[27] Finally, our independent review of the record leads us to add a finding in aggravation. Respondent's use of specious and unsupported arguments in an attempt to evade culpability in this matter reveals a lack of appreciation both for his misconduct and for his obligations as an attorney. In this respect, respondent's contentions here are quite similar to those he raised before the Supreme Court in *Bach* v. *State Bar, supra*, 52 Cal.3d 1201. As a result of respondent's meritless contentions in that matter, the Court found that the case for actual suspension was bolstered. (*Id.* at p. 1209.) These same specious arguments, asserted here on review, similarly show respondent's "persistent lack of insight into the deficiencies of his professional behavior." (*Id.* at p. 1208.) In short, the Supreme Court's conclusions regarding another errant attorney in *Carter* v. *State Bar* (1988) 44 Cal.3d 1091, 1101 apply equally here: "His defense did not rest on a good faith belief that the charges were unfounded, but on a blanket refusal to acknowledge the wrongfulness of [his] . . . conduct." (See also *Alberton* v. *State Bar* (1984) 37 Cal.3d 1, 16; *Sodikoff* v. *State Bar* (1975) 14 Cal.3d 422, 432.) Respondent's apparent unwillingness to recognize his professional obligations to his clients and to the State Bar constitutes an independent aggravating factor in this matter. (*Conroy* v. *State Bar* (1991) 53 Cal.3d 495, 507-508; see also std. 1.2(b)(v).)

F. Mitigation.

[28] Respondent testified at length about how busy he was with other legal matters, both personal and client-related, at the time he took on the clients involved in this matter. This testimony does not constitute mitigation. (*In re Naney* (1990) 51 Cal.3d 186, 196 [fact that attorney had heavy caseload at time of misconduct is not mitigation]; *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667 [time constraints of a busy solo practice are not mitigation].) If respondent was too busy to handle the Dunsmoor and Sampson matters competently and complete the necessary work within an appropriate time frame, he should not have taken on the cases. (See rule 6-101(B)(1).)

Respondent also testified that he was forced to move his office on short notice in October 1986, and that he was out of his office and unable to work for about eight weeks beginning in mid-May 1982 due to a herniated disk. These facts have no bearing on his failure to pursue Dunsmoor's TRO in November and December 1987, or his failure to take any action in Sampson's case from sometime in 1984 until February 1988.

[29a] Respondent did present facts which constitute legitimate mitigation. Respondent testified that he had performed a substantial amount of pro bono work for indigents and minorities, and had taken on those and other unpopular causes at considerable personal sacrifice, because this work engendered hostility towards him in the local press and on the part of local elected officials. (Std. 1.2(e)(vi).) Though respondent's pro bono work was taken into account by the referee, his decision does not adequately indicate the weight that he gave this factor.

In *Gadda* v. *State Bar* (1990) 50 Cal.3d 344, the Supreme Court concluded that an attorney's pro bono work was deserving of consideration as a mitigating factor. In that case, the attorney was described as "'one of the most active participants' in the immigration court's pro bono program and . . . 'continuously and unselfishly contribute[s] his services to defending the indigent at deportation, exclusion and bond hearings.'" (*Id.* at p. 356.) Conversely, in *Amante* v. *State Bar* (1990) 50 Cal.3d 247, the Supreme Court held that where an attorney represented one indigent client on a pro bono basis, his conduct did "not demonstrate the kind of 'zeal in undertaking pro bono work'" that would be considered as a mitigating factor. (*Id.* at. p. 256.)

[29b] Here, respondent admittedly conducted a "substantial amount" of pro bono work for indigents and minorities. But exactly what was meant by "substantial" is not evident from the record, and respondent's testimony was the only evidence admitted on this subject. We cannot attribute to his

work the weight in mitigation that was afforded the attorney in *Gadda* v. *State Bar*, *supra*, 50 Cal.3d 344, but neither does respondent's work deserve to be discounted to the extent done in *Amante* v. *State Bar*, *supra*, 50 Cal.3d 247. Thus, respondent's pro bono record puts him in the middle of the range of weight established by *Gadda* v. *State Bar*, *supra*, and *Amante* v. *State Bar*, *supra*. (See *Rose* v. *State Bar*, *supra*, 49 Cal.3d at pp. 665-666, 667.)

Respondent also testified that he had, apparently fairly recently, offered Sampson $3,500 in settlement of her pending malpractice action against him, but that the offer had been refused. [30] However, an offer of restitution made in response to litigation by the client, and long after the initiation of State Bar proceedings, does not constitute proper mitigation. (See, e.g., *In re Naney*, *supra*, 51 Cal.3d at p. 196; cf. *Read* v. *State Bar*, *supra*, 53 Cal.3d at p. 423 [failure to make restitution until after completion of disciplinary hearing cited as aggravating factor].)

RECOMMENDED DISCIPLINE

In making a recommendation as to discipline, our greatest concern is ensuring the protection of the public and the highest professional standards for attorneys. (*King* v. *State Bar* (1990) 52 Cal.3d 307, 315.) In determining the appropriate discipline, we must also look to the standards and to relevant case law for guidance as to the proportionality of the discipline given the particular facts of this matter. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311 [evaluating proportionality of disciplinary recommendation based on facts of other recent cases].)

Based on his findings, the referee recommended that respondent be suspended for five years, stayed, with probation for five years on the conditions of actual suspension for three years and until respondent made restitution to his clients, and upon completion of the Professional Responsibility Examination. However, beyond reciting the applicable standards indicating the appropriateness of suspension, the hearing referee did not articulate a rationale for his discipline recommendation, nor did he cite any Supreme Court cases to show that his recommendation was proportionate and consistent with precedent.

The referee correctly applied standard 2.4(b), which provides that for offenses involving "culpability of a member of wilfully failing to perform services in an individual matter or matters not demonstrating a pattern of misconduct or culpability of a member of wilfully failing to communicate with a client shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client." The referee also correctly applied standard 1.7(a). That standard requires that if a member has previously been disciplined, the discipline in the second matter should be of a greater degree than that imposed in the prior matter, unless the prior discipline both was remote in time and was based on misconduct of minimal severity. We agree with the referee's conclusion that neither of the exceptions applies. Accordingly, in this proceeding the standards indicate that respondent should receive discipline greater than the one-year stayed suspension, one-year probation, and thirty days actual suspension recently imposed on him by the Supreme Court.

Aside from indicating this range, however, the standards alone do not provide us with guidance concerning the exact length of stayed suspension, probation, and actual suspension that is appropriate in this case based on its particular facts. The referee's recommended discipline is not inconsistent with the standards, but, as already noted, he neither articulated a rationale nor cited case law to explain the basis for his recommendation.

On review, in supplemental post-argument briefing, the examiner argues that the referee's recommended three-year actual suspension is consistent with *Middleton* v. *State Bar*, *supra*, 51 Cal.3d 548. Contrary to the examiner's assertion, *Middleton* v. *State Bar*, *supra*, is not factually comparable to this matter. Middleton's misconduct was clearly more severe than respondent's here. Middleton not only abandoned her clients in two matters, but also threatened to sue one set of clients if they persisted in requesting the return of the unearned advance fee they had paid. She also committed a third act of misconduct involving contacting directly an opposing party whom she knew was represented by counsel. Middleton not only refused to cooperate with the State Bar investigation, but also failed to participate in the disciplinary proceeding and made affirmative

misrepresentations to the State Bar. Her misconduct was found to evidence a pattern and to pose a serious threat of reoccurrence in the future. We therefore do not find *Middleton* v. *State Bar*, *supra*, sufficiently similar to the case at hand to support the referee's recommendation as to discipline.

Our review of recent Supreme Court cases involving misconduct comparable to that of which respondent has been found culpable leads us to conclude that the referee's recommendation was excessive. In *King* v. *State Bar*, *supra*, 52 Cal.3d 307, the attorney had abandoned two clients, had failed to forward their files promptly to successor counsel, and had given false assurances to one of the clients regarding the status of his case. In one of the matters, the abandonment resulted in a considerable judgment against King for malpractice. King's conduct in the disciplinary proceeding indicated a failure to accept responsibility for his actions and to appreciate the severity of his misconduct. (*Id.* at pp. 311, 314-315.) However, King presented substantial evidence in mitigation, including a lengthy period of misconduct-free practice, depression, a marital dissolution, financial problems, and the fact that he had permitted the injured client to obtain a default judgment against him on the malpractice claim. In the King matter the Supreme Court adopted the former review department's recommended discipline of four years stayed suspension, four years probation, and three months actual suspension. While the facts in *King* v. *State Bar*, *supra*, are not entirely identical to those of this matter, there is some similarity.

In *Lister* v. *State Bar* (1990) 51 Cal.3d 1117, the Supreme Court considered together two matters in which the former review department had recommended a total of one year of actual suspension (two consecutive six-month terms), together with three years stayed suspension and three years probation. The Supreme Court reduced the length of Lister's actual suspension from one year to nine months, concluding that the former review department's recommendation was excessive, and that nine months actual suspension would be "adequate to protect the public and . . . more proportionate to the misconduct." (*Id.* at p. 1129.)

The facts in *Lister* v. *State Bar*, *supra*, 51 Cal.3d 1117 are more similar to the facts of this matter than the facts in *King* v. *State Bar*, *supra*, 52 Cal.3d 307. Lister abandoned three clients after a period of trouble-free practice comparable in length to that of respondent in this matter, except for a 1978 private reproval which the Supreme Court dismissed as minor in nature and remote in time. (*Lister* v. *State Bar*, *supra*, 51 Cal.3d at pp. 1128-1129.) The abandonments were accompanied by a failure to return the client's file and cooperate with successor counsel in one matter; by incompetent tax advice in the second matter; and by failure to communicate and to return an unearned advance fee in the third. Only one of the clients was harmed. Lister, like respondent, failed to cooperate with the State Bar's investigation and was found culpable of violating section 6068 (i), but did participate fully in the State Bar proceedings after the filing of the notice to show cause.

In *Conroy* v. *State Bar*, *supra*, 53 Cal.3d 495, the attorney was charged with one count of misconduct. He was found culpable of violating rule 2-111(A)(2) by withdrawing as counsel without cooperating with his successor; violating section 6068 (m) by failing to respond to reasonable status inquiries of his client; violating section 6106 by making misrepresentations to the client about the status of his case; and violating rule 6-101(A)(2) by prolonged inaction in a case in reckless disregard of his obligation to perform diligently. Aggravating factors included a prior private reproval; failure to take and pass the Professional Responsibility Examination ("PRE") before the deadline imposed by the conditions of the private reproval; and failure to cooperate with the State Bar. There was no mitigation.

Citing Conroy's second prior disciplinary proceeding (*Conroy* v. *State Bar* (1990) 51 Cal.3d 799 [failure to timely take and pass PRE]), his repeated failure to participate in State Bar proceedings, and his misrepresentations to his client, the Supreme Court concluded that Conroy should receive a lengthier actual suspension than six months. The Supreme Court ordered a five-year stayed suspension, five years probation, and a one-year actual suspension. (*Id.* at p. 508.)

Unlike Conroy, respondent here has not been found culpable of any act of moral turpitude in violation of section 6106, and respondent participated both in this proceeding and in his prior

disciplinary proceeding. Thus, the more severe discipline imposed by the Supreme Court in *Conroy* v. *State Bar*, *supra*, 53 Cal.3d 495 would not be appropriate here, and *Conroy* v. *State Bar*, *supra*, demonstrates the excessive nature of the greater discipline recommended by the referee in this matter.

Nonetheless, *Conroy* v. *State Bar*, *supra*, 53 Cal.3d 495 strongly supports the imposition of a substantial period of actual suspension. Moreover, while respondent here has participated in this State Bar Court proceeding, he has, in so doing, evidenced the same "persistent lack of insight into the deficiencies of his professional behavior" which the Supreme Court found so troubling in his previous disciplinary matter. (*Bach* v. *State Bar*, *supra*, 52 Cal.3d at p. 1208.)

[31a] In this case, respondent abandoned two clients and has been previously disciplined (including 30 days actual suspension) for a third abandonment occurring at roughly the same time. Respondent also failed to return the unearned portion of Dunsmoor's advance fee, and failed to cooperate with the State Bar investigation. In aggravation, respondent committed multiple acts of misconduct, caused harm to his clients, and evidenced a lack of understanding of his professional obligations and a desire to avoid responsibility for his actions. His prior disciplinary record must also be considered as aggravation. The mitigation in this matter is that respondent engaged in some pro bono work, and practiced without discipline for some 20 years prior to his first misconduct (the misconduct involved in his prior matter), which was roughly contemporaneous with the misconduct involved in the present matter. (See *Shapiro* v. *State Bar* (1990) 51 Cal.3d 251, 259 [16 years of practice prior to first misconduct still considered mitigating notwithstanding prior record of discipline, because all incidents of client misconduct occurred within fairly narrow time frame].)

[31b] We conclude that, on balance, respondent's misconduct was somewhat more serious than that found in *King* v. *State Bar*, *supra*, 53 Cal.3d 495, and more comparable to that found in *Lister* v. *State Bar*, *supra*, 51 Cal.3d 1117. Especially in view of respondent's demonstrated lack of understanding of his professional obligations, we find that two years stayed suspension, two years probation, and actual suspension for nine months are necessary to ensure the protection of the public and the maintenance of high professional standards by members of the legal profession.

[32] We further conclude, as did the referee, that it is appropriate to recommend that respondent be ordered to pay restitution to Dunsmoor in the amount of the arbitration award. We note, however, that the record reflects that Dunsmoor may have made a Client Security Fund claim. (R.T. p. 89.) Accordingly, we recommend that respondent be ordered to pay restitution either to Dunsmoor, if Dunsmoor's Client Security Fund claim has not yet been paid, or in the alternative, to the State Bar's Client Security Fund, if Dunsmoor's claim has been paid.

We disagree with the referee's recommendation that restitution be made to respondent's other client, Sampson. As of the date of the hearing, Sampson had a malpractice action pending, and the amount of damages (if any) caused to her by respondent's misconduct had not been determined. The referee based the amount of restitution on the amount of the defendant's Code of Civil Procedure section 998 offer. **[33]** It is inappropriate to use restitution as a means of awarding unliquidated tort damages for malpractice. (See *Sorensen* v. *State Bar* (1991) 52 Cal.3d 1036, 1044 [Supreme Court does not approve imposition of restitution in attorney discipline matters as compensation to victim of wrongdoing].) That is what malpractice actions are for, and Sampson has filed one.

In summary, we recommend that respondent be suspended for two years, stayed, with probation for two years, on the condition that he be actually suspended for nine months and until restitution is made in the Dunsmoor matter (either to Dunsmoor or to the State Bar's Client Security Fund, as appropriate), and on the conditions numbered two through eight recommended by the referee. (Decision pp. 15-17.)[14] We further recommend that this discipline be con-

14. We modify the probation condition numbered eight in the referee's recommendation, in accordance with our other recommendations, so that it refers to a two-year rather than a five-year period of stayed suspension.

secutive to that imposed in *Bach* v. *State Bar*, *supra*, 52 Cal.3d 1201.

Because we recommend actual suspension in excess of three months, we adopt the referee's recommendation that respondent be ordered to comply with rule 955, California Rules of Court. We also recommend that respondent be ordered to comply with standard 1.4(c)(ii) if, by reason of his failure to pay restitution, his actual suspension lasts for more than two years under our recommended discipline, or if the Supreme Court orders that respondent be actually suspended for two years or more. We do not adopt the referee's recommendation that respondent be required to take or pass any professional responsibility examination, because he has recently been ordered to do so by the Supreme Court in his prior matter. (*Bach* v. *State Bar*, *supra*, 52 Cal.3d at p. 1209.)

We concur:

PEARLMAN, P.J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN ROBERT TINDALL

A Member of the State Bar

[No. 88-O-12063]

Filed September 11, 1991

SUMMARY

Respondent was found culpable of misappropriating nearly $25,000 in client funds held in trust as part of a dispute involving a dissolved partnership. Respondent made 19 unauthorized withdrawals over an eight-month period, failed to perform legal services competently for the client, did not return client calls and, upon discharge, did not return promptly the client's funds, papers and property or execute a substitution of counsel form as requested. The hearing judge recommended a five-year stayed suspension, five years probation, and actual suspension for two years and until respondent completed restitution and demonstrated his rehabilitation, fitness to practice and learning in the law. (Ronald Dean, Judge Pro Tempore.)

Respondent requested review, asserting factual and procedural errors and contending that the recommended discipline was excessive. The review department determined that the material facts as found by the hearing judge were supported by the record; sustained the hearing judge's conclusions as to culpability; and rejected respondent's claim that the hearing judge improperly denied him a continuance of the hearing on mitigation. Reviewing Supreme Court precedent, the review department concurred with the hearing judge that although respondent's misappropriation was very serious, it did not stem from venality and was not surrounded by deceit, and thus did not warrant disbarment. However, the review department concluded that a lengthier actual suspension than recommended by the hearing judge was necessary in light of the nature of respondent's misconduct and his failure to recognize and acknowledge his ethical breaches. The review department therefore increased the recommended actual suspension to three years. (Pearlman, P.J., filed a concurring opinion.)

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **159 Evidence—Miscellaneous**
162.20 Proof—Respondent's Burden
165 Adequacy of Hearing Decision
Where neither respondent nor respondent's former client testified as to respondent's hourly fee, but respondent had sent one bill to client reflecting an hourly rate of $100, and respondent apparently acquiesced in hearing judge's finding that respondent's fee was $100 per hour, review department adopted such finding.

[2] **115 Procedure—Continuances**
167 Abuse of Discretion
The length of pendency of matters before the State Bar Court is a matter of great concern and continuances have long been disfavored by the court. A judge's denial of a motion for a continuance to prepare for the mitigation portion of a hearing was not an abuse of discretion where respondent had notice one month before trial of how the evidence would be presented, and respondent failed to take any steps to contact potential character witnesses.

[3 a, b] **159 Evidence—Miscellaneous**
165 Adequacy of Hearing Decision
221.00 State Bar Act—Section 6106
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
A finding that the amount respondent withdrew from a client trust account was not an earned fee, even though the client did not dispute respondent's testimony that it was an earned fee, was consistent with the evidence that respondent had not performed any legal services during the period of time for which he withdrew the funds; that what work was done by the attorney occurred after the trust funds had been withdrawn; that no value had been placed on the attorney's services during that time, and that the attorney had otherwise been inattentive to the client's case.

[4] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
An attorney's withdrawal of client trust funds based on a reasonable or unreasonable but honest belief of entitlement to fees may constitute only a violation of the rule of professional conduct regarding client trust funds, and not an act of moral turpitude or dishonesty. However, where an attorney could not have held an honest belief that he was entitled to most of the money he withdrew from a client trust account, his misappropriation of the funds not only violated the rule governing client trust funds, but also involved moral turpitude and dishonesty.

[5] **214.30 State Bar Act—Section 6068(m)**
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.20 Rule 3-700(A)(2) [former 2-111(A)(2)]
Where a client's matter involved a large amount of money and the client was concerned that his reputation would be affected by the dispute, the client's anxiousness to resolve the matter as quickly as was practical, and his periodic attempts to learn the status of the matter, were reasonable. His attorney's failure to complete necessary legal services and to return the client's calls thus violated the duty to respond to reasonable status inquiries and to provide competent legal services.

[6] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
420.00 Misappropriation
822.39 Standards—Misappropriation—One Year Minimum
Misappropriation of client funds is a particularly serious ethical violation, which breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the legal profession. Misappropriation generally warrants disbarment of the attorney involved unless clearly extenuating circumstances are present. In assessing the appropriate discipline to recommend for a respondent who had misappropriated a large amount of client funds and also abandoned the client, the review department focused on the misappropriation, the most serious aspect of the misconduct.

[7] **745.51 Mitigation—Remorse/Restitution—Declined to Find**
Where respondent made partial restitution of misappropriated client funds only after the institution of a disciplinary investigation, this negated the otherwise mitigating effect of his amends.

[8] **710.53 Mitigation—No Prior Record—Declined to Find**
Where an attorney had been admitted to practice less than seven years at the time of his misconduct, his prior good record was not significant as mitigation.

[9] **765.10 Mitigation—Pro Bono Work—Found**
Respondent deserved mitigating credit for practice on behalf of poor and disadvantaged clients, which should have been weighed more heavily than did the hearing judge.

[10] **795 Mitigation—Other—Declined to Find**
Respondent's claim of inexperience did not mitigate misappropriation of client funds nor breach of related fiduciary duties to client.

[11] **760.33 Mitigation—Personal/Financial Problems—Found but Discounted**
760.52 Mitigation—Personal/Financial Problems—Declined to Find
Stress from pressure of other business was not sufficiently linked to misappropriation of client's funds to constitute mitigation; family health difficulties also were not mitigating when they arose after the misappropriation occurred; financial pressure from inability to pay office rent was entitled to little weight in mitigation.

[12] **420.00 Misappropriation**
545 Aggravation—Bad Faith, Dishonesty—Declined to Find
801.41 Standards—Deviation From—Justified
822.39 Standards—Misappropriation—One Year Minimum
Misappropriation can be committed in different degrees of culpability, deserving of different discipline. Even where the most compelling mitigating circumstances do not clearly predominate, extenuating circumstances relating to the facts of the misappropriation may render disbarment inappropriate. An attorney who acts deliberately and with deceit should receive more severe discipline than an attorney who acts negligently and without deception. Disbarment would rarely, if ever, be appropriate for an attorney whose only misconduct was a single act of misappropriation unaccompanied by deceit or other aggravating factors.

[13 a, b] **621 Aggravation—Lack of Remorse—Found**
801.41 Standards—Deviation From—Justified
822.39 Standards—Misappropriation—One Year Minimum
Disbarment was not appropriate in a misappropriation case where the misconduct resulted more from respondent's lack of understanding of an attorney's ethical duties rather than innate venality. However, because there was more serious misconduct and less mitigation than in other cases, and respondent had not recognized the seriousness of the misconduct, a three-year actual suspension, a showing of rehabilitation and fitness to practice before termination of the actual suspension, and strict probation conditions were required.

ADDITIONAL ANALYSIS

Culpability
Found
214.31 Section 6068(m)
221.11 Section 6106—Deliberate Dishonesty/Fraud
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.11 Misappropriation—Deliberate Theft/Dishonesty
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
Aggravation
Found
521 Multiple Acts
571 Refusal/Inability to Account
Declined to Find
565 Uncharged Violations
582.50 Harm to Client
Discipline
1013.11 Stayed Suspension—5 Years
1015.09 Actual Suspension—3 Years
1017.11 Probation—5 Years
Probation Conditions
1021 Restitution
1024 Ethics Exam/School
1030 Standard 1.4(c)(ii)
Other
1091 Substantive Issues re Discipline—Proportionality

OPINION

STOVITZ J.:

In this original disciplinary proceeding, a State Bar Court hearing judge pro tempore ("judge") has recommended that respondent John Robert Tindall, a member of the State Bar since 1980 and with no prior record of discipline, be suspended from the practice of law for a period of five years, that the suspension be stayed and that he be placed on probation for five years on conditions including actual suspension for the first two years and until he completes restitution and has shown rehabilitation, fitness to practice and learning in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V).

The judge's recommendation is found in a thorough 26-page decision. It rests on findings of fact that respondent misappropriated nearly $25,000 of his client's funds by means of 19 unauthorized withdrawals over an 8-month period. In addition, the judge found that respondent failed to perform legal services competently for his client; that he failed to return the trust funds promptly upon the client's demand; that he failed to communicate reasonably with his client; and that when discharged, he failed to turn over the client's papers and records either to the client or the client's new counsel and failed to execute a substitution of attorney.

Respondent's request for review takes issue with 10 of the judge's findings of fact, claims that he was not given sufficient time to present evidence in mitigation and disputes the degree of discipline, contending that at the very most, a 30-day actual suspension is the maximum discipline needed in this matter. In response, the State Bar examiner supports the judge's findings and conclusions, except that she contends that the judge also should have concluded that respondent violated his oath and duties to his client. As discipline, she urges that "disbarment would not be inappropriate and a lengthy actual suspension is absolutely indicated."

Upon our independent review of the record, we adopt almost all of the judge's findings and conclusions. We conclude that respondent's misappropriation was willful and extremely serious; however for the reasons set forth by the hearing judge, we believe lengthy suspension on strict conditions of restitution and proof of rehabilitation will suffice to protect the public and is consistent with the discipline deemed appropriate by our Supreme Court in similar matters. Nevertheless, because respondent's offense was very serious, we believe that applicable Supreme Court decisions warrant a three-year rather than two-year actual suspension as a condition of probation.

I. THE RECORD

A. The Charges.

The February 5, 1990, notice to show cause charged respondent with misconduct in two counts relating to the same client matter. Count one charged him with misappropriating about $25,500 of trust funds between about December 11, 1986, and September 23, 1987, belonging to the business of one Verne Miller. This count also charged respondent with failing to promptly disburse to Miller the funds to which he was entitled and with failing to perform services for which he hired respondent. Count one charged respondent with the following Business and Professions Code section[1] violations: 6068 (a), 6103 and 6106, and with the following (former) Rules[2] of Professional Conduct violations: 2-111(A)(2), 6-101(A)(2) and 8-101(B)(4).

Count two charged respondent with failing to provide an accounting of trust funds as Miller requested and failing to forward Miller's file to his new counsel. This count also charged respondent with failing to respond to several letters requesting execution of a substitution of attorney and return of Miller's

1. Unless noted otherwise, all references to sections are to those of the Business and Professions Code.

2. Unless noted otherwise, all references to rules are to the Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

financial records and papers. Violations charged in this count were sections 6068 (a), 6068 (m), and 6103, and rules 2-111(A)(2) and 8-101(B)(3).

B. The Findings and Evidence.

Except for minor changes noted below, we adopt the findings of fact of the hearing judge, found on pages two through seven of his decision. We summarize those findings and the supporting evidence revealed by the record:

1. Miller's Initial Hiring of Respondent.

At the time of the State Bar Court hearing in August of 1990, Verne Miller of Hemet (Riverside County), California, was an insurance services agent. Between 1980 and 1985 he was a general partner and part owner of a small business partnership known as Fish 'n Ships. This business owned one or more commercial fishing boats operating in Alaskan waters. (R.T. pp. 26-27; exhs. 12, 16.) Fish 'n Ships stopped operating in 1985, its assets were sold and the partnership liquidated. Another partner, Halverson, had assigned his property and partnership interests to the Southeastern California Association of Seventh-Day Adventists ("Seventh-Day").[3] Halverson died. Seventh-Day was trustee of Halverson's trust, and sued Miller for money it claimed Halverson owed Seventh-Day. Seventh-Day's lawsuit filed in the Riverside County Superior Court, on August 27, 1986, claimed it was due over $59,000 plus interest and attorney fees. (Exh. 12.)

Miller knew respondent as a business acquaintance or friend-of-a-friend. (R.T. p. 30.) He therefore retained respondent in about September 1986 to represent him in the Seventh-Day dispute and respondent agreed to do so. Miller wanted the dispute resolved quickly. (Decision at p. 2 [findings of fact 2-4]; R.T. pp. 52, 155.)

It is undisputed that respondent never prepared a written fee agreement and we amend the findings of fact of the hearing judge to so find. (R.T. p. 158.)[4] Neither respondent nor Miller had any clear recollection as to what respondent's fee agreement was supposed to be. Miller did expect respondent to negotiate with Seventh-Day and, if needed, to appear in court opposing the litigation. (R.T. p. 31.) Miller's recollection of the fee agreement was that he was supposed to pay fees on an "ongoing" basis as needed, by the service and that there was no set hourly rate. (R.T. p. 32.) Respondent testified that he knew that Miller held the partnership assets in some $52,000 worth of cashier's checks and that Miller had no other source of funds. Respondent told Miller he could not predict how much the fees would be—that if a quick settlement could be reached, the fees would not be very great at all, but a sizable retainer would be needed if respondent had to get into litigation. Respondent quoted Miller a fee of $2,000 to start the case. (R.T. p. 156.) [1] Although neither respondent nor Miller testified to a fee of $100 per hour, the hearing judge found that that was respondent's fee, based on the recital of that rate in the only bill respondent ever sent Miller. In view of the evidence of Miller's apparent acquiescence in that fee, we adopt the judge's finding in that regard.

2. Respondent's Opening of a $49,000 Trust Account and Performance of Some Services for Miller in Late 1986.

To relieve the immediate pressure of Seventh-Day's lawsuit, with Miller's agreement, respondent obtained an open extension of time from Seventh-Day's counsel to answer the suit. (R.T. p. 156; exh. 12.) At about the same time, respondent and Miller were each aware that Seventh-Day's counsel was concerned about preserving the partnership funds in Miller's possession. Considering the size of the trust funds and that litigation could take some time, respondent (understandably) did not want to place Miller's funds in his regular trust account since that trust account remitted interest to the State Bar for distribution to qualified legal service providers under the Legal Services Trust Fund Act. (§§

3. Miller himself had previously been employed by Seventh-Day in the publications department and had been affiliated with the church for many years. (R.T. pp. 52-53.)

4. The law requiring attorney-client written fee agreements did not take effect until a few months later, January 1, 1987. (Bus. & Prof. Code, § 6148.)

6210-6228). Therefore, respondent opened a separate trust account for Miller's funds with the Riverside Thrift and Loan Association ("Riverside Thrift"). He chose Riverside Thrift because he knew a member of its board of directors.[5] Respondent was the only signatory on the Riverside Thrift account. The signature cards for the account showed that the beneficiary was "Fish 'n Chips" [sic]. (Exh. 2.) The net opening deposit in the account was $49,000. It is undisputed that Miller had paid respondent a $2,000 retainer on October 7, 1986, a few weeks before respondent opened the trust account. (Exhs. 1, 18; finding of fact 5.)

With Miller's agreement, respondent reviewed the partnership records Miller had given him and correctly identified that a substantial amount of accounting work was needed to determine whether the funds in Miller's possession (now in the Riverside Thrift trust account) were partnership funds or Miller's personal funds and whether Seventh-Day could have a legal interest therein. At the same time, respondent pressed to keep his open extension of time to respond to the suit with Seventh-Day's counsel on the ground that after he had the results of a thorough accounting review, he would be in a position to approach Seventh-Day with an appropriate settlement offer. With Miller's consent, respondent hired bookkeepers and a certified public accounting firm to review the partnership records. In October 1986, respondent also commenced Miller's deposition which was apparently continued to a later date. (Exh. 3; R.T. pp. 62, 157-161.)

Miller testified that when he gave the cashier's checks to respondent to open the Riverside Thrift account, he told respondent to hold the funds for safekeeping until Miller notified respondent what should be paid out of the funds. He never told respondent he could take money out of the account at will. (R.T. pp. 35-36.)

3. Respondent's Proper and Improper Disbursements From the Riverside Thrift Account in 1986 and 1987.

Respondent's billing of December 11, 1986, to Miller showed that between September 26 and December 10, 1986, he had performed a total of 30.8 hours of services. At his fee of $100 per hour, he was entitled to a fee of $3,080 which he billed. As a credit, his bill deducted the initial $2,000 retainer Miller had given him earlier for a balance due of $1,080. On December 11, 1986, respondent withdrew this sum from the Riverside Thrift account and Miller had no objection to it. (Exhs. 3, 13; R.T. p. 37.)

As the record reflects, between December 1986 and August 1987, respondent disbursed a total of $24,380.95 to bookkeepers, accountants and others with Miller's approval. However, between January 30, 1987, and September 23, 1987, respondent also disbursed a total of $24,842 to himself without Miller's consent or knowledge, in 19 different withdrawals. (A small amount of one withdrawal ($158) was used for court costs for Miller.) By September 23, 1987, the Riverside Thrift trust account balance stood at $537.82. Thereafter, there was no activity in the account except for small, monthly interest additions and the balance of the account as of April 30, 1990, was $644.60. (Exh. 1.)

As noted, respondent never sent bills to Miller for any of his 19 withdrawals, nor did he ever account to Miller for these disbursements. Review of the bank records indicates that all 19 of the disbursements were made by respondent in an identical manner. He would fill out a withdrawal slip and have Riverside Thrift personnel write a check to him for the particular amount withdrawn. He never placed any notation on the withdrawal slip as to the withdrawal's purpose or function. Some of the withdrawals were suspiciously very close together, with

5. As the judge correctly found (decision at p. 3 [finding of fact 5]), Riverside Thrift was not federally insured either as a bank or a savings and loan association. Long after most of the funds from this account had been disbursed, the association became insolvent. At the time of the hearing below, funds could only be withdrawn upon advance notice and subject to availability.

several on the same day or on consecutive days. (Exh. 13.)

4. Respondent's Subsequent Failure After May 1987 to Perform Services, to Communicate Adequately With Miller or to Cooperate With Miller's New Counsel.

Respondent did perform a few services for Miller during 1987. On February 18, 1987, respondent wrote a two-page letter to Seventh-Day's counsel enclosing a detailed financial report and balance sheet prepared by the accounting firm which had reviewed Miller's partnership records. In this letter, respondent proposed settling Seventh-Day's suit by Miller's payment of $13,000 to Seventh-Day. Respondent concluded his letter to Seventh-Day's counsel by stating that since partnership funds were "now being held in my client's trust account, the $13,000 can be paid without further delay, upon acceptance of the offer."[6] (Exh. 16.)

A week after respondent sent his February 18, 1987, letter to Seventh-Day's counsel, the latter replied to respondent asking for specific additional information about the distribution of funds revealed in the CPA report. Respondent never furnished this additional information. As a result, Seventh-Day's counsel revoked the open extension of time to answer the suit and respondent filed a demurrer on April 9, 1987. Superior court records showed that on May 7, 1987, respondent attended the hearing on the demurrer. (Exh. 12.) Upon the superior court's sustaining the demurrer with 30 days leave to Seventh-Day to amend the complaint, respondent never took any further action in the superior court suit.[7] It is undisputed that respondent never resolved the dispute with Seventh-Day.

Miller thought that this matter might take about one year to resolve from the time he retained respondent in September 1986. (R.T. pp. 51-52.) In 1986 and 1987, Miller called respondent frequently to find out the status of the matter and "rarely" received a return telephone call. On three or four occasions, after not having received a return call from respondent, Miller went to respondent's home. At some of those times, Miller's visits were by appointment. When Miller could locate respondent, respondent told Miller in general terms that things were "just moving along" and he was just waiting to see what was going to happen next. As noted, Miller was very concerned because the failure to pay whatever monies might be due to Seventh-Day affected his reputation with some in the Seventh-Day church and respondent was aware of Miller's concern. (R.T. pp. 38-41, 52-54.)

On April 1, 1988, Miller sent respondent a two-page letter complaining of respondent's failure to keep appointments, return Miller's calls, provide information he needed for filing of his partnership tax return and resolve the Seventh-Day litigation. Miller told respondent that he had contacted the State Bar and would be filing a complaint unless he heard from respondent immediately and received the help he had asked for from respondent, an accounting of all disbursements from the Riverside Thrift account and a distribution of the remaining trust funds to Miller. (Exh. 4.)

Within a month after sending the above letter to respondent, Miller went to Riverside Thrift and discovered that the balance in the account was only about $395. He was "rather alarmed and very unhappy." (R.T. p. 48.) He hired another lawyer, Douglas F. Welebir, to represent him. After Welebir was himself unable to communicate with respondent in June 1988, Miller terminated respondent's services and instructed him to send Welebir within eight days all of Miller's documents and an accounting of the Riverside Thrift account. (Exhs. 5, 6.)

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6. On February 18, 1987, the Riverside Thrift account contained over $45,000. (Exh. 13.)

7. On February 16, 1988, Seventh-Day filed a first amended complaint. As discussed *post*, the action was dismissed in June of 1989 after Miller discharged respondent and hired new counsel who settled the matter with Seventh-Day. (Exh. 12.)

The final events in this matter can be briefly stated and are appropriately reflected in findings of fact 18-23 of the judge's decision: Miller and Welebir were unsuccessful in receiving from respondent a substitution of attorneys, an accounting or any other papers and records, but in June 1989, were able to settle the matter successfully with Seventh-Day for Miller's payment of $7,500. (R.T. pp. 135-136; see exh. 12.)

Although respondent ignored Miller's and Welebir's requests for accountings, papers, records and a substitution of attorney, respondent did hire counsel of his own who apparently convinced respondent that what he had done in using Miller's funds was wrong. At about the same time, respondent was expecting to receive a very large referral fee in a case involving many tenants suing a lessor of property for a large amount of damages. Respondent received this fee, $66,667; and, on March 22, 1989, paid $22,000 of that sum to Miller in care of Welebir. (R.T. pp. 182-187; exh. 22.) Miller used part of respondent's restitution to settle Seventh-Day's claim.

5. Respondent's Testimony in Mitigation.

At the hearing below, respondent gave several explanations for his conduct regarding his use of Miller's money. He first testified that all of the $25,000 he withdrew was entirely for attorney fees. (R.T. pp. 202-203.) In colloquy, respondent stated that he was also entitled to the amounts of money he took as fees because he told Miller that defending the suit was going to cost money and respondent worked hard to save Miller something like $80,000. Yet it is undisputed that Welebir, not respondent, settled Miller's dispute with Seventh-Day. In that colloquy, respondent also stated that what was wrong was his mistake in judgment in reaching the conclusion that he was entitled to those fees. (R.T. pp. 245-246.) Later in his argument to the hearing judge, respondent stated that he never denied owing the money and that he could have made restitution sooner. (R.T. pp. 263-264.) Respondent admitted his failure to keep timely or accurate records and he claimed that this was due to lack of experience. (R.T. pp. 155-158.) Respondent admitted that he used the funds he withdrew from the Riverside Thrift account for personal purposes (investments and to pay bills). (R.T. pp. 202-203.)

Prior to starting his private law practice, respondent had a poverty law and legal services background. He worked at the Western Center for Law and Poverty, had been a VISTA volunteer, and had worked for several legal services and legal aid programs, focusing on issues of fair housing and housing for the poor and disadvantaged. He had experienced financial pressures in private practice because of the modest means available to his clients to pay fees and because of a suit brought against him by landlords which forced him to drop all clients because of a conflict of interest. (R.T. pp. 260-261.) Respondent lived modestly with his wife and children. In October 1988, their third child was stillborn. Respondent admitted that this had no impact on his representation of Miller since Miller had terminated respondent's services prior to that time; nevertheless, it added to pressures on respondent thereafter.

Respondent characterized the Miller case as an aberration and testified that he has had adequate opportunity after the Miller case to represent people with large sums of money and has refused to do so. Since the Miller matter, he changed types of law practice and has been working in a community center in San Bernardino in the Mexican-American community where he provides legal services at reduced rates and even on a pro bono basis. (R.T. pp. 261-262.)

6. The Hearing Judge's Resolution of the Evidence.

From the foregoing evidence, the hearing judge found that respondent misappropriated $24,842 from Miller's trust fund in 19 unauthorized withdrawals over an 8-month period, that he failed to complete work on Miller's behalf, failed to provide him with status reports as Miller had requested and failed to respond to Miller or Miller's new counsel, failed to complete a substitution of attorney form and failed to provide Miller with Miller's papers and records after Miller discharged respondent. The hearing judge concluded that respondent was culpable of violating section 6106 by virtue of the misappropriation, of violating section 6068 (m) by failing to respond promptly to reasonable status inquiries from Miller, of violating rule 8-101(B)(3) by failing to account to Miller regarding trust funds, of violating rule 2-111(A)(2) by failing to deliver to Miller his papers

and property upon discharge and of violating rule 6-101(A)(2) by failing to perform legal services competently.

The judge explained why he did not credit respondent's testimony that respondent had a good faith belief as to his entitlement to the trust funds as fees. The judge also considered a number of mitigating and several aggravating circumstances as well as the appropriate Standards for Attorney Sanctions for Professional Misconduct and guiding decisions of the Supreme Court. He concluded that respondent was not inherently venal and that he was not beyond rehabilitation, but that his misconduct stemmed from a clear failure to recognize or appreciate the high duties owed by an attorney to a client, particularly when handling trust funds. Accordingly, the judge recommended lengthy suspension rather than disbarment.

II. DISCUSSION

A. Procedural Claim of Unfairness Relative to Mitigating Circumstances.

Before us respondent raises one procedural issue. He asks for a re-referral to the hearing judge for a further hearing on factors in mitigation, asserting that the judge did not give him adequate time to prepare to present evidence in mitigation.

In a status conference held on July 6, 1990, about one month before the first trial date, the judge noted that the parties were advised of the judge's preference, where possible, to rule from the bench at the close of the culpability phase of trial and if culpability were found, to expect that the parties would be prepared to provide immediately evidence with respect to mitigation and aggravation.

At the first trial date, August 3, 1990, respondent stated that his wife was expecting to give birth to a child at any moment and that he was apprehensive in view of the tragic result of her most recent prior pregnancy. The first day of trial was completed without incident. The trial was set to be resumed Monday, August 6, 1990. The birth of respondent's child occurred during the weekend and respondent did not request any further continuances of trial. After the parties resumed the trial on August 7, and the judge found respondent culpable, respondent objected to proceeding further, claiming inadequate time for preparation. At several times during the hearing of August 7, respondent stated he was tired, having had little sleep in the last several days. When the judge asked respondent whether he had contacted any potential character witnesses, respondent replied that he had not. (R.T. pp. 258-259.) As the judge recited in his decision (pp. 10, 11, 13-17), having observed respondent's conduct during the entire hearing, both before and after his claimed difficulties with being tired, the judge concluded that those problems did not affect respondent's ability to present his case adequately and the judge denied his request. As noted, respondent did cover a number of subjects of mitigation in his testimony, and that testimony was essentially unrebutted.

[2] The length of pendency of matters before the State Bar Court is a matter of great concern and continuances have been long disfavored by the court. (See, e.g., *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 597-598.) Considering all the circumstances, we cannot say that the judge's failure to grant the continuance was an abuse of discretion in view of the notice respondent had of how evidence would be presented and his failure to take any steps even to contact potential witnesses. (See *Kennedy* v. *State Bar* (1989) 48 Cal.3d 610, 616; *Boehme* v. *State Bar* (1988) 47 Cal.3d 448, 453.)

B. Culpability.

In conducting this review at respondent's request, our procedures are well settled: We review independently the record of proceedings presided over by the hearing judge. Our review is not an "appeal" from the judge's decision. The judge's findings serve only as recommendations to us and we may adopt our own findings of fact and conclusions, even though varying from those of the hearing judge. (Rule 453(a), Trans. Rules Proc. of State Bar; *Fitzsimmons* v. *State Bar* (1983) 34 Cal.3d 327, 333.) As to matters of testimonial credibility, we do give great weight to the hearing judge who saw and heard all witnesses and who was in the best position to resolve issues pertaining to testimony. (Rule 453(a), Trans. Rules Proc. of State Bar.)

Applying these rules to respondent's request for review, we note that he takes issue with 10 of the 23 findings of fact of the hearing judge. For the most part, respondent attacks findings or parts thereof which are not critical to his culpability and many of his attacks on the findings are unexplained except by a simple citation to the portion of the record respondent has chosen to cite. While respondent does appear to admit his culpability of professional misconduct, he does not identify its basis. From the findings he has not chosen to attack and from his failure to attack any of the judge's conclusions, respondent must be held to have acceded to his culpability of: misappropriation of $22,000 he later restored, failure to act competently on Miller's behalf, failure to render appropriate accountings to Miller, failure to communicate reasonably with Miller in response to his requests and failure to deliver to Miller papers and property to which Miller was entitled upon being discharged from employment.

[3] Respondent attacks a portion of finding 11, that he did no work during the period for which he withdrew $2,500 from the Riverside Thrift account on January 30, 1987, and respondent cites for support of his attack on that finding work he performed in reviewing accounting reports, communicating with Seventh-Day's counsel and later filing a demurrer. However, those facts do not undermine the judge's finding since those services were not performed until *after* respondent withdrew the $2,500. Moreover, as the hearing judge observed, respondent never suggested a value for the services he did perform in 1987 and his inattention to Miller's needs to resolve the matter was clear.

[3b] Respondent has also disputed the portion of finding 11 that he misappropriated the $2,500 of the January 30, 1987, withdrawal. The judge noted that respondent's testimony that $2,500 was an earned fee was not disputed by Miller. Nevertheless, by evaluating all of the other evidence, including the documentary evidence, the judge concluded that the fee in fact was not earned and that the $2,500 withdrawal was a misappropriation. There is ample evidence in the record to support the judge's finding and we therefore adopt it.

As another example of respondent's attack on the findings, he disputes finding 12 by pointing out that, contrary to the judge's finding that he failed to timely respond to the complaint, he filed a demurrer on which he prevailed. While respondent did take the action indicated and the judge so found (decision at p. 5 [finding of fact 13]), respondent fails to understand the true import of the judge's finding. We read finding 12 as a determination that respondent did not timely perform the services which Miller had requested to resolve the dispute over Seventh-Day's claim of entitlement to partnership assets of Fish 'n Ships. Although respondent had received a generous open extension of time to answer, he failed to pursue the matter diligently. When he finally responded to opposing counsel in February 1987 and opposing counsel asked for further information, respondent failed to follow through, causing opposing counsel to revoke the long-pending extension of time.

We also find supported by the evidence the remainder of finding of fact 12 that respondent failed to appear at the continued deposition of Miller; but we, like the hearing judge, accord little importance to that finding since Miller was not ultimately harmed by that failure.

We adopt the judge's findings and conclusion that respondent misappropriated $24,842 from trust funds belonging to Miller and that by doing so he violated section 6106. By wilfully failing to promptly pay those funds to Miller when he requested them, he also violated rule 8-101(B)(4). [4] Although some recent decisions of our Supreme Court hold that an attorney's reasonable or unreasonable but honest belief of entitlement to fees from trust funds constitutes an offense or misappropriation violating only rule 8-101 and not also section 6106 (*Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092, 1099; *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 332), in the case before us, respondent could not have held such an honest belief of entitlement to almost all of the money he withdrew as fees.

Very recently, in *McKnight* v. *State Bar* (1991) 53 Cal.3d 1025, 1033-1034 the Supreme Court concluded that an attorney's misappropriation was willful and involved moral turpitude in facts somewhat akin to the present where the attorney claimed entitlement to some of the misappropriated funds as fees for legal services. "'There is no doubt that the wilful misappropriation of a client's funds involves moral

turpitude.'" (*McKnight* v. *State Bar*, *supra*, 53 Cal.3d at pp. 1033-1034, quoting *Bate* v. *State Bar* (1983) 34 Cal.3d 920, 923.) In this case there is an absolute paucity of documentary evidence to support any conclusion that respondent earned more than the $3,080 he billed.

[5] For a few months after he was retained, respondent did provide services to Miller. He protected Miller's rights by obtaining an extension of time to answer; and, with Miller's consent, sought expert accounting services to attempt to determine Miller's potential liability to Seventh-Day. However, commencing in about February 1987, coincident with his unauthorized use of Miller's trust funds, respondent's work for Miller flagged and ultimately ceased. At the same time, respondent became more unresponsive to Miller's requests concerning the status of the matter. Considering the potential amount of the dispute at issue and Miller's fear that his reputation would be affected with some members of the Seventh-Day church, Miller's periodic attempts to seek information were reasonable as was his desire to have the matter concluded as soon as practical. Under the circumstances, we must conclude as did the hearing judge, that respondent violated section 6068 (m) and rule 6-101(A)(2).

It is also clear from the record that respondent was discharged from employment no later than June 1988. Nevertheless, respondent failed to execute a substitution of attorney and failed to return Miller's papers and records, thus forcing Miller's new counsel to represent Miller without access to that material. Fortunately for Miller, his new counsel was able to settle the dispute with Seventh-Day on favorable terms but by that time, there were almost no funds left in the Riverside Thrift account. Only by the fortuity of respondent's restitution after a State Bar investigation had commenced but before formal charges had issued, was Miller able to make the settlement payment arranged by his new attorney. These facts support the hearing judge's conclusion that respondent willfully violated rule 2-111(A)(2). We also agree with the judge that respondent did not violate his oath and duties as set forth in sections 6068 (a) and 6103. (See, e.g., *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815.)

C. Discipline.

[6] In assessing the appropriate discipline to recommend, we focus on the most serious aspect of respondent's misconduct, his misappropriation of a large amount of his client's trust funds. Regrettably, an attorney's misappropriation of trust funds appears too frequently in the decisions of our Supreme Court as a basis for attorney discipline. In the very recent case of *McKnight* v. *State Bar*, *supra*, 53 Cal.3d at p. 1035, our Supreme Court repeated the familiar principles bearing on discipline for an attorney's misappropriation of trust funds: "'Misappropriation of client funds has long been viewed as a particularly serious ethical violation. [Citations.] It breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.] Although there is no "fixed" disciplinary formula [citation], misappropriation generally warrants disbarment unless "clearly extenuating circumstances" are present. [Citation.]'" (*Id.*, quoting *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 656; see *Edwards* v. *State Bar* (1990) 52 Cal.3d 28, 37.)

"Standard 2.2(a) of the Standards for Attorney Sanctions for Professional Misconduct [citation] specifically provides, 'Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominates, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.'" (*McKnight* v. *State Bar*, *supra*, 53 Cal.3d at pp. 1035-1036, fn. omitted.)

In the case before us, respondent's misappropriation was both large and manifested in 19 separate acts over a 8-month period. **[7]** While respondent did make restitution of most of the funds he misappropriated, he did so only after the intervention of a State Bar investigation, thus negating the otherwise mitigating effects of his amends. (See *Rosenthal* v. *State Bar* (1987) 43 Cal.3d 658. 664.) Respondent never established the value of some services he did perform for Miller in 1987 after he started misappropriating

the trust funds and we adopt the hearing judge's determination that respondent still owes Miller $2,840 plus interest. Commenting on a similar situation, the recent *McKnight* v. *State Bar* opinion described the attorney's conduct as suggesting "both a distressing lack of appreciation of the seriousness of his misconduct and an absence of remorse for a substantial violation of his fiduciary obligations in trust account matters." (*McKnight* v. *State Bar*, *supra*, 53 Cal.3d at pp. 1036-1037.)

As we previously discussed, respondent's misconduct toward Miller did not stop at his serious misappropriation. Rather, it extended to his willful failure to perform needed services, his failure to communicate reasonably with Miller and Miller's new counsel and his failure to comply with ethical duties when Miller discharged him.

[8] Although respondent has no prior record of discipline, he had been admitted to practice less than seven years prior to the misconduct. As such, respondent's prior good record is not significant in mitigation. (See *Read* v. *State Bar* (1991) 53 Cal.3d 394, 426; *Kelly* v. *State Bar*, *supra*, 45 Cal.3d 658.)

[9] Respondent does deserve mitigating credit for his practice on behalf of poor and disadvantaged clients and we believe it should be weighed more heavily than did the hearing judge. **[10]** At the same time we agree with the judge that respondent's claim of inexperience does not mitigate his misappropriation of funds nor his breach of related fiduciary duties to Miller. **[11]** We also agree that although it did appear that respondent experienced stress from another case pressing him at the time he represented Miller and although respondent was most concerned about his wife's health, those factors would not serve as sufficient excuses to mitigate respondent's misappropriation. Respondent presented no evidence to link the pressure of his other civil case with his misappropriation of Miller's funds and his wife's health condition did not arise until 1988, after he had misappropriated his client's funds. Respondent did testify that at the time he misused Miller's funds he experienced financial pressures in not being able to pay his office rent, but we agree with the hearing judge's assignment of little weight to this factor.

We note that although respondent misappropriated Miller's funds by 19 withdrawals over an 8-month period, there was no evidence of misconduct toward any other client nor was there any evidence of intentional deceit of Miller. (See *Kelly* v. *State Bar* (1991) 53 Cal.3d 509, 518-519; *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067, 1069.)

We also agree with the hearing judge that despite the seriousness of respondent's misconduct, there was insufficient evidence of harm to Miller warranting separate consideration as an aggravating circumstance. We have previously identified the principal aggravating circumstances we see in this matter, which included respondent's other breach of duties to Miller beyond his misappropriation of substantial trust funds and his lack of appreciation of his duties as an attorney when either representing Miller or when handling Miller's funds. While the hearing judge's choice of suspension rather than disbarment appears to rest on a careful review of the factors, our analysis of very recent decisions of the Supreme Court and of this department involving misappropriation of funds with no prior record of discipline leads us to conclude that the referee's suspension recommendation is insufficient in degree.

In *Kaplan* v. *State Bar*, *supra*, 52 Cal.3d 1067, the Court disbarred the attorney who had no prior record in 12 years of practice prior to his misappropriation of $29,000 of law firm funds in 24 acts over a 7-month period. Kaplan's acts of misappropriation were very similar to those of respondent in amount, duration and multiple acts; but unlike respondent, Kaplan deceived his partners and a State Bar investigator as to why he misused the money. Kaplan also engaged in misappropriation to further an expensive life style. On the other hand, Kaplan offered extensive favorable character evidence and completed restitution before State Bar proceedings started. Respondent did not complete restitution before State Bar proceedings started, but, respondent had served persons of low and moderate income for most of his relatively brief practice. In *Kaplan*, the hearing panel had recommended probation with two years actual suspension; the (former) review department recommended disbarment.

In *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, a majority of this department recommended disbarment of an attorney who had 15 years of blemish-free practice before misappropriating over $66,000 of trust funds. In dissent, the Presiding Judge concluded that a three-year actual suspension as part of strict conditions of a five-year probation was appropriate. After misappropriating the funds, and unlike respondent, Kueker repeatedly wrote false letters to his client's agent over an 18-month period to conceal his misdeeds and was not forthcoming in the ensuing State Bar investigation. Kueker had also restored only about half of the funds he misappropriated although his client had declined offers of restitution once its complaint was made. The hearing referee in *Kueker* had recommended probation with actual suspension for two years and until Kueker made restitution.

In *McKnight* v. *State Bar*, *supra*, 53 Cal.3d 1025, the Supreme Court adopted the (former) review department's recommended one-year actual suspension (as part of a seven-year stayed suspension). The hearing panel had recommended only a ninety-day actual suspension as part of a four-year stayed suspension. McKnight, who had eight years of practice before his misconduct, wilfully misappropriated $17,000 as a combination of unjustified attorney fees and an excess loan from his client. He failed to make restitution of half of the funds. Unlike respondent, Kaplan or Kueker, McKnight established that he suffered from a manic-depressive condition at the time of his misdeeds which caused a need for a higher level of spending although he established no causal connection between his affliction and the actual misconduct. In choosing the one-year suspension rather than disbarment, the Court gave great weight to McKnight's mental disorder which had a profound impact on his behavior and from which he had been successfully recovering.

Finally, in *Lipson* v. *State Bar* (1991) 53 Cal.3d 1010, the Supreme Court adopted the (former) review department's recommended two-year actual suspension, decreasing the hearing panel's disbarment recommendation. In one matter, Lipson borrowed money from his client without complying with the duties of rule 5-101. In another matter, Lipson wilfully misappropriated $8,400. Lipson had no prior record in over 42 years of practice, was candid with the State Bar but had not made restitution.

[12] In *Lipson* v. *State Bar*, *supra*, 53 Cal.3d at p. 1022, the Supreme Court recognized that misappropriation can be committed in different degrees of culpability, deserving of different discipline and the Court's discussion is apt to the present case: "Even where the most compelling mitigating circumstances do not clearly predominate, we have recognized extenuating circumstances relating to the facts of the misappropriation that render disbarment inappropriate. In *Edwards* [v. *State Bar* (1990) 52 Cal.3d 28, 38], we said: 'As the term is used in attorney disciplinary cases, "wilful misappropriation" covers a broad range of conduct varying significantly in the degree of culpability. An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception .... Disbarment would rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of misappropriation, unaccompanied by acts of deceit or other aggravating factors.'"

[13a] Our independent record review leads us to the same conclusion as did the hearing judge that respondent's violations resulted more from his lack of understanding or recognition of his conduct measured against an attorney's duties rather than from innate venality. Since we conclude, as did the judge, that respondent can be adequately rehabilitated by lengthy suspension and strict conditions of rehabilitation, discipline short of disbarment is appropriate in this case.

[13b] Although we follow the judge's decision not to recommend respondent's disbarment, the record shows more serious misconduct and less mitigation than found in either *McKnight* v. *State Bar* or *Lipson* v. *State Bar* discussed *ante*. In that regard, the judge's finding of fact 59 that respondent has not admitted the true nature and serious import of his misdeeds further supports our conclusion as to the need for an extremely strict set of probationary conditions, including three years of actual suspension and until respondent satisfies the requirements of standard

1.4(c)(ii) before respondent is entitled to return to practice.

In his brief, respondent cites some misappropriation cases which have imposed less discipline than recommended even by the hearing judge but we observe that all of those cases involved either far less serious misconduct than we see in the present record or more compelling mitigating circumstances than in the present record or both. For example, although respondent cited *Lawhorn* v. *State Bar* (1987) 43 Cal.3d 1357 for another point, the discipline imposed in *Lawhorn* for a far less serious misappropriation than occurred here was a five-year stayed, two-year actual, suspension.

III. FORMAL RECOMMENDATION

For the reasons stated above, we recommend to the Supreme Court that the respondent John Robert Tindall be suspended from the practice of law in the State of California for a period of five (5) years; that execution of the order for such suspension be stayed; and that respondent be placed on probation for said period of five (5) years under the following conditions:

1. That during the first three (3) years of said period of probation and until he makes restitution as set forth below in paragraphs 2 and 3, and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, he shall be actually suspended from the practice of law in the State of California.

2. That respondent shall make restitution to Verne Miller in the following amounts: (a) $2,842 being the remainder of the misappropriated amounts; (b) interest at the rate of 10% per annum on the sum of $2,842 from March 22, 1989, until the date paid; (c) the sum of $4,000 which represents interest at 10% on the other $22,000 that was misappropriated from the time of each individual misappropriation to the March 22, 1989 repayment. This $4,000 shall also accrue interest at the rate of 10% per annum from the effective date of the Supreme Court's order until paid. Respondent shall furnish satisfactory evidence of said restitution to the Office of the State Bar Court, Los Angeles.

3. That respondent shall comply with conditions 3 through 13 of the conditions recommended by the hearing judge set forth in his decision on pages 21-25.

We further recommend that respondent be ordered to take and pass the California Professional Responsibility Examination prior to the expiration of his period of actual suspension.

Finally, we recommend to the Supreme Court that it include in its order a requirement that the respondent comply with the provisions of rule 955, California Rules of Court, and that respondent comply with the provisions of paragraph (a) of said rule with 30 days of the effective date of the Supreme Court order herein and to file the affidavit with the Clerk of the Supreme Court provided for in paragraph (c) of the rule within 40 days of the effective date of the order, showing his compliance with said order.

I concur:

NORIAN, J.

PEARLMAN, P.J., concurring:

I agree that the hearing judge's discipline recommendation cannot be reconciled with Supreme Court decisions on comparable facts. In my view, it is not a question of whether the discipline for the serious misconduct at issue here should be two years or three years suspension, but whether the mitigating evidence warrants three years suspension in lieu of disbarment. Discipline should be consistent with and proportional to that imposed in similar recent cases. (*Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1309.) Moreover, there must be justification in the record for declining to recommend the discipline called for by the standards. (See *Blair* v. *State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) I agree that there are mitigating factors here which were not present in the recent Supreme Court decision imposing disbarment in *Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067, and find the record here comparable to the record presented to this review department in *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583 in which the majority recommended disbarment and I recommended three years actual suspension in light of Supreme Court precedent.

Both cases involved very serious wrongdoing against a single client with mitigating factors which persuaded the trier of fact that the respondent was not venal and that lengthy suspension was appropriate in lieu of disbarment. The Supreme Court has taken into account a referee's "firsthand opportunity to observe petitioner's demeanor" in accepting a recommendation not to impose disbarment for a single instance of misappropriation. (See *Snyder* v. *State Bar*, *supra*, 49 Cal.3d 1302.) Such deference appeared particularly appropriate in *In the Matter of Kueker*, since the referee made a specific finding that Kueker, 10 years after his misappropriation, presented no current risk to the public and little or no future risk of repeating his misconduct. These factors are significant in determining whether a sanction less than disbarment can adequately protect the public. (See *Friedman* v. *State Bar* (1990) 50 Cal.3d 235; *Amante* v. *State Bar* (1990) 50 Cal.3d 247, 254.)

In the court below, despite finding a lack of venality, the hearing judge found that as of the time of the hearing, respondent failed "to understand the true nature of his misconduct and has certainly not atoned for it." (Finding 58, decision p. 17.) As a consequence, the hearing judge recommended a standard 1.4(c)(ii) hearing prior to respondent's resumption of practice to safeguard the public in the event respondent does not gain insight into the nature of his misconduct. This requirement is essential. The burden will be on respondent at the time of that hearing to satisfy the court of his rehabilitation, learning in the law and fitness to practice. In the interim, respondent will have three years to gain insight into his misconduct. If he makes no better showing at the time of his 1.4(c)(ii) hearing than he did in this proceeding, he will not have satisfied his burden.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD DISTEFANO

Petitioner for Reinstatement

No. 90-R-10598

Filed September 12, 1991

SUMMARY

An attorney petitioned for reinstatement after having been disbarred in 1975 based on his conviction for filing false federal tax refund claims. In 1979, after his disbarment, petitioner had been convicted in state court of grand theft and forgery based on his embezzlement of $32,000 from his employer. The hearing judge found petitioner had shown clear and convincing evidence of rehabilitation and present good moral character, and recommended reinstatement. (Hon. Ellen R. Peck, Hearing Judge.)

The State Bar sought review, contending that petitioner's failure to make full restitution to his former employer precluded a showing of rehabilitation. The review department held that the California Supreme Court requires proof of passage of a professional responsibility examination as a precondition to reinstatement under the California Rules of Court, and therefore remanded the matter to the hearing judge for further proceedings and findings as to whether petitioner had passed such an examination. In addition, the review department ordered further proceedings on petitioner's showing of rehabilitation and present good moral character, holding that petitioner's obligation to make restitution did not depend on the existence of any legal obligation to do so, bnt that convincing evidence of petitioner's recognition of his culpability, contrition and rehabilitation could warrant reinstatement even absent restitution.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: Beatrice R. Lawson

HEADNOTES

[1] **725.11 Mitigation—Disability/Illness—Found**
760.11 Mitigation—Personal/Financial Problems—Found
In disciplinary matters, greater mitigating weight is given to financial pressures if the pressures are extreme and result from circumstances beyond the control of the attorney, such as nndiagnosed psychiatric problems.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **2504 Reinstatement—Burden of Proof**
Reinstatement is not necessarily precluded where the reinstatement petition omits information which is insignificant and the petitioner has no intent to mislead or to conceal derogatory information. However, reinstatement may be denied when omissions from the petition are significant or misleading.

[3 a, b] **194 Statutes Outside State Bar Act**
2504 Reinstatement—Burden of Proof
The California Rule of Court regarding reinstatement requires petitioners for reinstatement to pass a professional responsibility examination, and to establish their learning and ability in the law, rehabilitation and present moral qualifications. Applicants who fail to show sufficient learning in the law may be required to pass the examination required of initial applicants for admission.

[4 a, b] **2504 Reinstatement—Burden of Proof**
The heavy burden of proving rehabilitation is with the petitioner seeking reinstatement. One who has been previously disbarred must present stronger proof of present honesty and integrity than one seeking initial admission whose character has never been questioned. The proof submitted must overcome the prior adverse judgment of the petitioner's character, and must be considered in light of the moral shortcomings which led to the disbarment. The burden is on petitioners seeking reinstatement to show by a sustained course of good conduct that they have attained a standard of character which entitles them to be members of the bar.

[5 a, b] **135 Procedure—Rules of Procedure**
2504 Reinstatement—Burden of Proof
2509 Reinstatement—Procedural Issues
Passage of a professional responsibility examination is one of the basic requirements for reinstatement. Although a State Bar rule permits the State Bar Court to grant a petitioner up to two years after the reinstatement hearing to pass the examination, the Supreme Court requires proof of passage to precede reinstatement. Thus, the State Bar rule is interpreted to require passage of the examination as a condition precedent to a State Bar Court recommendation of reinstatement to the Supreme Court. (Trans. Rules Proc. of State Bar, rule 667.)

[6] **2590 Reinstatement—Miscellaneous**
The Supreme Court has not ruled out the possibility of a conditional reinstatement, but the condition must not be inconsistent with the basic purpose underlying reinstatement.

[7] **130 Procedure—Procedure on Review**
165 Adequacy of Hearing Decision
2509 Reinstatement—Procedural Issues
2559 Reinstatement Not Granted—Other Basi
Where there was no evidence in the record that a reinstatement petitioner had taken and passed a professional responsibility examination, and neither the parties nor the hearing judge focused on the issue when evaluating petitioner's request for reinstatement, the matter was remanded to give the petitioner an opportunity to take and pass the examination if he had not already done so, and for findings on the issue.

[8] **2504 Reinstatement—Burden of Proof**
To demonstrate rehabilitation, a reinstatement petitioner needs to show a recognition of his or her wrongdoing, and evidence of rehabilitation is viewed in light of the moral shortcomings that led to the disbarment.

[9 a, b] **591 Aggravation—Indifference—Found**
745.52 Mitigation—Remorse/Restitution—Declined to Find
2504 Reinstatement—Burden of Proof
An attorney's obligation to make restitution is not limited to legally enforceable claims. An attorney may have a moral obligation to make restitution as part of the duties of an attorney, in order to confront the harm caused by the theft. Nonetheless, payment of restitution is neither mandatory nor determinative of rehabilitation. The attorney's attitude toward payment to the victim is considered as well as the ability to pay.

[10] **591 Aggravation—Indifference—Found**
745.52 Mitigation—Remorse/Restitution—Declined to Find
2504 Reinstatement—Burden of Proof
An attorney's moral duty to make restitution is not limited to clients, and extends to an employer to whom the attorney owed a fiduciary duty.

[11 a, b] **2504 Reinstatement—Burden of Proof**
2551 Reinstatement Not Granted—Rehabilitation
Where there has been an absence of complete restitution and no evidence of an inability to pay, a petitioner for reinstatement may present evidence of other affirmative acts which demonstrate the petitioner's recognition of fault, contrition and curing of the source of the initial problem and the resulting harm. Such other evidence must be "quite convincing" to establish the present rehabilitation of the petitioner. The fact that petitioner's victim had recommended petitioner's imprisonment, rather than probation and restitution, did not justify petitioner's failure to make restitution.

[12 a, b] **2504 Reinstatement—Burden of Proof**
Testimonials from attorneys and employers are given considerable weight in reinstatement proceedings but are not alone conclusive. A broad spectrum of witnesses who have observed the petitioner's daily conduct and mode of living is particularly insightful. Information on business ventures and pro bono or charitable work also reflects on petitioner's moral character and rehabilitation.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

The State Bar of California seeks review of the decision of a hearing judge of the State Bar Court recommending that the petition of Richard Distefano (petitioner) seeking reinstatement to the practice of law in the State of California be granted. Petitioner was disbarred by the Supreme Court of California in 1975 based on his conviction for filing false claims with the Internal Revenue Service, contrary to 18 United States Code section 287, an offense involving moral turpitude. (*In re Distefano* (1975) 13 Cal.3d 476.) After his disbarment, petitioner embezzled $32,000 from his employer and was convicted in 1976 in state court for grand theft and forgery. Since his release from incarceration in 1979, he has been employed as a law clerk and also owns and operates a business which writes medical reports for forensic purposes. He made full restitution of $4,194.18, as ordered pursuant to his federal sentence, but made only a partial repayment of $3,000 prior to his state conviction to his former employer, who is now deceased. The hearing judge, on weighing all the facts and circumstances including the issue of restitution, found that petitioner's showing of rehabilitation and present good moral character was clear and convincing, and recommended that the reinstatement petition be granted.

The State Bar contends on review that petitioner's failure to make or offer full restitution after his release from prison precludes a showing of rehabilitation. In response, petitioner rests on the findings and conclusions in the hearing decision, but indicated at oral argument a willingness to accept conditions to his reinstatement.

Upon our independent review of the record, we remand this matter to the hearing judge for further proceedings and findings as to whether petitioner has passed a professional responsibility examination, as required by former rule 954(d), California Rules of Court (now renumbered as rule 951(f), effective December 1, 1990), and rule 667, Transitional Rules of Procedure of the State Bar, and for further proceedings on the issue of petitioner's showing of rehabilitation and present moral qualifications.

FACTS

Petitioner was initially admitted to the practice of law in 1967 and was disbarred by the Supreme Court in March 1975, based on his conviction in federal court in 1972 on three counts of violating 18 United States Code section 287, for submitting false income tax returns claiming refunds. Petitioner, over a two-year period, submitted thirteen federal income tax returns using the names and social security numbers of living taxpayers, falsifying the remainder of the returns, preparing fictitious W-2 forms and signing the forms. The false refund claims totalled over $16,000. Petitioner was sentenced to two five-year probation terms, to be served concurrently, on conditions including restitution of $4,194.18 and psychiatric treatment.

After his disbarment, petitioner was employed as an office manager for a dental corporation owned by Dr. Richard Stermer and during the course of his employment embezzled $32,000. Petitioner repaid over $3,000 to Dr. Stermer prior to Dr. Stermer reporting the thefts to the police. Dr. Stermer also retained $900 he owed petitioner in salary and other compensation. Dr. Stermer then demanded that petitioner repay him in full immediately by borrowing the money from petitioner's aging parents. Petitioner refused to do so and offered to make regular payments over time instead. That alternative was apparently rejected by Dr. Stermer and petitioner was arrested.

Petitioner pled guilty to one count of grand theft (Pen. Code, § 487) and one count of forgery (Pen. Code, § 470). The record indicates that Dr. Stermer told state probation officials that he thought petitioner should serve time in prison and appeared in court at petitioner's sentencing. The state probation department rejected petitioner's plea that he be given a non-custodial sentence so that he could work and repay Dr. Stermer in full. The state probation department recommended that petitioner be committed to state prison for the term prescribed by law and, on September 24, 1976, the judge sentenced petitioner to state prison. In a subsequent proceeding in November 1976, to recall petitioner from prison and place him on probation, petitioner again offered to repay the full amount taken from Dr. Stermer if

released from prison. The recommendation from state correctional officials was for petitioner to be placed on probation, rather than returned to prison. The sentencing judge rejected the recommendation and petitioner remained in state prison until May 1978. Petitioner served 18 months in state prison, with one year of parole thereafter.

As a result of his state conviction, on July 11, 1977, petitioner's federal probation was revoked and he was sentenced to three terms of imprisonment for one year and one day, to be served concurrently with each other and consecutive to his state term of imprisonment. Petitioner moved to reduce his federal sentence, pleading that the additional prison time subsequent to his time in state prison would preclude him from making any restitution to Dr. Stermer during the period of his state parole. The motion was denied. Petitioner served one year and one day in federal custody (a combination of prison and half-way house confinement) subsequent to his state incarceration. Petitioner has paid the restitution ordered as part of his federal sentence, but was not ordered to repay any monies in connection with his state conviction.

The hearing judge (and the Supreme Court in the disbarment case) found that during each criminal episode petitioner was involved with a male lover who demanded money and other material support from petitioner in order to sustain their relationship. The hearing judge found that petitioner was unable to face ending the relationship with each man and could not resist the increasing demands for funds or financially continue to sustain his material support of each man on his salary. He therefore resorted to criminal means to pay the debts incurred. The money taken in each case was either given to or spent on petitioner's lover.

Petitioner was ordered as part of his federal sentence to submit to psychiatric treatment (exh. 2) and did receive counseling while on federal parole and in state prison. At the reinstatement hearing, Dr. Bruce Steinberg, a board certified psychiatrist, testified concerning his psychiatric evaluation of petitioner. [1] In discipline proceedings, financial pressures are given greater weight in mitigation "if they are extreme and result from circumstances . . . that are beyond the attorney's control." (*In re Naney* (1990) 51 Cal.3d 186, 196.) Very recently, in *McKnight* v. *State Bar* (1991) 53 Cal.3d 1025, 1038, the Supreme Court gave great weight to the fact that "undiagnosed psychiatric difficulties apparently did give rise to his spending extravagances, which in turn prompted the need for funds at the time of his misfeasance."

Based on a review of petitioner's prior psychiatric records and treatment, and two interviews with petitioner, Dr. Steinberg concluded that petitioner does not currently suffer from any behavior disorders, psychoses or personality disorders and is not in need of psychological treatment. Petitioner did exhibit some traits of a dependent/avoidant personality as well as some generalized non-specific impulse control disorders, which were manifest in his criminal conduct. In the opinion of Dr. Steinberg, these traits are in remission and, further, petitioner has demonstrated remorse for and insight into his prior conduct and taken measures in his personal life to lessen his vulnerability to similarly destructive relationships. Dr. Steinberg demurred at offering any guarantees concerning future behavior, but stated that in his opinion further criminal behavior by petitioner was unlikely. Petitioner also offered the testimony of Conrad Hartell, a retired businessman and close friend of petitioner for almost 20 years who was familiar with petitioner's disbarment and subsequent incarceration. Hartell presented his observations of petitioner's emotional development and acceptance of his homosexuality.

Petitioner's learning and ability in the law have not been challenged by the State Bar. Since his release from incarceration, petitioner has been employed as a law clerk in the firm of Alschuler, Alschuler, Alschuler, and Alschuler, and is the sole shareholder and principal employee in Forensic Consultants, Inc., a service which drafts medical reports for physicians for submission to federal and state agencies and for use in court proceedings. The four partners in the Alschuler firm and the firm's bookkeeper, Mrs. Walter Alschuler, testified in support of the reinstatement petition. Petitioner lives with and is the sole relative caring for his elderly parents, but he does not provide them with financial support.

There are two additional facts not mentioned in the hearing department decision which should be noted. During the State Bar's cross-examination, petitioner revealed that he had not disclosed two items on his reinstatement application: (1) a minor criminal conviction for trespass, involving the solicitation of an under-cover police officer which took place in 1975, in between his two more serious offenses, and (2) on his list of employers, he did not list his employment by the Stermer Dental Corporation between January 1, 1975, and June 2, 1976, the date his thefts were discovered by Dr. Stermer. His explanation at the hearing was that his omission of the items was an oversight. His employment by Dr. Stermer was before the court in connection with his criminal conviction for grand theft and forgery. The decision in favor of reinstatement impliedly accepted the explanation that the omissions were the result of oversight. On remand, the court can clarify its ruling in this regard.[1] **[2 - see fn. 1]**

REQUIREMENTS FOR REINSTATEMENT

[3a] Former rule 954(d), California Rules of Court (now renumbered as rule 951(f), effective December 1, 1990) requires applicants for reinstatement to pass a professional responsibility examination, to establish their rehabilitation and present moral qualification, and to establish present ability and learning in the law.[2] **[3b - see fn. 2]** **[4a]** Petitioner bears the burden of proving rehabilitation on a petition for reinstatement after disbarment and that burden is a heavy one. (*Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 745.) As the Supreme Court often recites in reinstatement opinions, "The person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character. [Citations.] In determining whether that burden has been met, the evidence of present character must be considered in the light of the moral shortcomings which resulted in the imposition of discipline. [Citation.]" (*Roth* v. *State Bar* (1953) 40 Cal.2d 307, 313.)

[4b] In its opinion disbarring petitioner, the Supreme Court similarly stated that "the burden properly must rest on him to prove by a sustained course of good conduct that he has attained a standard of character which entitles him to be a member of the Bar." (*In re Distefano*, *supra*, 13 Cal.3d at p. 481.)

We note that there was extensive discussion at the hearing level of petitioner's showing of rehabilitation, present moral character, and ability and learning in the law. There was no evidence in the record that petitioner has taken and passed a professional responsibility examination.

[5a] Passage of a professional responsibility examination is one of the basic requirements under the court rules for reinstatement. If the petitioner has not passed the professional responsibility examination by the conclusion of the hearings, the court, "in its discretion, may permit the petitioner a period of up to two years thereafter within which to pass the examination." (Rule 667, Trans. Rules Proc. of State Bar.) The Supreme Court has interpreted rule 951(f) to require proof of passage of the professional responsibility examination to precede reinstatement. Thus, in a recent case, it remanded a matter to our hearing department after a hearing judge had recommended conditional reinstatement of a formerly disbarred attorney provided, among other condi-

1. While the examiner raised these matters at the hearing below, there were no follow-up arguments made by the parties. **[2]** An omission may not be fatal to a reinstatement petition where the information omitted is insignificant and there is no intent to mislead the State Bar or conceal derogatory information. (*Calaway* v. *State Bar* (1986) 41 Cal.3d 743, 748.) However, where the omissions are significant or misleading, reinstatement may be denied. (*In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, review den. Aug. 15, 1990 [S015226].)

2. **[3b]** Applicants who fail to show sufficient present learning in the law may be required by the State Bar to pass the admission examination required of initial applicants for admission. (Former rule 954(d), Cal. Rules of Court [now rule 951(f)].)

tions, that the attorney take and pass the professional responsibility examination given by the National Conference of Bar Examiners within one year after the Supreme Court's reinstatement. (*In re Thomson*, order filed July 11, 1991 (S020731).) The Supreme Court's remand order required further proceedings and findings that Thomson "has passed the professional responsibility examination." (*Ibid.*)[3] **[6 - see fn. 3]** **[5b]** Thus, rule 667 must be interpreted to require successful passage of the PRE as a condition precedent to a State Bar Court recommendation of reinstatement.

[7] In light of the fact that in the instant matter, neither the parties nor the hearing judge focused on the professional responsibility examination requirement in evaluating petitioner's request for reinstatement, we deem it appropriate in light of *In re Thomson* to remand the matter to the hearing department to give petitioner an opportunity to take and pass the professional responsibility examination if he has not already done so, and for additional proceedings and findings on this issue.

In reopening the record for evidence of passage of the professional responsibility examination, it will also be appropriate for the parties to present additional evidence, if any, on petitioner's showing of rehabilitation or lack thereof. **[8]** To demonstrate rehabilitation, a petitioner needs to show a recognition of his or her wrongdoing, and evidence of rehabilitation is viewed in light of the moral shortcomings that led to the disbarment. (*Tardiff* v. *State Bar* (1980) 27 Cal.3d 395, 403.) For guidance on remand, we address the issue of restitution since the examiner has taken the position that absent restitution petitioner should not be readmitted and petitioner has taken the position that restitution is no longer necessary.

It is undisputed that petitioner did not have the wherewithal to make complete restitution prior to going to jail and made such payments then as he was able. It is also undisputed that petitioner did not seek to complete restitution after his release, although he did acquire sufficient funds to do so, because he believed he had already paid his debt to society. It appears that petitioner now is under no legal obligation—criminal or civil—to repay the victim of his crime.

[9a] Restitution is not, however, limited to legally enforceable claims. As the Supreme Court stated in disbarring petitioner, "the responsibilities of a lawyer differ from those of a layman; 'correspondingly, our duty to the public and to the lawyers of this state in this respect differs from that of the trial judge in administering criminal law.' [Citation.]" (*In re Distefano*, *supra*, 13 Cal.3d at p. 481.) An attorney may therefore be required to make restitution as a moral obligation even when there is no legal obligation to do so. (*Brookman* v. *State Bar* (1988) 46 Cal.3d 1004, 1008.) Restitution forces an attorney to confront the harm caused by theft. (*Id.* at p. 1009.) **[10]** While the victim was not a client, the victim was petitioner's employer to whom petitioner owed a fiduciary duty. The Supreme Court does not predicate a moral duty to make restitution on the victim being a client. **[9b]** Nonetheless, restitution is neither mandatory, nor in and of itself determinative of rehabilitation. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1093.) Applicants for reinstatement are to be judged not solely on the ability to make restitution, but by their attitude toward payment to the victim. (*Resner* v. *State Bar* (1967) 67 Cal.2d 799, 810; *In re Gaffney* (1946) 28 Cal.2d 761, 764-765.)

[11a] Petitioner's attitude toward restitution is of concern. He contends that the victim wanted petitioner to spend the maximum time in jail and opposed any probation which would have allowed petitioner an opportunity to complete repayment. He thus claims that the victim got what he wanted. Petitioner cannot justify his failure to make restitution because the victim recommended petitioner's imprisonment rather than recommending probation. Petitioner embezzled his employer's funds and his rehabilitation can only be demonstrated by his own conduct. Since petitioner has not made complete restitution, we address the sufficiency of other evidence of petitioner's rehabilitation.

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3. **[6]** While the Supreme Court has not ruled out the possibility of a conditional reinstatement (*Hippard* v. *State Bar* (1989) 49 Cal.3d 1084, 1098), the condition must not be inconsistent with the basic purpose underlying reinstatement. (*Ibid.*)

[11b] As the Court noted in *Hippard* v. *State Bar*, where there has been an absence of restitution and no evidence of an inability to pay, there may still be other affirmative actions by petitioner which demonstrate the same recognition of fault, contrition and curing of the source of the initial problem and the resulting harm to the public and the bar. Under these circumstances, such evidence must be "quite convincing" to establish the present rehabilitation of the attorney. (*Hippard* v. *State Bar*, *supra*, 49 Cal.3d at p. 1095.) **[12a]** The favorable testimony of attorneys and employers of those seeking reinstatement is entitled to considerable weight. (*Feinstein* v. *State Bar* (1952) 39 Cal.2d 541, 547.) However, testimonials alone are not conclusive. (*Ibid.*)

[12b] We are concerned in independently reviewing the present record regarding the lack of breadth of rehabilitative evidence presented by petitioner. In reinstatement cases, "the favorable testimony of acquaintances, neighbors, friends, associates and employers with reference to their observation of the daily conduct and mode of living of an attorney who has suffered disbarment" is particularly insightful. (*In re Andreani* (1939) 14 Cal.2d 736, 749-750.) Information concerning business ventures has been considered in past cases in evaluating rehabilitation. (See, e.g., *Calaway* v. *State Bar*, *supra*, 41 Cal.3d at p. 746; *Resner* v. *State Bar*, *supra*, 67 Cal.2d at pp. 808-809.) A greater spectrum of witnesses would provide a better basis for evaluating petitioner's qualifications for reinstatement, particularly if there is no evidence on rehearing of efforts at this juncture to complete restitution to Dr. Stermer's heirs or otherwise to demonstrate recognition of the need to take affirmative steps to make amends for his crime. While we do not expect petitioner to engage in *pro bono* or charitable works or contribute thereto solely to satisfy his showing of rehabilitation (see *Porter* v. *State Bar* (1990) 52 Cal.3d 518, 529, fn. 7), evidence of any such activities or the absence thereof does reflect on petitioner's moral character and rehabilitation.

CONCLUSION

For the reasons stated above, we remand this matter to the hearing department for further proceedings and findings (1) that petitioner has passed a professional responsibility examination (rule 951(f), California Rules of Court); and (2) on the issue of petitioner's showing of rehabilitation and present moral qualifications.

We concur:

GOLDHAMMER, J.*
NORIAN, J.

* By appointment of the Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ALVAADER FRAZIER

A Member of the State Bar

[No. 84-O-12333]

Filed October 10, 1991; as modified, January 9, 1992 and February 4, 1992

SUMMARY

Respondent engaged in serious misconduct commencing a year after her admission to practice law, including abandoning several clients; failing promptly to return unearned fees and other funds owed to the clients; misappropriating trust funds belonging to a bankruptcy estate; engaging in acts of deceit and dishonesty, and failing to provide legal services in a competent fashion. The hearing referee recommended disbarment. (Hon. John P. Sparrow (retired), Hearing Referee.)

On respondent's request for review, the review department rejected all except one of respondent's due process challenges to the pretrial proceedings and the hearing, but agreed with respondent's contention that the hearing referee should not have stricken respondent's answer on one count as a sanction for her refusal to testify when called as an adverse witness by the State Bar. On culpability, the review department found that some of the misconduct determined by the hearing referee was not supported by the record, and that there was greater mitigating evidence than the hearing referee had found.

After considering recent Supreme Court decisions involving attorneys whose psychological difficulties contributed to their misconduct, the review department concluded that in light of respondent's misconduct, her emotional difficulties and subsequent rehabilitation, public protection did not require respondent's disbarment. Rather, the appropriate discipline was a five-year suspension, stayed, a five-year probation period, and actual suspension for three years and until she made restitution and demonstrated rehabilitation and fitness to practice.

COUNSEL FOR PARTIES

For Office of Trials: Dominique Snyder

For Respondent: Lawrence A. Grigsby, Arthur R. Block, Michael A. Hardy

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **725.11 Mitigation—Disability/Illness—Found**
801.41 Standards—Deviation From—Justified
822.39 Standards—Misappropriation—One Year Minimum
833.90 Standards—Moral Turpitude—Suspension
Where respondent committed serious misconduct shortly after admission to practice, including abandoning several clients and failing to perform legal services competently; four instances of failure to return unearned advance fees promptly; misleading two clients; misappropriating trust funds of a bankruptcy estate; and accepting employment without sufficient time, resources and ability to perform competently; but respondent presented mitigating evidence of emotional and psychological difficulties and rehabilitation, disbarment was not required, and protection of the public and profession was satisfied by five-year stayed suspension, three-year actual suspension, requirements to make restitution and show rehabilitation before returning to practice, and a period of supervised probation.

[2 a, b] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
142 Evidence—Hearsay
159 Evidence—Miscellaneous
191 Effect/Relationship of Other Proceedings
Requests to augment the record at the review department level will be granted only if the original record is incomplete or incorrect. (Rule 1304, Provisional Rules of Practice.) Out-of-court evidence offered at the appellate level is ordinarily hearsay, and impossible to evaluate because of the absence of cross-examination to test the credibility of the declarant. The rule is to rely only on evidence which was presented to the trier of fact. The only general exception is to permit documentary evidence of subsequent rehabilitation when it is the only means to meet the heavy burden of demonstrating recovery from substance abuse or mental disorder. Where proffered additional evidence was derived from the record in another proceeding involving respondent, and was not offered to correct any omission in the record, the review department declined to grant respondent's motion to augment the record.

[3] **110 Procedure—Consolidation/Severance**
191 Effect/Relationship of Other Proceedings
2119 Section 6007(b)(3) Proceedings—Other Procedural Issues
2210.90 Section 6007(c)(2) Proceedings—Other Procedural Issues
Disciplinary proceedings and involuntary inactive enrollment proceedings are not related so as to require consolidation, and may be conducted on simultaneous, parallel tracks.

[4] **146 Evidence—Judicial Notice**
191 Effect/Relationship of Other Proceedings
2315.10 Section 6007—Inactive Enrollment After Disbarment—Not Imposed
In reviewing hearing department decision in disciplinary proceeding, review department took judicial notice that in separate involuntary inactive enrollment proceeding, respondent had been found to have rebutted the presumption, arising from hearing department's disbarment recommendation, that respondent's conduct posed a continuing threat of harm to clients and the public. However, the findings in the involuntary inactive enrollment proceeding were not binding in the disciplinary matter, nor did they have any probative value.

[5] **125 Procedure—Post-Trial Motions**
135 Procedure—Rules of Procedure
161 Duty to Present Evidence
On a motion to present additional evidence, the moving party did not show good cause where the substance of the evidence sought to be admitted was not summarized and there was no claim that the witnesses or affiants were unavailable to present their evidence at the disciplinary hearing or that their evidence related to events or observations which occurred after the disciplinary hearing. (Rules Proc. of State Bar, rule 562.)

[6 a, b] **113 Procedure—Discovery**
192 Due Process/Procedural Rights
Denial of respondent's motion to compel discovery did not deprive respondent of due process, where the information sought (information concerning the race, practice and gender of members of the State Bar, and statistics allegedly maintained by the Bar) was not gathered or maintained by the State Bar, and the State Bar was under no obligation to survey its membership in order to respond to respondent's discovery request.

[7] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
103 Procedure—Disqualification/Bias of Judge
Highly generalized claims of bias have been rejected as being overbroad.

[8] **106.40 Procedure—Pleadings—Amendment**
192 Due Process/Procedural Rights
A notice to show cause may be amended, including amendment to conform to proof, so long as the attorney is given a reasonable opportunity to defend the charge and provided the amendment is not a trap for the unwary attorney. Where respondent was given informal, oral notice of an intended amendment five months prior to its filing, and formal notice one month prior to trial, respondent had adequate time to prepare a defense, and due process was not violated.

[9] **139 Procedure—Miscellaneous**
192 Due Process/Procedural Rights
Respondent was not entitled to a three-member hearing panel as a matter of due process. Where it was evident from the pre-trial filings that the case would require more than one day of hearing, the State Bar Court did not have discretion to assign the matter to a three-member panel, under the then-applicable statue. (Bus. & Prof. Code, § 6079 (b).)

[10] **103 Procedure—Disqualification/Bias of Judge**
135 Procedure—Rules of Procedure
194 Statutes Outside State Bar Act
Where a standard for judicial disqualification in the State Bar's Rules of Procedure was drawn from a similar provision in the Code of Civil Procedure, case law under the statute could be looked to in applying the State Bar rule. (Rule 230, Rules Proc. of State Bar.)

[11] **103 Procedure—Disqualification/Bias of Judge**
112 Procedure—Assistance of Counsel
120 Procedure—Conduct of Trial
The hearing judge is entitled to exert reasonable control over the conduct of the hearing. Such measures as requiring one counsel to question a witness, requesting respondent not to consult with

respondent's attorneys while the judge was speaking to them, and expecting counsel to note objections for the record and then move forward with the case, were reasonable, did not demonstrate bias under the circumstances and did not deprive respondent of the statutory right to legal assistance.

[12] **103 Procedure—Disqualification/Bias of Judge**
192 Due Process/Procedural Rights
Bias on the part of the hearing referee was not demonstrated when the referee, without the knowledge of the parties, corresponded with an out-of-state trial court judge in an attempt to coordinate conflicting trial schedules. While the better method would have been for the referee to have advised the parties of his intent to contact the trial court judge and to have copied the parties on any correspondence, the referee's conduct was not improper in nature and did not establish an appearance of bias constituting a denial of due process.

[13] **103 Procedure—Disqualification/Bias of Judge**
A State Bar Court referee who referred respondent's out-of-state counsel to the Office of Trial Counsel for investigation for alleged misconduct and possible revocation of their admission to practice *pro hac vice* was not in the same position as a trial court judge ruling on a contempt matter, and the referee's conduct did not demonstrate bias.

[14] **141 Evidence—Relevance**
162.20 Proof—Respondent's Burden
Testimony concerning a psychological disorder related to respondent's misconduct constitutes at most mitigating evidence, and is not admissible during the culpability phase of the hearing unless the respondent asserts a defense of insanity or claims to be unable to assist in his or her own defense.

[15] **213.10 State Bar Act—Section 6068(a)**
214.30 State Bar Act—Section 6068(m)
Where an attorney's failure to communicate with a client occurred prior to the effective date of the statute specifically requiring communication with clients, a violation of the underlying duty predating this statute may be charged as a violation of the attorney's oath and duties generally.

[16] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Where respondent did some work on a lawsuit and provided a contemporaneous accounting of time to the client, the charge that respondent had retained unearned advanced fees was not supported by the record.

[17] **277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]**
Advances by the client for expenses incurred during representation are not encompassed by the rule requiring the prompt refund of unearned advanced fees upon request.

[18] **221.00 State Bar Act—Section 6106**
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.00 Misappropriation
An attorney's failure to return unspent costs advanced by the client did not violate the rule requiring prompt payment of client funds upon request, where there was no evidence that the client had requested the return of the funds. Nor did the attorney's inaction alone, in failing to return the funds for several years, support a finding that the attorney had misappropriated the funds or committed acts of moral turpitude.

[19] **221.00 State Bar Act—Section 6106**
Providing a trust account check to pay for a personal expense, and then failing to satisfy the underlying obligation when the check was dishonored, constituted an act of moral turpitude.

[20] **221.00 State Bar Act—Section 6106**
277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
Because the retention of unearned advanced fees is a violation of an express duty under the Rules of Professional Conduct, it would be duplicative to find the same conduct to constitute an act of moral turpitude, and such a finding is not supported by the case law.

[21] **221.00 State Bar Act—Section 6106**
280.00 Rule 4-100(A) [former 8-101(A)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.00 Misappropriation
Where an attorney representing a bankrupt client had possession of the proceeds of a court-ordered sale of estate assets, did not place the funds in a trust account, did not pay them as directed by the bankruptcy court, and did not otherwise account for the funds, the evidence supported a finding that the attorney misappropriated the funds, violated the rule requiring prompt payment of client funds on request, and committed an act of moral turpitude.

[22] **221.00 State Bar Act—Section 6106**
420.00 Misappropriation
While failure to keep a promise of future action alone is not ordinarily proof of dishonesty, where respondent promised to deliver client funds into court custody and soon thereafter misappropriated the funds, the review department upheld the hearing department's finding that respondent's actions were intended to mislead the client and therefore constituted deceitful conduct.

[23] **145 Evidence—Authentication**
162.11 Proof—State Bar's Burden—Clear and Convincing
221.00 State Bar Act—Section 6106
In an attorney discipline proceeding, all reasonable doubts must be weighed in favor of the attorney. Where the evidence presented by documents raised an inference of irregularity concerning the genuineness of a bankruptcy court order, but there was no evidence from the bankruptcy court concerning its practices nor any evaluation of the genuineness of the purported order itself, there was not clear and convincing evidence that the respondent had fabricated the order.

[24] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]
Wilfulness, for the purpose of finding a violation of the Rules of Professional Conduct, is defined as having acted or omitted to act purposely to do the act forbidden by the rule or not to do the act required by the rule. Where there was no evidence that respondent was incapable of forming the requisite purpose or intent, the review department upheld a finding that respondent was capable of the wilfulness necessary to commit the charged rule violation (accepting employment without resources to perform competently).

[25] **270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**
Where an attorney was willing to accept employment when the attorney knew or should have known that the attorney was not in the position to represent the client competently, the attorney

violated the (former) rule of professional conduct prohibiting knowingly accepting or continuing employment without the resources to perform competently. Respondent's acceptance of employment in four matters and subsequent abandonment of the clients demonstrated a violation of the rule.

[26 a, b] **135 Procedure—Rules of Procedure**
192 Due Process/Procedural Rights
Attorney discipline proceedings are sui generis, neither criminal nor civil, and ordinary criminal procedural safeguards do not apply. The proceedings are conducted pursuant to the Rules of Procedure adopted by the State Bar, which contain procedural safeguards that have been held to be adequate to assure procedural due process.

[27 a, b] **135 Procedure—Rules of Procedure**
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act
The rules of evidence in civil cases in courts of record, including applicable sections of the Code of Civil Procedure and judicial decisions as well as the Evidence Code, are followed in State Bar disciplinary proceedings. (Rule 556, Rules Proc. of State Bar.)

[28] **108 Procedure—Failure to Appear at Trial**
114 Procedure—Subpoenas
148 Evidence—Witnesses
Where respondent was not a California resident, and thus not subject to subpoena, respondent's attendance as a witness at the disciplinary hearing could have been required by notice to respondent's counsel.

[29] **108 Procedure—Failure to Appear at Trial**
114 Procedure—Subpoenas
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act
Evidence Code section 776, providing for calling the opposing party as an adverse witness, does not empower the State Bar to require the respondent's presence at a disciplinary hearing.

[30] **108 Procedure—Failure to Appear at Trial**
114 Procedure—Subpoenas
148 Evidence—Witnesses
The respondent in a disciplinary proceeding has an obligation to be present at the hearing even if not subpoenaed or noticed to appear as a witness.

[31] **120 Procedure—Conduct of Trial**
139 Procedure—Miscellaneous
148 Evidence—Witnesses
194 Statutes Outside State Bar Act
In State Bar Court proceedings, the court acts as an administrative arm of the Supreme Court, and State Bar Court judges and referees function as "judicial officers." Therefore, under Code of Civil Procedure section 1990, any person present at a State Bar Court hearing may be compelled to take the witness stand by the judge or referee.

[32 a, b] **144 Evidence—Self-Incrimination**
193 Constitutional Issues
Since attorney discipline matters are not criminal cases for purposes of the Fifth Amendment of the U.S. Constitution, an attorney may be called to the witness stand at the attorney's own hearing, and immunized testimony may be introduced against the attorney. However, the attorney may assert the Fifth Amendment privilege against self-incrimination in response to specific questions, and no adverse inference may be drawn from such invocation. An attorney may not be disciplined solely based on invoking the privilege against self-incrimination.

[33 a, b] **106.50 Procedure—Pleadings—Answer**
120 Procedure—Conduct of Trial
144 Evidence—Self-Incrimination
193 Constitutional Issues
Where respondent refused to take the witness stand when ordered to do so by the referee at the disciplinary hearing, and invoked the protection of the Fifth Amendment through counsel and not in response to specific questions, respondent's actions were improper. If appearing under subpoena, respondent's actions could have been certified for contempt before the Superior Court. If culpability had been found on the underlying misconduct charges, respondent's actions could have been considered evidence in aggravation. However, the referee did not have contempt power and lacked the authority to sanction respondent by striking respondent's answer to the notice to show cause and deeming the allegations admitted by default as a matter of law.

[34 a-c] **142 Evidence—Hearsay**
The handwritten complaint and accompanying documents of a complaining client, since deceased, were inadmissible as hearsay. The documents did not fit within any of the exceptions to the hearsay rule regarding deceased declarants. The deceased client's letter to respondent could not be admitted as an adoptive admission because there was no admissible evidence of words or other conduct by respondent demonstrating adoption of the statements in the letter. The corroborative evidence exception was also inapplicable because there was no admissible evidence in record which the documents would serve to substantiate.

[35] **162.11 Proof—State Bar's Burden—Clear and Convincing**
162.20 Proof—Respondent's Burden
801.90 Standards—General Issues
Circumstances in mitigation and aggravation must be established by clear and convincing evidence.

[36] **515 Aggravation—Prior Record—Declined to Find**
802.21 Standards—Definitions—Prior Record
An attorney's administrative suspension for failure to pay bar dues does not constitute prior discipline for purposes of weighing the appropriate discipline in a subsequent disciplinary case, in that the prior snspension is administrative in nature and does not result from a finding of misconduct.

[37] **611 Aggravation—Lack of Candor—Bar—Found**
Respondent's failure to maintain a current address with the State Bar's membership records office, which delayed and stymied the investigation of respondent's misconduct, constituted failure to cooperate with the State Bar.

[38] **615 Aggravation—Lack of Candor—Bar—Declined to Find**
Respondent's failure to obey the hearing referee's order to take the witness stand at the disciplinary hearing was not considered an aggravating factor, where respondent was acting on the advice of counsel and the law was not clear at the time. Nor was the courtroom behavior of respondent's counsel attributable to respondent in assessing respondent's cooperation with the State Bar.

[39] **541 Aggravation—Bad Faith, Dishonesty—Found**
591 Aggravation—Indifference—Found
601 Aggravation—Lack of Candor—Victim—Found
621 Aggravation—Lack of Remorse—Found
Where respondent failed to make restitution efforts until after disciplinary actions had been instituted; asserted that it was the State Bar's duty to contact her clients when she abandoned her practice; and had committed misconduct involving acts of deceit and bad faith, respondent's conduct evidenced a lack of understanding of her duties and insight into her misconduct.

[40 a, b] **725.11 Mitigation—Disability/Illness—Found**
Extreme emotional difficulties or stressful family circumstances can be considered as mitigating evidence where it is established by expert testimony that the emotional difficulties were responsible for the attorney's misconduct, and the attorney has demonstrated full recovery and rehabilitation by clear and convincing evidence, such that recurrence of further misconduct is unlikely.

[41] **725.32 Mitigation—Disability/Illness—Found but Discounted**
Evidence of severe emotional problems does not mitigate misconduct which arose prior to the triggering of the attorney's emotional difficulties.

[42] **725.11 Mitigation—Disability/Illness—Found**
Acute depression and other psychological problems can explain, but not excuse inattention to the demands of a law practice and the ethical improprieties that result. To the degree that emotional problems underlay respondent's failure to provide competent legal services, to communicate with clients, and to protect clients' rights when ceasing to practice, evidence of respondent's recovery from these problems and the unlikelihood of a recurrence was mitigating.

[43] **795 Mitigation—Other—Declined to Find**
Where misconduct involves misappropriation, inexperience is irrelevant and has no weight as mitigation.

[44] **750.59 Mitigation—Rehabilitation—Declined to Find**
The lack of any subsequent misconduct charges against a respondent who had moved to another state was not compelling mitigation, since respondent had not been representing California clients and misconduct allegations arising in another state would not necessarily be reported to discipline authorities in California.

[45] **765.59 Mitigation—Pro Bono Work—Declined to Find**
Clients of limited or no means are entitled to able, responsive and trustworthy counsel from the attorneys they hire. Improper or unethical conduct is not excused because the attorney represents those of limited means.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
221.11 Section 6106—Deliberate Dishonesty/Fraud
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.01 Rule 4-100(A) [former 8-101(A)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.11 Misappropriation—Deliberate Theft/Dishonesty

Not Found

213.15 Section 6068(a)
220.15 Section 6103, clause 2
221.50 Section 6106
277.65 Rule 3-700(D)(2) [former 2-111(A)(3)]
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]

Aggravation

Found

521 Multiple Acts
582.10 Harm to Client

Mitigation

Declined to Find

710.53 No Prior Record
745.51 Remorse/Restitution

Standards

801.30 Effect as Guidelines
802.30 Purposes of Sanctions

Discipline

1013.11 Stayed Suspension—5 Years
1015.09 Actual Suspension—3 Years
1017.11 Probation—5 Years

Probation Conditions

1021 Restitution
1022.10 Probation Monitor Appointed
1024 Ethics Exam/School
1025 Office Management
1026 Trust Account Auditing
1030 Standard 1.4(c)(ii)

Other

1091 Substantive Issues re Discipline—Proportionality

OPINION

STOVITZ, J.:

Respondent Alvaader Frazier was admitted to practice in December 1982. The amended notice to show cause[1] charged respondent with seven counts of misconduct, dating from November 1983 until May 1985. After hearing, the referee concluded that respondent (1) abandoned clients in six matters (rule 2-111(A)(2))[2]; (2) failed to return unearned fees to one additional client as well as to four of the abandoned clients (rule 2-111(A)(3)); (3) failed to perform legal services competently for seven clients, with no legal work performed for five of the clients (rule 6-101(A)(2)); (4) committed acts of moral turpitude and dishonesty (Bus. & Prof. Code, § 6106)[3] by: misappropriating $6,881.60 in escrow funds by means of a fabricated bankruptcy order, misappropriating unearned client fees totalling $10,976, giving two checks written on a closed trust account to two different clients, obtaining $500 from a client under false pretenses, and representing to two different clients that lawsuits had been filed on their behalf when they had not; (5) failed to return advanced costs and other client funds to which three clients were entitled (rule 8-101(B)(4)); (6) failed to deposit client funds in a trust account (rule 8-101(A)), and (7) in all six cases of misconduct, wilfully accepted employment for which she had not the time, skill and resources to perform with competence (rule 6-101(B)(2)).

In mitigation, respondent submitted testimony from her psychotherapist who had treated her for deep depression after respondent had left California and moved to New York. She testified as to respondent's recovery. Respondent also submitted numerous letters attesting to her character and activities on behalf of low income clients and political causes. Proof was adduced that respondent had made settlements with most complainants, albeit after the institution of bar proceedings against her. The hearing referee concluded that the nature of the misconduct found coupled with aggravating factors, such as respondent's past suspension for non-payment of fees, her failure to cooperate at the hearing, and bad faith toward and harm to her former clients, outweighed the mitigating factors. Under the standards for attorney discipline, the referee concluded that disbarment was warranted.

Respondent filed this request for review. Although respondent's contest is largely a procedural or due process attack on the decision, she also urges lack of a factual basis for disciplinary findings regarding two clients. She also claims her answer to one count of the amended notice to show cause should not have been stricken as a sanction for her refusal to testify in the State Bar hearing.

With the exception of our determination that the referee erred in striking respondent's answer, we have found that none of respondent's procedural claims warrant relief. [1] However, on our independent review of the record, we find fewer acts of misconduct than determined by the referee and greater mitigating evidence than he found in the form of emotional and psychological difficulties suffered by respondent. Nevertheless, we find respondent culpable of serious misconduct, commencing just over one year after her admission, including five instances of abandoning or withdrawing from cases without protecting the clients' causes of action; failing to perform legal services competently and failing to communicate with the clients in those five cases; failing to return promptly unearned fees in four of those cases; making misleading statements to two clients; failing to deposit $6,881.60 from the bankruptcy estate of a client in her trust account and later misappropriating the trust funds; and accepting legal

1. The examiner originally filed a 13-count notice against respondent. On April 6, 1989, the examiner moved to dismiss six counts of the original notice and amend the notice to add two additional allegations of misconduct to renumbered count three (Mary Peterson). Respondent opposed the amendment to add the additional charges. Leave to amend the notice was granted by order dated April 19, 1989. Respondent's challenge on review to the amendment is discussed *infra*.

2. Unless noted otherwise, all further references to rules are to the Rules of Professional Conduct effective between January 1, 1975, and May 26, 1989.

3. Unless noted otherwise, all further references to sections or codes are to the Business and Professions Code.

employment in these matters without having sufficient time, resources or ability to perform the necessary work with competence. We find this misconduct to warrant serious discipline, but given respondent's mitigating and rehabilitative evidence, we do not conclude, as did the referee, that disbarment is required. The protection of the public interest and the profession will be served in this matter by a five-year suspension stayed on conditions of three years actual suspension and until restitution and rehabilitation are proven as well as placement on a period of supervised probation on terms outlined at the conclusion of this opinion.

I. PROCEDURAL ISSUES

Since much of respondent's attack on the hearing referee's decision focuses on procedural issues, we discuss them first.

A. Motion to Augment the Record

First we address respondent's request to augment the record before us to include the decision, order, transcript and declarations filed in *In the Matter of Alvaader Frazier*, case number 90-TE-14293, a proceeding to consider enrolling respondent involuntarily as an inactive member of the bar pursuant to section 6007 (c) (hereinafter "6007 proceeding"). That proceeding was started after the filing of the hearing referee's decision which is before us on review. Respondent claims that the 6007 proceeding record bears on the issues of her affirmative defenses and showing of mitigation, is related to the underlying disciplinary action and that for the record to be complete and to serve the interests of justice, all relevant decisions, specifically the 6007 proceeding and its record, should be before us.

In opposing respondent's position, the examiner disputes that the disposition of the 6007 proceeding is in any way related to the underlying disciplinary recommendation. She notes the issues in a proceeding for inactive enrollment are different from a disciplinary case and, later in her argument, that unlike a disciplinary hearing, the formal rules of evidence are not in force. She argues that what respondent is actually seeking is to present additional evidence. As such, under rule 562 of the Transitional Rules of Procedure of the State Bar, respondent must show, under penalty of perjury, why such evidence was not presented at the time of the hearing. To illustrate, she notes two cases, *Weber* v. *State Bar* (1988) 47 Cal.3d 492 and *In re Naney* (1990) 51 Cal.3d 186, where motions had been granted to present additional evidence after the hearing decision had been rendered, where the evidence consisted of aggravating circumstances which occurred after the hearing. Finally, the examiner outlines her objections to specific exhibits sought to be admitted by respondent. (OTC brief in opposition, pp. 4-11.)

[2a] Rule 1304 of the Provisional Rules of Practice of the State Bar Court provides that augmentation requests will be granted only if it is found that "the original record is incomplete or incorrect." This follows the Supreme Court policy of only relying on evidence presented to the trier of fact. (*In re Rivas* (1989) 49 Cal.3d 794, 801.) Such out-of-court evidence ordinarily involves hearsay and offers no means to test the credibility of the declarant. (*Ibid.*) "Such evidence is virtually impossible to evaluate in the absence of cross-examination and, to the extent it consists of opinions about the [respondent's] mental attitude, is often based on his own self-serving, out-of-court statements." (*Lydon* v. *State Bar* (1988) 45 Cal.3d 1181, 1187.) The only general exception the Supreme Court has recognized to its steadfast rule of refusing to entertain evidence not heard by the State Bar Court is for limited (i.e., documentary) evidence of subsequent rehabilitation when it is the only means to meet a heavy burden to demonstrate recovery from substance addiction or a mental disorder. (*Hawes* v. *State Bar* (1990) 51 Cal.3d 587, 596.)

[3] Section 6007 proceedings are not proceedings related to disciplinary actions such that consolidation of the cases is mandated. In fact, disciplinary and 6007 proceedings may be conducted on simultaneous, parallel case tracks. (Cf. *Ballard* v. *State Bar* (1983) 35 Cal.3d 274, 288 [where attorney was competent to assist in his defense, and with both disciplinary and 6007 proceedings filed, the State Bar would have to conduct parallel proceedings].) [4] We do take judicial notice of the existence of the 6007 proceeding and the resulting decision therein finding that respondent had rebutted the presumption from the disbarment recommendation that

respondent's conduct posed a continuing substantial threat of harm to the interest of her clients or the public. However, as the Supreme Court noted in *Conway* v. *State Bar* (1989) 47 Cal.3d 1107, 1119, "Neither the involuntary inactive enrollment order itself nor any of the findings made in those proceedings is binding or has any probative value in the formal disciplinary case." (Footnote omitted.) We recognize that although no involuntary inactive enrollment order was made in this case, the principle nevertheless remains the same. **[2b]** Here, the proffered evidence is not offered to "correct" any omission in the record developed below. Therefore, we find that respondent has not demonstrated that the record must be augmented to correct or complete the hearing record.

[5] We could also construe respondent's motion as seeking to admit additional evidence under rule 562 of the Rules of Procedure of the State Bar. The rule requires the movant to offer by affidavit or declaration, the substance of the new evidence and demonstrate good cause why the proffered evidence was not previously presented. (Rules Proc. of State Bar, rule 562.)[4] Respondent does not summarize the substance of the evidence sought to be added from the 6007 proceeding and quotes a mere sentence fragment from the 23-page decision resolving the 6007 proceeding. There is no claim that the witnesses or the affiants were unavailable to present their evidence on rehabilitation at the disciplinary hearing or that the substance of their testimony concerns events or observations which post-date the hearing. Reverend Al Sharpton was the only witness in the 6007 proceeding who did not offer some form of evidence (report or character letter) at the disciplinary hearing. We find that respondent has not demonstrated good cause to admit this additional evidence not submitted to the hearing referee. Accordingly, we deny her request.

B. Due Process Objections

Respondent asserts that on a variety of grounds she was denied a fair hearing in the State Bar Court. Her objections fall into two general categories which claim that she was denied a fair hearing because of: (1) adverse rulings prior to trial which assertedly curtailed or prevented discovery to support respondent's affirmative defenses, thereby allowing an amendment of the notice to show cause by the examiner, which respondent contended was prejudicial, and which resulted in the denial of respondent's request of a three-referee panel; and (2) the conduct of the hearing by the hearing referee, during which, according to respondent, the referee's bias and prejudice against respondent and her counsel were manifest and his rulings on admissibility of evidence and testimony constituted prejudicial error.

1. Pre-trial rulings

The issues concerning discovery were raised prior to trial and the rulings reviewed by the discovery review referee. (Rules Proc. of State Bar, rule 324.) **[6a]** Respondent propounded a series of interrogatories concerning the gender, race and practice of members of the State Bar, particularly those members who had been disciplined by the Supreme Court in the recent past, and sought statistical and other information she contended was held by the State Bar. In response, the examiner provided what documents she had in connection with the allegations in the complaint, as well as information from the *California Lawyer* periodical and statistical compilations of cases resolved by the State Bar Court by type of discipline imposed. The examiner did not provide any information concerning the race, gender or practice of members of the California bar, representing that such information was not gathered or maintained by the State Bar's membership records and to secure it would require a survey of the entire membership of the bar, which she was not required to do to satisfy respondent's discovery demand pursuant to Code of Civil Procedure section 2030(f)(2). The hearing referee did not find the State Bar's position to be unreasonable and denied respondent's motion to compel discovery.

[6b] The denial of respondent's motion to compel discovery does not demonstrate a denial of due

4. Since this hearing began prior to the commencement of hearings by the present State Bar Court, the hearing referee applied the rules of procedure effective prior to September 1, 1989. (Trans. Rules Proc. of State Bar, rule 109.)

process. Had the information sought been maintained by the State Bar, then respondent's motion to compel would have carried more weight. Given that the information sought was not in the possession and control of the State Bar, respondent's restrictions in developing her affirmative defenses on these grounds were limited not by the State Bar but by her own resources. [7] Respondent's claim of bias is highly generalized and such broad claims have been rejected previously. (Cf. *In re Utz* (1989) 48 Cal.3d 468, 477-478.)

Respondent objected at the hearing, and at the time of a proposed amendment to the notice to show cause, to the added charges of misconduct related to a check issued against insufficient funds (hereafter, "NSF check") and alleged solicitation of one Mary Peterson by respondent. The motion to amend the notice was filed on April 6, 1989, and granted on April 19, 1989. Respondent alleged unfair surprise in that she did not have enough time to prepare a defense to the added charges, resulting in a violation of due process. The examiner averred in her supporting declaration to her motion to file the amended notice that she had advised counsel for respondent of the additional charges in December 1988 during the exchange of informal discovery. Both the hearing referee and the discovery review referee concluded that there was sufficient advance warning to respondent of the additional misconduct allegations to enable her to adequately prepare to meet the additional charges. We agree.

[8] A notice to show cause may be amended, including amending to conform to proof at the hearing, so long as the attorney is given a reasonable opportunity to defend the charge (*Rose* v. *State Bar* (1989) 49 Cal.3d 646, 654, citing *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 420) and providing that the amendment is not a trap for the unwary respondent who has already introduced evidence to defend a different theory of charges. (*In re Ruffalo* (1968) 390 U.S. 544, 550-551.) Considering the informal notice to respondent almost five months before the amendment was filed and the one-month formal notice given prior to trial, respondent was accorded adequate time to prepare her defense. (See *Marquette* v. *State Bar* (1988) 44 Cal.3d 253, 264-265 [new allegations arose in testimony on first day of hearing; notice was amended a week later; and attorney given one week to file answer and a continuance of more than one month to prepare defense; no due process violation found].) Therefore, we do not find a due process violation regarding the additional allegations in the amended notice to show cause.

[9] Respondent is not entitled to a three-member panel as a matter of due process. (*In re Utz*, *supra*, 48 Cal.3d 468, 477-478; *In re* Demergian (1989) 48 Cal.3d 284, 292-293.) It was evident from the pretrial proceedings that the hearing would take more than one day of trial and the request for a three-member panel was denied on that basis. (Order denying three-member panel dated March 30, 1989.) Given the estimated length of the hearing, the State Bar Court had no discretion to assign the matter to a three-member panel. (Bus. & Prof. Code, § 6079 (b); *In re Demergian*, *supra*, 48 Cal.3d at p. 293.) In any event, this review panel of three judges has conducted an independent examination of the record. (Rule 453, Rules Proc. of State Bar.)

2. Conduct of the hearing

[10] Respondent filed numerous motions to disqualify the hearing referee based upon her assertion under rule 230, Rules of Procedure of the State Bar, that a reasonable person might question the impartiality of the hearing referee because of his personal bias or prejudice concerning respondent and her counsel.[5] This disqualification standard is drawn from Code of Civil Procedure section 170.1, subdivision (a)(6)(C) and we agree with the (then) State Bar Court Assistant Presiding Referee's approach in looking to case law interpreting this portion of section 170.1 to resolve the issue in his decision

5. The pertinent portion of rule 230 reads as follows: "A referee shall be disqualified if: . . . (3) a person aware of the facts might reasonably entertain a doubt that the referee is biased or prejudiced against the examiner, respondent or respondent's attorney, provided, however, that such a challenge must be supported by a verified showing of the facts supporting this inference." (Rule 230, Rules Proc. of State Bar.)

dismissing respondent's motion. The applicable standard articulated in *United Farm Workers of America* v. *Superior Court* (1985) 170 Cal.App.3d 97, 104, looks to "whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality." The Assistant Presiding Referee concluded that there was no doubt as to the hearing referee's impartiality at that stage in the proceedings and that his rulings were within the limits of his discretion. Our review of the record affords no basis to differ with that assessment.

[11] The assigned hearing judge or referee is entitled to exert reasonable control over the conduct of proceedings. (See *Dixon* v. *State Bar* (1982) 32 Cal.3d 728, 736.) Requiring one counsel to question a witness from beginning to end, asking that respondent not speak to her attorneys while the hearing referee is addressing counsel and expecting that counsel will note their objections for the record and move forward with the hearing are not unreasonable standards for courtroom behavior, do not deprive respondent of the statutory recognition of legal assistance during her disciplinary hearing (see Bus. & Prof. Code, § 6085 (b)) and do not, without more, constitute bias on the referee's part.

We reject as without merit two additional claims by respondent of bias allegedly committed by the hearing referee. **[12]** In attempting to complete the mitigation portion of the hearing after a number of continuances to accommodate the litigation schedules of respondent and her counsel, the hearing referee wrote to a New York judge who was presiding over a criminal jury trial in which both respondent and one of her counsel were appearing on behalf of the criminal defendant. The criminal trial dates conflicted with hearing dates scheduled in the State Bar Court. In correspondence which was not originally provided the parties, the hearing referee accurately advised the New York judge of the nature and status of the public California disciplinary proceedings and asked if the jury trial could be accommodated in some way. (Exh. AA.) The New York judge responded that his trial schedule could not be altered (exh. BB), and later referred in court to the hearing referee's letter to respondent and her counsel in an appearance involving the criminal case after which the parties obtained copies. While the better way may have been for the hearing referee to advise counsel on both sides of his intent to contact the New York judge and copy them on his correspondence, his conduct does not establish an appearance to a reasonable person of bias constituting a denial of due process. Attempting to coordinate conflicting trial dates is not improper in and of itself and there is no evidence in the contents of the referee's communications that showed bias against the respondent.

[13] The other claimed instance of bias was the hearing referee's recommendation to the Office of Trial Counsel to investigate the conduct of respondent's two New York counsel for possible disciplinary misconduct and to recommend to the State Bar Court that the *pro hac vice* admission of both counsel be revoked. (See Cal. Rules of Court, rule 983.) The hearing referee was careful to refer these determinations to other bodies for final determination. Because of his referral, he is not in the same position as a trial judge ruling on a contempt citation and we find inapplicable respondent's citation to U.S. Supreme Court decisions in contempt cases.

3. Expert witness testimony

[14] Respondent claims that she was entitled to present psychiatric testimony during the culpability phase of the hearing. Unless respondent was asserting a defense of insanity to the misconduct charges (see *Newton* v. *State Bar* (1983) 33 Cal.3d 480), or claiming inability to assist in her own defense (see *Slaten* v. *State Bar* (1988) 46 Cal.3d 48, 53-57), which she was not, testimony as to psychological disorders related to the misconduct constitutes at most evidence in *mitigation* of the discipline to be imposed. (*Porter* v. *State Bar* (1990) 52 Cal.3d 518; *Silva-Vidor* v. *State Bar* (1989) 49 Cal.3d 1071; *In re Lamb* (1989) 49 Cal.3d 239.) The hearing referee's determination that such evidence be presented only after a finding of culpability is consistent with the law and did not deny respondent a fair hearing.

II. FACTS

The factual summary presents the counts in the order of the amended notice to show cause, with the exception of the Brumback matter, count five, which will be discussed separately. Unless otherwise noted,

these factual findings and conclusions of law are drawn from the referee's decision, are supported by the record and we concur in them. When we disagree with the sufficiency of the evidence for a finding or conclusion by the referee or where there is a substantial issue raised by the parties, a more thorough examination of the issue will be presented.

A. Count One (Jackson-Day)

Respondent was hired on March 22, 1983, by Rogernald Jackson, a retired scientist from the U.S. Department of Agriculture, and William Day, a college chemistry professor, to represent them in a civil lawsuit. Each paid $1,000 in advanced attorneys fees and agreed that respondent's time would be billed at a rate of $75.00 an hour. On August 29, 1983, respondent filed suit against two named defendants and up to 1,000 "Doe" defendants to be named later, and was able to serve one of the named defendants. Thereafter, respondent asked for an additional $500 from each of her clients on December 26, 1983, in order to file an answer to a cross-complaint. She was paid upon request and filed the answer to the cross-complaint on behalf of Day and Jackson on January 31, 1984. Upon request of her clients, respondent prepared an accounting of her time dated December 20, 1983. Day and Jackson were unable to contact respondent thereafter despite numerous requests to her for additional information through telephone calls and letters. Jackson and Day hired new counsel on March 18, 1986, and new counsel sent respondent a substitution of attorney form and letter requesting the client file on March 18, 1986. Receiving no answer from respondent, the new counsel was forced to file a motion to discharge respondent and substitute himself as new counsel.

In 1989, respondent paid Jackson and Day $1,500 each in exchange for releasing all claims against respondent. The releases are dated March 31, 1989 (Jackson) and May 10, 1989 (Day).

The hearing referee found that respondent had wilfully violated rule 2-111(A)(2) in that she had withdrawn from employment without taking reasonable steps to avoid prejudice to her clients, failed to perform legal services competently, contrary to rule 6-101(A)(2), and failed to communicate with her clients or ignored her clients' needs, contrary to section 6068 (a).[6] **[15 - see fn. 6]** Particularly given respondent's failure to cooperate with subsequent counsel, her failure to respond to pointed letters from her clients and her total inaction after filing the answer to the cross-complaint, these conclusions are well grounded in the record.

[16] The referee made no finding on the charge that respondent had failed to return unearned fees to her clients as required under rule 2-111(A)(3). We find that in light of respondent's accounting for her time dated December 20, 1983, and her subsequent filing of an answer to the cross-complaint, the charge that she retained fees which she did not earn is unsupported in the record.

B. Count Two (Vaz)

Respondent was retained on a contingency fee basis by Toni Vaz to file and prosecute a civil lawsuit on her behalf against a retail store for assault and battery (personal injury). The retainer agreement was signed on April 25, 1984, and Ms. Vaz paid respondent $300 in advanced costs in three payments, the last one on June 5, 1984.[7] Ms. Vaz testified

6. In each client matter, the hearing referee concluded that respondent had committed wilful violations of sections 6103 and 6068 (a). The Supreme Court held in *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815, and numerous cases thereafter that section 6103 "does not define a duty or obligation of an attorney, but provides only that violation of his oath and duties defined elsewhere is a ground for discipline." Accordingly, we do not find any culpability on that basis. As to section 6068 (a), it appears to have been "appended to each conclusion that an act of moral turpitude or a violation of the Rules of Professional Conduct had occurred. As in *Baker*, we fail to see how [respondent's] alleged misconduct constitutes a violation of section 6068 (a)." (*Lipson* v. *State Bar* (1991) 53 Cal.3d 1010, 1016.) **[15]** However where, as in this count, we find a failure to communicate or an inattention to client needs which predates the adoption of section 6068 (m) (see *Baker*, *supra*, 49 Cal.3d at pp. 814-815), the pre-section 6068 (m) doctrine underlying this duty remains a viable ground of discipline as a violation of section 6068 (a). (*Layton* v. *State Bar* (1991) 50 Cal.3d 889, 903-904; *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.)

7. The hearing referee found that on a later unspecified date the respondent represented that she had filed a lawsuit on behalf of Ms. Vaz seeking $1 million in damages. There is no support for this finding in either Ms. Vaz's testimony at the hearing nor in the documents submitted relating to this count. Therefore, we do not adopt this finding.

that she was unable to reach respondent after that date by telephone and, after leaving numerous phone messages, finally visited respondent's office, where she learned that respondent had moved without leaving a forwarding address. Examination of court records by the State Bar investigator did not disclose any lawsuit filed on behalf of Ms. Vaz against the retail store.

Respondent repaid $300 to Ms. Vaz by letter from her attorney dated November 25, 1988.

In this review, respondent has not disputed the facts found by the referee in this count. The hearing referee concluded, and we agree, that respondent failed to perform legal services competently, contrary to rule 6-101(A)(2). He also found that respondent withdrew from employment without taking reasonable steps to avoid foreseeable prejudice, in violation of rule 2-111(A)(2). Based on the referee's findings supported by the record showing that respondent failed to return Vaz's phone calls, we also adopt the referee's conclusion that respondent breached her duty to communicate with her client, contrary to section 6068 (a). (See *ante*, footnote 6.)

[17] We cannot concur with the referee's conclusion that respondent's failure to return unearned costs promptly constituted a violation of rule 2-111(A)(3). (Decision, p. 7.) As the Supreme Court noted in *Read* v. *State Bar* (1991) 53 Cal.3d 394, 410, advances for payments of expenses incurred during representation are outside the scope of rule 2-111(A)(3), which deals with the refunding of unearned legal fees.

[18] The referee did not address in his conclusions of law the State Bar's charges in this count that respondent violated rule 8-101(B)(4) and section 6106. We do not find that respondent's failure to return unearned costs violated rule 8-101(B)(4) without evidence, as required by the rule's terms, that Vaz requested return of the monies. (*Chefsky* v. *State Bar* (1984) 36 Cal.3d 116, 126-127.) Although no lawsuit was filed on Vaz's behalf and Vaz was entitled to refund of these monies without having to wait four and a half years, we do not find that respondent's inaction alone supports a finding that she misappropriated those costs or that her failures constituted acts of moral turpitude under section 6106.

C. Count Three (Peterson)

Mary Peterson was initially hired by respondent to move her offices from 2716 South Western Avenue to 2822 South Western Avenue, both addresses in Los Angeles. In payment, respondent gave Peterson a check dated December 31, 1984, drawn on her client trust account for $126.37. The check was returned to Peterson stamped "account closed." Peterson testified that after reaching respondent by telephone, respondent promised her that she would make the check good, but never did. Respondent disputes the referee's finding that respondent was aware that the trust account was closed at the time she gave Peterson the check. We agree that the record is not clear on this point, given the limited bank records that were offered by the State Bar. [19] However, respondent gave a trust account check to pay for a personal expense and, after her bank refused to honor the check, did not meet her financial obligation represented by the NSF check, and thus committed an act of moral turpitude. (*Cannon* v. *State Bar* (1990) 51 Cal.3d 1103, 1113-1114.)

After her early 1985 telephone conversation with respondent, Peterson met with respondent to seek respondent's help in two matters: a worker's compensation claim and an action to recover her home. Peterson signed a retainer agreement on February 25, 1985, advanced respondent $600 in fees on that date and paid respondent an additional $900 in fees by April 15, 1985. Respondent met with Peterson in early May 1985 and advised her that respondent would be meeting shortly with one of the parties that would conceivably be a defendant in the real estate action. Peterson never heard from or saw respondent after that meeting. Her phone messages to respondent were not returned and office visits were unavailing. No work was done on the worker's compensation matter and no lawsuit was filed on the real estate dispute; the latter is now pending litigation filed by Peterson's subsequent legal counsel.

Peterson received a $1,500 refund from respondent on or about November 25, 1988, but respondent did not return or preserve Peterson's file or other documents entrusted to her.

The hearing referee concluded, and we agree, that respondent had abandoned her client, contrary to

rule 2-111(A)(2); that her refund of the advanced unearned attorneys fees was not prompt, contrary to rule 2-111(A)(3); and that in failing to take any action on the worker's compensation matter or to file any action on behalf on Peterson on the real estate matter, respondent failed to perform legal services competently, contrary to rule 6-101(A)(2). In addition, we find, as the referee did implicitly, that respondent's violation of section 6068 (a) resulted from the breach of her duty to communicate with her client. (See *ante*, footnote 6.)

The referee also found that respondent had committed acts of moral turpitude and dishonesty by supplying an NSF trust account check to pay for her office move contrary to section 6106 (see *ante*) and by misappropriating $1,500 in advanced fees. We have already concluded that respondent's tendering of the NSF check and subsequent disregard of the underlying debt to Peterson constituted an act of moral turpitude. **[20]** However, after reviewing Supreme Court decisions dealing with the retention of unearned advanced fees, we do not find a basis in the case law to support the proposition that an attorney's failure to return promptly unearned fees constitutes an act of moral turpitude encompassed by section 6106. Given that the retention of unearned fees is a violation of an express duty under rule 2-111(A)(3) (now rule 3-700(D)(2)), we need not make a duplicative finding of culpability for the same misconduct under section 6106. (*Bates* v. *State Bar* (1990) 51 Cal.3d 1056, 1060.)

D. Count Four (Butler)

Charlotte Butler retained respondent on September 3, 1984, to file a civil suit for damages on her behalf. At her initial consultation with respondent, Butler paid $150 in advanced attorney fees. Another $150 was paid to respondent on September 21, 1984, to, in the words of Butler, "file the lawsuit." Two additional payments of $150 each were made in November 1984, with respondent representing to Butler each time that the lawsuit was filed and pending court action. Butler's last payment to respondent was in March 1985, for a total of $750 in advanced fees. Butler was unable to contact respondent after March 1985 despite numerous telephone calls and finally visited respondent's office, where she was advised that respondent had left without a forwarding address or telephone number. A State Bar investigator testified that no lawsuit on behalf of Butler was on file in Los Angeles Superior Court.

Respondent gave Butler a check on or about November 25, 1988, for $750, representing the monies advanced by Butler.

Respondent has not disputed the referee's findings and conclusions. We concur with the hearing referee's conclusions that respondent's failure to perform services and departure without providing her client with a forwarding address, telephone number, or her file breached rule 2-111(A)(2) as an abandonment of Butler without protecting her rights; respondent's failure to return fees advanced by Butler until November 1988 violated rule 2-111(A)(3), and her misrepresentations as to the status of the lawsuit to Butler constituted an act of moral turpitude under section 6106. The referee concluded that respondent's acts generally violated section 6068 (a). We limit that finding solely to respondent's failure to communicate with Butler. Consistent with our analysis under count three, we do not find, as did the referee, that respondent's lengthy retention of unearned fees was an act of dishonesty, corruption or moral turpitude contrary to section 6106.

E. Count Six (Allen)

Respondent was retained by Evelyn Allen on November 16, 1983, to represent Allen in her chapter 11 bankruptcy proceeding concerning her board and care facility for mentally disabled adults. Allen's prior counsel, William Tookey, had filed the initial petition and all other papers up to respondent's substitution of counsel form filed with the bankruptcy court on November 30, 1983. Allen paid respondent $300 in advanced fees at her initial meeting with respondent and $500 more on November 29, 1983.

Allen's real estate holdings were listed in her bankruptcy filings and as such were subject to the jurisdiction of the court. (11 U.S.C. § 525.) Allen's creditors filed their claims with the bankruptcy court and would be paid under a court- and creditor-approved plan from assets in the estate. (11 U.S.C. §§

1123, 1129.) Other than in the ordinary course of business with approval of the bankruptcy judge, Allen, as debtor in possession, could only sell or lease her property after notice and a hearing. (11 U.S.C. § 363 (b).) During this time, the bankruptcy judge assigned to the Allen case was John Bergener.[8]

Allen learned from a real estate agent that her house in Altadena was being sold. She contacted respondent, who asked for the name of the escrow agent and advised Allen that she (respondent) would send a courier to the escrow office to obtain the balance of the funds from the sale and convey those monies to the bankruptcy court. Closing on the property occurred on December 23, 1983. Copies of two checks made payable to respondent, representing the balance of funds from the sale totaling $6,881.60, were in the file obtained from the escrow company and showed that the checks were deposited by respondent in her bank account on or about December 23, 1983 ($6,385.93) and March 27, 1984 ($485.67). The escrow file also contained an order dated December 6, 1983, allegedly from the bankruptcy court, referring to a "Petition For Sale of Property Outside of the Ordinary Course of Business." The terms of the order authorized the sale of Allen's Altadena property, with the net funds to be delivered to the respondent's trust account pending further order of the bankruptcy court. The order was on respondent's letterhead, bore a date aud entered stamp for December 6, 1983, and was stamped at the end of the order with the name "William J. Lasarow."[9]

The complete bankruptcy file does not contain nor does the accompanying docket sheet note the petition for the sale of the property or the order authorizing the sale. There are no additional proceedings directing the disbursal of the net funds from the sale evident in the file or docket sheet. Allen testified that she did not receive any funds in connection with the sale, nor could she contact respondent after March 1984. The only filing respondent made in bankruptcy court on behalf of Allen which is reflected in the bankruptcy file or docket sheet was her November 30, 1983 substitution.

After the initiation of disciplinary proceedings, respondent paid Allen $3,000 in exchange for releasing all claims against respondent.

The hearing referee concluded on this evidence that the bankruptcy order was fraudulent and that respondent misappropriated the funds owed to the bankruptcy estate. **[21]** Respondent's wilful violation of rule 8-101(B)(4) has been demonstrated by her failure to pay the funds as directed by the bankruptcy court. The funds can be traced to respondent's hands from the copies of the checks in the escrow file. Since then, the funds themselves have never been accounted for. Respondent was responsible for depositing them in a trust account pursuant to rule 8-101(A)[10] and under the terms of the bankruptcy order authorizing the sale. We concur with the hearing referee that this evidence supports a finding of misappropriation (see *Greenbaum* v. *State Bar* (1987) 43 Cal.3d 543, 550) and constitutes an act of moral turpitude and dishonesty as well. (Bus. & Prof. Code, § 6106; *McKnight* v. *State Bar* (1991) 53 Cal.3d 1025, 1033-1034.) The record also supports the findings that respondent failed to communicate with Allen, thereafter abandoned her, and failed to perform legal services competently. These findings justify the conclusion that respondent wilfully violated section 6068 (a), and rules 2-111(A)(2) and 6-101(A)(2).

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8. The matter was later transferred to Bankruptcy Judge Geraldine Mund. (Exh. 32.)

9. At the time alleged in this count, Judge Lasarow was the presiding judge of the U.S. Bankruptcy Court for the Central District of California.

10. Copies of two checks made payable to respondent, representing the balance of funds from the sale totaling $6,881.60, were in the file obtained from the escrow company. The first check negotiated on December 23, 1983, was not deposited in the trust account respondent maintained at West Olympia Bank. (Exh. 34.) The back of the second check, negotiated on March 27, 1984, has written "4 X 20[;] 4 X 100[;] 1 X 5" which corresponds to the $485 amount of the check. In addition, respondent's California driver's license number and credit card number from the May Company appear on the check, consistent with a finding that respondent cashed the check. We conclude, as did the referee, that respondent did not deposit either check in her trust account as required by rule 8-101(A).

[22] Respondent's statement to Allen that she would arrange for a courier to deliver the proceeds of the sale to the bankruptcy court was an act of dishonesty and moral turpitude contrary to section 6106 as well. Ordinarily, failure to keep a promise of future action is not by itself proof of dishonesty. (*Tenzer* v. *Superscope* (1985) 39 Cal.3d 18, 30-31.) The Supreme Court dismissed an argument based on the *Tenzer* dicta in an attorney discipline case where the record revealed misconduct beyond mere nonperformance. (*Bowles* v. *State Bar* (1989) 48 Cal.3d 100, 109 [issuance of a bad client trust account check, attorney's subsequent failure to make good on the check and failure to promptly forward client funds awarded in an arbitration together support finding of moral turpitude].) In this case, respondent's reassurance to her client that the funds would be remitted to the court was followed shortly thereafter by respondent's misappropriation of those same funds. Given these circumstances, we agree with the hearing referee that respondent's actions were intended to mislead her client and constituted deceitful conduct, contrary to section 6106.

[23] We do not find clear and convincing evidence that respondent forged the bankruptcy order to authorize the sale. In an attorney discipline proceeding, all reasonable doubts must be weighed in favor of the accused attorney. (*Kapelus* v. *State Bar* (1987) 44 Cal.3d 179, 183.) While the evidence presented only from the documents raises an inference of irregularity, without evidence from the bankruptcy court attesting to its practices and evaluating the genuineness *vel non* of respondent's order purportedly signed by a judge other than the assigned judge, we cannot conclude that clear and convincing evidence exists to find respondent culpable of fabricating a court order in this matter.

F. Count Seven (Rule 6-101(B)(2))

The hearing referee concluded based on the evidence in six of respondent's cases in which she abandoned clients and their causes, retained unearned fees, passed at least one bad check, and misrepresented to clients the status of their cases that respondent repeatedly accepted employment and continued representation when she reasonably should have known she did not have nor would acquire in time to perform, sufficient time, resources and ability to perform in violation of rule 6-101(B)(2). The hearing referee focused his discussion on respondent's mental state and whether she had the requisite wilfulness to violate the rule. [24] The definition of wilfulness for a Rule of Professional Conduct violation is one often repeated by the Supreme Court. The attorney must simply have acted or omitted to act purposely to do the act forbidden by the rule or not to do the act required by the rule. (*McKnight* v. *State Bar*, *supra*, 53 Cal.3d 1025, 1034; *Beery* v. *State Bar* (1987) 43 Cal.3d 802, 815.) There is no evidence that respondent was incapable of forming the requisite purpose or intent. We adopt the referee's finding that respondent was capable of the willfulness necessary to violate rule 6-101(B)(2).

[25] There are few cases that address the elements of rule 6-101(B)(2), which became effective in October 1983. The one case with some discussion of the rule is *Garlow* v. *State Bar* (1988) 44 Cal.3d 689. In *Garlow*, the attorney was charged with three matters of professional misconduct. As to one client matter, the Supreme Court found that the attorney had failed to communicate with and abandoned the client, failed to provide competent legal services and failed to refund the unearned fee, along with falsely testifying that he had been fired by the client. His abandonment of the client without performing any work for her led the Court to conclude that Garlow had violated 6-101(B)(2) "because of his willingness to accept employment when he should have known he was not in the position to competently represent his client." (*Id.* at p. 706.) The fact that Garlow handled a large number of cases only bolstered the conclusion that he had accepted employment in this instance with insufficient resources to competently act on the client's behalf. (*Id.* at p. 711.) Given the evidence presented in at least four client matters establishing that respondent accepted employment and then abandoned her clients' causes with little or no work done and unearned fees retained, a violation of rule 6-101(B)(2) has been abundantly demonstrated on this record.

G. Count Five (Brumback)

1. Striking of answer and admission of allegations

On this count, the hearing referee made numerous factual and culpability findings concerning the

alleged complaint of a now deceased client, Virginia Brumback, based on evidence admitted into the record after respondent refused to testify when called by the State Bar in connection with this count of alleged misconduct.

On the third day of trial (May 10, 1989), respondent was called as an adverse witness by the State Bar as part of its case on culpability on the Brumback allegations. (Evid. Code, § 776.) Respondent had neither been served with a subpoena nor a notice in lieu of subpoena by the State Bar. On advice of counsel, respondent refused to be sworn or testify. In response to respondent's refusal to take the stand, the hearing referee conditionally struck respondent's answer to the amended complaint on this count and deemed the allegations admitted. (Order filed May 10, 1989; decision at p. 14, par. 45.) Respondent never testified during the proceeding.

We see three primary questions raised by the facts: (1) was respondent properly called to the witness stand to testify as an adverse witness for the State Bar; (2) did she have the right to refuse to testify, and (3) if she had to testify, whether the referee was empowered to enter her default for her refusal to testify?

[26a] Attorney discipline proceedings are sui generis, neither criminal nor civil, and ordinary criminal procedural safeguards do not apply. (*Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 447.) The proceedings are conducted pursuant to the Rules of Procedure adopted by the State Bar, and **[27a]** the rules of evidence in civil cases in courts of record are generally followed. (Rule 556, Rules Proc. of State Bar.[11]) **[26b]** The California Supreme Court has noted that the procedural safeguards contained within the Rules of Procedure are adequate to assure procedural due process. (*Van Sloten* v. *State Bar* (1989) 48 Cal.3d 921, 928.)

[28] Governing law and the Rules of Procedure provide that parties may compel the attendance of witnesses by subpoena. (Rules Proc. of State Bar, rule 310(b); Bus. & Prof. Code, § 6049 (c); Code Civ. Proc., § 1985.) At the time of the hearings, respondent was not a resident of California and thus was not amenable to service of a subpoena prior to the hearing. (See Code Civ. Proc., § 1989.) Since respondent is a party, the State Bar could have provided her California counsel with a notice in lieu of subpoena to require respondent's attendance as a witness at the disciplinary proceeding. (Code Civ. Proc., § 1987 (c); see also Rules Proc. of State Bar, rule 555(b).[12])

Respondent contends in her post argument brief[13] that the Rules of Procedure provide that respondent can only be compelled to appear as a witness if subpoenaed and to permit otherwise would abrogate the protection accorded by the subpoena process. She argues that the rules specified in our proceedings are not rules of evidence incorporated by rule 556 of the Rules of Procedure. In her view, the intent of rule 556 is to include by reference purely procedural mechanisms for conducting hearings. Code of Civil

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11. Rule 556 reads in its entirety: "Except as provided in hearings authorized by rule 555 [default hearings], and subject to relevant decisions of the Supreme Court, the rules of evidence in civil cases in courts of record in this state shall be generally followed in a formal proceeding, but no error in admitting or excluding evidence shall invalidate a finding of fact, decision or determination, unless the error or errors complained of resulted in the denial of a fair hearing."

12. When a member fails to appear at a disciplinary or probation revocation hearing, after the notice to show cause and the notice of hearing were properly served, a default may be entered against the member. The charges in the notice may be deemed established without further proof if and only if the member was subpoenaed to appear or was served with a notice to appear as a witness. (Rule 555(b), Rules Proc. of State Bar.)

13. After oral argument, we requested that the parties submit briefs in response to the following inquiry: "Whether sections 177 and 1990 of the Code of Civil Procedure or any other provisions of California law apply to this State Bar proceeding to authorize the trial referee in this matter to have directed that Respondent, present in the courtroom but not under subpoena or notice to appear, be called as a witness? If the answer is in the affirmative, under what authority did the referee have the power to sanction Respondent in the manner in which such sanction occurred?"

Procedure sections 177[14] and 1990[15] confer judicial powers on a "judicial officer" or "court," and referees are neither. To apply either section through rule 556 would be too broad a reading of the powers of the State Bar Court and therefore ultra vires.

The State Bar replies that it had the right to call respondent as an adverse witness under Evidence Code section 776, and that sections 177 and 1990 of the Code of Civil Procedure constitute additional support for its position. Evidence Code section 776 permits the State Bar to call respondent as a witness and examine her as if under cross-examination at any time during its presentation of evidence. The examiner finds no authority for the assertion that under Evidence Code section 776, a witness must first be subpoenaed. She also notes that respondent is obligated to appear at the disciplinary proceeding. (*Morales* v. *State Bar* (1988) 44 Cal.3d 1037, 1046.)

"The process by which the attendance of a witness is required is the subpoena." (Code Civ. Proc., § 1985, subd. (a); Witkin, Cal. Evidence (3d ed. 1986) Witnesses, § 1036.) In the case of a party, the alternative process is notice to the party's attorney. (Code Civ. Proc., § 1987, subd. (b); Witkin, Cal. Evidence (3d ed. 1986) Witnesses, § 1047.) [29] Evidence Code section 776 alone does not empower the examiner with the authority to require respondent's presence at the hearing. Once the hearing commences the State Bar is entitled to call respondent to the witness stand as part of its presentation of evidence to prove its case.

[30] Notwithstanding the fact that respondent was neither subpoenaed nor noticed to appear at the discipline hearing, she does have the obligation to be present. (*Martin* v. *State Bar* (1991) 52 Cal.3d 1055, 1063; *Yokozeki* v. *State Bar, supra*, 11 Cal.3d 436, 447.) She was in fact in attendance for most of the proceedings.

[27b] We find the application of section 1990 of the Code of Civil Procedure appropriate in this case. Section 1990 is found in part IV of that code (Miscellaneous Provisions), and is also part of title III entitled "Production of Evidence." Rule 556 of the Rules of Procedure of the State Bar is not limited solely to incorporating the Evidence Code. That rule encompasses "the rules of evidence in civil cases in courts of record in this state." The law applied in civil cases includes the Evidence Code, applicable sections of the Code of Civil Procedure and judicial decisions. Proceedings before the State Bar are sui generis, neither civil nor criminal in nature. (*Brotsky* v. *State Bar* (1962) 57 Cal.2d 287, 300.) [31] The State Bar Court, in disciplinary matters, acts as the administrative arm of the Supreme Court. (*Lebbos* v. *State Bar* (1991) 53 Cal.3d 37, 47; *Herron* v. *State Bar* (1931) 212 Cal. 196, 199.) Disciplinary proceedings under the prior volunteer system were characterized by our Supreme Court as "in essence the initial stage of an action in court" with the State Bar acting as a fact finder or referee for the Supreme Court. (*Brotsky* v. *State Bar, supra*, 57 Cal.2d 287, 301.) Attorney disciplinary hearing panels were also recognized as composed of "judicial officers" within the ambit of section 6068 (d).[16] (*Franklin* v. *State Bar* (1986) 41 Cal.3d 700, 709; *Olguin* v. *State Bar* (1980) 28 Cal.3d 195, 200.) We find that the hearing referee was functioning as a "judicial officer" in this disciplinary proceeding. Therefore, the referee had the authority to compel respondent, present in his hearing room, to be a witness under Code of Civil Procedure section 1990.

No person may be compelled to take the witness stand and be a witness at his or her own criminal trial.

14. Code of Civil Procedure section 177 reads as follows: "Every judicial officer shall have power: [¶] 1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of official duty; [¶] 2. To compel obedience to his lawful orders as provided in this code; [¶] 3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code; [¶] 4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties."

15. Code of Civil Procedure section 1990 states: "A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer."

16. Under section 6068 (d), an attorney has the duty to "employ ... such means only as are consistent with truth, and never seek to mislead *the judge or any judicial officer* by an artifice or false statement of fact or law." (Emphasis added.)

(U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) A witness may assert the privilege in any proceeding so as not to give answers which would subject him or her to criminal prosecution. (*Malloy* v. *Hogan* (1964) 378 U.S. 1.) **[32a]** An attorney may not be disciplined solely based on invoking the Fifth Amendment privilege against self-incrimination. (*Spevack* v. *Klein* (1967) 385 U.S. 511.)

[32b] However, an attorney disciplinary matter is not a criminal case for purposes of the Fifth Amendment, so an attorney may be called as a witness at his or her own disciplinary hearing (*Black* v. *State Bar* (1972) 7 Cal.3d 676, 686) and immunized testimony may be used. (*Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 887.) While respondent could have been required to take the witness stand when properly called, she could have declined to answer specific questions when asked by asserting her Fifth Amendment right to protection from criminal liability. (*Black* v. *State Bar*, *supra*, 7 Cal.3d 676, 688.) No adverse inference can be drawn from a respondent's invocation of the Fifth Amendment's protection. (Evid. Code, § 913, subd. (a); cf. *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928, 930.)

[33a] Respondent never took the stand and disobeyed the referee's proper order to testify. She invoked the Fifth Amendment through counsel without specific questions having been addressed to her. Her actions were not warranted; and, had she been under subpoena, she could have been certified to the Superior Court for contempt proceedings. (Bus. & Prof. Code, § 6050.)

[33b] The referee also could have considered respondent's conduct to be an aggravating factor in the event culpability had been found. (Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(vi) (hereafter "stds.") However, even the examiner concedes that the hearing referee did not have the direct power of contempt (Bus. & Prof. Code, § 6051) nor could he exercise the authority to strike respondent's answer and deem the allegations at issue to have been admitted by default as a matter of law. Those latter remedies were not available as sanctions in the discovery phase of the proceeding (rule 321, Rules Proc. of State Bar); and, in our view, the referee had no authority to invoke them as a sanction for failure to testify at the hearing. Therefore, we disagree with the referee's striking of respondent's answer to count five of the notice to show cause and find instead that respondent has not admitted the allegations therein.

2. Hearsay nature of evidence presented

In her answer, respondent denied every allegation in count five, including the allegation of an attorney-client relationship. The only witnesses presented by the State Bar as to this count were its investigators David T. Fritz and Tim Biagas. Fritz testified that he was assigned to investigate a complaint filed by a Virginia Brumback against respondent. He wrote Brumback a letter and received a handwritten response on the same sheet of paper. (Exhibit 10.) Fritz's portion of exhibit 10 is admissible as a business record, having been prepared in the ordinary course of his employment with the State Bar. (Evid. Code, § 1271, subd. (a).) Biagas testified that he had done a court records search and that no civil actions had ever been filed by respondent on Brumback's behalf. As noted, Brumback was deceased at the time of the hearings below.

The remainder of the documentary evidence, including a retainer agreement, the complaint filed with the State Bar, and documents accompanying the complaint were all written by Brumback. The referee found that the Brumback statements in exhibits 10 and 11 fit within three exceptions to the hearsay rule: (1) as adoptive admissions of the respondent; (2) for the limited purpose of showing Brumback's state of mind; and (3) as "[c]orroborated hearsay under the decisional exception for hearsay corroborated by non-hearsay evidence, i.e., Exhibits 12, 13a, 13b and 13c (Evidence Code section 1200(b); *PG&E* v. *Thomas Drayage and Rigging Co.* (1968) 69 C 2d 33)." (Decision, pp. 16-17.)

[34a] The handwritten complaint and its accompanying documents remain hearsay as out-of-court statements of a now deceased declarant. (Evid. Code, § 1200.) None of the exceptions to the hearsay rule concerning deceased declarants apply under these facts. (See Evid. Code, §§ 1242 [dying declarations]; 1227 [wrongful death action]; 1261 [action against decedent's estate].) The complaint form could be

admitted for the limited use of showing the state of mind of Brumback; i.e., to show Brumback believed she had a complaint against respondent which she desired to bring to the attention of the State Bar by filing a complaint, and only where her state of mind is at issue in the case. (Evid. Code, § 1251.) The truth and substance of the complaint are not in evidence, however, under this exception to the hearsay rule. (Evid. Code, § 1251, subd. (b).) Moreover, Brumback's state of mind is not an element in the charged violations; it is respondent's state of mind which is at issue.

[34b] Brumback's letter to respondent (exhibit 13a) could have been admitted as an adoptive admission, as proposed by the referee under *Bowles* v. *State Bar*, *supra*, 48 Cal.3d at p. 108, if Brumback had testified. In *Bowles*, the client's mother testified that she had written to Bowles accusing him of failing to communicate or perform services for the client, her daughter. Because Bowles had failed to respond, the witness's testimony was admissible as an adoptive admission. (*Id.* at p. 108.) Had Brumback been available to testify that she did not receive a response to the letter, as did the complaining witness in the *Bowles* case, her testimony and, conceivably, the letter memorializing her act, would have been admissible. Without some admissible evidence, such as testimony, that there had been words or other conduct manifesting respondent's adoption of the statement, the letter alone is not an adoptive admission under Evidence Code section 1221.

Evidence Code section 1200, subdivision (b) states that hearsay evidence is inadmissible except as provided by law, thereby recognizing exceptions created by case law as well as statute. *Pacific Gas & E. Co.* v. *G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33 (hereafter *Pacific Gas & E. Co.*) created the corroborative evidence exception to the hearsay rule. (Jefferson, Synopsis of Cal. Evidence (1985) The Hearsay Rule, § 1.3, pp. 16-17.) The *Pacific Gas & E. Co.* case involved, in part, the admissibility of invoices, bills and receipts to prove the amount of damages plaintiffs sustained. The Court found the documents to be hearsay and thus unusable as proof of liability, payment for the repairs or the reasonableness of the charges. (*Pacific Gas & E. Co.*, *supra*, at pp. 42-43.) The Court noted, "If, however a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony." (*Id.* at p. 43.) There was testimony in the *Pacific Gas & E. Co.* record that the invoices had been paid, so that the invoices could be admitted for the limited purpose of corroborating that testimony.

Admission of the documents to corroborate independent testimony is a limited hearsay exception, similar in effect to the "state of mind" exception. The Court in *Pacific Gas & E. Co.* further ruled that the documents admitted to corroborate a party's testimony could not be used to prove that the actual repairs had been made. Expert testimony on the reasonableness of the charges for the repair work, which was based on the individual items listed on the invoices, was therefore inadmissible. (See, e.g., *People* v. *Maki* (1985) 39 Cal.3d 707, 711-712 [admission of a hearsay document as an adoptive admission, "not merely as corroboration," requires additional evidence of knowledge by the party against which it is sought].)

California courts have invoked this hearsay exception to sustain the admission of invoices from a packing house after the manager of the cattle company testified to receiving them and arranging for payment (*Imperial Cattle Co.* v. *Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 272); of dental bills and the reasonableness of the charges, where the plaintiff/patient testified as to the services received, his receipt of the bill and his payment (*McAllister* v. *George* (1977) 73 Cal.App.3d 258, 263); and of doctor bills and the reasonableness of the charges therein, where the plaintiff/patients first identified each bill, testified as to what each charge was for and the amount of each which had been paid. (*Rodgers* v. *Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 626.) We have found no cases authorizing the use of otherwise hearsay documents to corroborate admissible evidence other than testimony.

[34c] The admissibility of the Brumback complaint, attached documents and response to the State Bar investigator's inquiry were argued to be "corroborated hearsay." This misstates this narrow decisional exception to the hearsay rule. The hearsay evidence must corroborate admissible evidence, gen-

erally testimony, already in the record, not the other way around. Therefore, under the "corroborating hearsay rule," the Brumback complaint was sought to be admitted for the truth of the matters asserted therein for the purpose of corroborating exhibits 12 (retainer agreement) and 13a (April 12, 1985 letter from Brumback to respondent), 13b (copy of check from respondent's trust account) and 13c (back of 13b). However, these exhibits could not properly be admitted into evidence because those documents are themselves hearsay, and do not fall within one of the hearsay exceptions.

We are then left with the testimony of the two investigators, the evidence of Brumback's intent to file a complaint against respondent and the Fritz letter seeking information from Brumback concerning a returned check for $17,500 written on the respondent's trust account. Based on this record, we cannot find there is clear and convincing evidence of misconduct alleged in this count.

III. EVIDENCE IN MITIGATION AND AGGRAVATION

[35] Circumstances in mitigation or aggravation must be established by clear and convincing evidence. (Stds. 1.2(b) and (e); *Rose* v. *State Bar*, (1989) 49 Cal.3d 646, 667.) We consider the evidence in aggravation and mitigation in turn.

A. Facts in Aggravation

The referee identified several aggravating factors which he found were established by clear and convincing evidence. These include respondent's suspension between August 5, 1985, and October 16, 1986, for non-payment of fees, her "contemptuous" attitude toward her misconduct and the disciplinary proceedings, and her failure to cooperate with the State Bar. In the referee's view, respondent's misconduct constituted multiple acts of wrongdoing, involved bad faith and concealment, and reflected a pattern in which respondent failed to communicate with her clients, did not perform legal services on their behalf and eventually abandoned them. The misconduct he found included misappropriation of client trust funds and advanced fees, totalling over $10,000, and acts of moral turpitude and bad faith in addition to the theft of funds. (Decision, pp. 46-47; 49.) Overall he concluded the misconduct resulted in harm to her clients, the public and the administration of justice. (Decision, p. 47.) The referee also found that respondent lacked candor toward her clients and the State Bar during the pendency of the discipline proceedings. (Decision, p. 49.)

[36] The hearing referee found that respondent's 14-month suspension for failure to pay bar dues constituted prior discipline. (Decision, p. 46.) The Supreme Court has, in some cases, referred to an attorney's suspension for nonpayment of State Bar membership fees as "prior discipline." (*Phillips* v. *State Bar* (1989) 49 Cal.3d 944, 950; *Farnham* v. *State Bar* (1976) 17 Cal.3d 602, 608; *Demain* v. *State Bar* (1970) 3 Cal.3d 381, 383.) However, in other cases of attorneys previously suspended for nonpayment of fees, the Supreme Court declined to treat those prior suspensions as part of a record of prior discipline. (*Hitchcock* v. *State Bar* (1989) 48 Cal.3d 690, 701, 708; *Bate* v. *State Bar* (1983) 34 Cal.3d 920, 922.) Given that the suspension for nonpayment of fees arises solely from that administrative fact (§ 6143) and not from any finding of misconduct, we believe that the Court's treatment in *Hitchcock* and *Bate* is the appropriate one and we therefore decline to consider respondent's administrative suspension for failure to pay bar fees to be a prior record of discipline for purposes of weighing the appropriate discipline in this case. However, we do not find her lack of prior discipline to be a factor in mitigation in light of the evidence that her misconduct began just over one year after her admission to practice. (*Amante* v. *State Bar* (1990) 50 Cal.3d 247, 256.)

[37] We find that respondent failed to cooperate with the State Bar insofar as she failed to keep her address current with membership records so that much of the State Bar's investigation was delayed and stymied. [38] We will not impute any aggravating effect to respondent's failure to take the stand when properly called (see discussion *ante*) in that she was following the advice of her counsel on that issue and the law was not clear at the time. Nor, in assessing her cooperation with the State Bar in this case, will we attribute to respondent the courtroom behavior and rhetorical fervor of her counsel.

[39] We do not find respondent to have demonstrated insight into her misconduct. Her failure to pay restitution until well after she was financially able to do so and only under the pressure of these proceedings weakens her claim to rehabilitation. (*Read* v. *State Bar*, *supra*, 53 Cal.3d at p. 426.) Although Allen testified that in November of 1988, she agreed to accept $3,000 from respondent in full settlement, the record is clear that respondent misappropriated $6,881.60 of Allen's proceeds. From at least a moral standpoint, respondent still owes Allen an additional $3,881.60. An attorney may be required to make restitution as a moral obligation even if there is no legal obligation to do so. (*Brookman* v. *State Bar* (1988) 46 Cal.3d 1004, 1008.) She misrepresented the status of the lawsuit to Butler and misled Allen as to the supposed deposit of the net proceeds from the house sale with the bankruptcy court. Such acts of bad faith and concealment toward her clients are aggravating factors. (Stds. 1.2(b)(iii) and (b)(vi).) Respondent's assertion that it was the State Bar's duty to contact her clients and safeguard her client files when she left her California clients suddenly, ignores her responsibilities to communicate with her clients, safeguard their interests and protect their confidences. (See, e.g., *Read* v. *State Bar*, *supra*, 53 Cal.3d at p. 426 [attorney's belief that it was the State Bar's duty to contact her clients and develop restitution plan illustrated lack of insight into misconduct and questionable rehabilitation].) Those obligations are imposed on all attorneys admitted to practice in California and respondent cannot shift them to the State Bar.[17]

Respondent's wrongdoing involved multiple acts of misconduct (std. 1.2(b)(ii)), and resulted in harm to respondent's clients. (Std. 1.2(b)(iv).) Day, Jackson and Peterson incurred costly delays and required additional proceedings by subsequent counsel in pursuing their lawsuits. Vaz and Butler lost their causes of action altogether as a result of respondent's inaction and abandonment. The misappropriation in the Allen case resulted in a loss to Allen's bankrupt estate, and consequently to her creditors of almost $7,000, but we cannot conclude that respondent's inadequate legal assistance caused the conversion of Allen's chapter 11 proceeding to a chapter 7 action.

B. Facts in Mitigation

Respondent's case in mitigation concentrated on her emotional distress and disability, her recovery from her emotional problems, and her subsequent activities on behalf of the underrepresented, primarily in New York City. Her evidence of emotional disability consisted of the testimony of Bette Braun, the psychotherapist who co-led respondent's group therapy sessions from November 1985 until March 1987, and her treatment summary of respondent prepared in June 1989, prior to her testimony. To formulate her summary, Ms. Braun relied in part on treatment summaries written by Lenora Fulani, Ph.D., and Fred Newman, Ph.D.,[18] also prepared in preparation for respondent's disciplinary hearing.[19] Respondent was treated by Dr. Fulani from June 1985, soon after her arrival in New York from Los Angeles, until September 1985. She then had a few individual sessions with Dr. Newman and joined the group therapy sessions with Ms. Braun and Dr. Newman.

Ms. Braun testified that in her view, respondent arrived from California suffering from a deep depression, triggered when respondent's seventeen-year-old son ran away from his mother's home in 1984 and threatened to kill himself if respondent attempted to force him to return.[20] She identified respondent's state

17. In the limited circumstances where an attorney is shown to be incapacitated, the State Bar may then seek an order from the superior court for the court to assume jurisdiction over the law practice. (Bus. & Prof. Code, §§ 6180, 6190, 6190.1, et seq.)

18. Dr. Fulani practiced under the supervision of Ms. Braun. Dr. Newman is the founder of the social therapy approach to psychotherapy and practices in New York in partnership with Ms. Braun.

19. The summaries by Drs. Fulani and Newman were admitted into evidence (exhs. P and Q) for the limited purpose of indicating the source of information for Ms. Braun in making her diagnostic assessment of respondent, and not for the truth of the statements therein.

20. The son had been the focus of a two-year custody fight during respondent's college and law school education between respondent and an elderly couple who had kidnapped the boy from respondent at an early age. Respondent also suffered from other traumatic events which occurred during her adolescence.

as "crisis paralysis," an immobilizing condition characterized by feelings of inadequacy, self-destruction and self-blame resulting from the racism in American society. In the view of Ms. Braun, professional people of color are susceptible to this emotional illness. Social therapy helps such patients overcome the condition by teaching them to avoid self-blame for the racism in society and relinquish the role as victim, and instills confidence in their ability to change society.

After her initial crisis was resolved, respondent became involved in community-based free legal clinics in Harlem and other minority communities in New York City. She has also been very active in the AIDS Bill of Rights and human rights struggles in Haiti and elsewhere. Twenty letters attesting to her community and human rights activities were admitted in evidence. About a third of the letters made no reference to the disciplinary charges against respondent. Of those which evidenced some familiarity with the charges, a few simply stated that they were aware that respondent's misconduct occurred around the time she closed her practice in California. The remainder indicated that they had been told that respondent had been found culpable of abandoning clients and mishandling client funds prior to June 1985. Most character references asserted that any unethical conduct by respondent would be aberrational in light of their experience with respondent. Two letters questioned the motives of the State Bar in proceeding against respondent.

In rebuttal, the examiner presented testimony from Robert Pasnau, M.D., director of the Adult Psychiatric Clinical Services and Professor of Psychiatry at the University of California's Los Angeles campus. Dr. Pasnau's testimony dealt solely with the treatment summaries of respondent prepared by respondent's New York therapists. Dr. Pasnau's criticism focused on the failure to conduct a physical examination or other diagnostic tests of respondent, failure to verify or attempt to corroborate any of the family or background history provided by respondent with other sources, the lack of any notation or consideration of a personality or character disorder which respondent's file might suggest and the limited diagnostic evaluations made. In his view, the reports reviewed and relied upon by Ms. Braun did not encompass the period of respondent's misconduct in California and failed to address the bearing, if any, her mental state had on her law practice. Dr. Pasnau was not familiar with the "crisis paralysis" condition and did not find a definition or description of it after consulting a number of psychiatric treatises.

The referee concluded that there was not clear and convincing evidence in the record that respondent suffered from extreme emotional distress nor sufficient proof that what difficulties she experienced played a significant role in her misconduct. (Decision, pp. 43-44.) He discounted her character references because they were in the form of declarations and because he did not find that the declarants were fully conversant with the disciplinary charges against respondent. (*Weller* v. *State Bar* (1989) 49 Cal.3d 670, 677.)

[40a] The Supreme Court has recognized that "extreme emotional difficulties are a mitigating factor where 'expert testimony establishes [that the difficulties were] directly responsible for the misconduct; . . . provided that the member has established through clear and convincing evidence that he or she no longer suffers from such difficulties.'" (*Porter* v. *State Bar* (1990) 52 Cal.3d 518, 527, quoting std. 1.2(e)(iv).) Aberrational conduct resulting from extremely stressful family circumstances can also be considered emotional stress warranting mitigation of discipline. (*Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245; *In re Demergian*, *supra*, 48 Cal.3d 284, 294.) The expert testimony must establish more than the impairment of the attorney's judgment or distortion of values caused by stress generally; there must be evidence that the emotional difficulties caused the misconduct. (*In re Naney*, *supra*, 51 Cal.3d at p. 197.) There must be clear and convincing proof of the attorney's complete and sustained recovery such that further misconduct is unlikely in the future. (*Porter* v. *State Bar*, *supra*, 52 Cal.3d at p. 528; *In re Lamb*, *supra*, 49 Cal.3d at p. 246.) Absent a finding of rehabilitation, emotional problems are not considered a mitigating factor. (*Kaplan* v. *State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney*, *supra*, 51 Cal.3d at p. 197.)

[40b] We disagree with the referee's conclusion that no weight should be accorded the testimony

regarding respondent's psychological problems. The shortcomings of Ms. Braun's analysis as identified by Dr. Pasnau do not negate her observations that respondent was in a state of depression and distress when she joined Newman and Braun's therapy sessions in New York in late 1985. Her conclusion that respondent, after a year and a half of therapy, conquered her psychological problems and developed coping mechanisms for dealing with any future challenges, carries convincing weight as well. [41] The critical issue is the relationship, if any, between these family and psychological problems and respondent's misconduct. Many of the acts of misconduct predate the departure of respondent's son in 1984. Since the son's running away from home was the triggering event in respondent's emotional crisis, ethical violations arising prior to this time cannot be traced to these problems. (See, e.g., *Read* v. *State Bar, supra*, 53 Cal.3d at pp. 424-425 [family and emotional problems which overwhelmed attorney in February 1984 do not mitigate misconduct which occurred prior to that date].) We do not find sufficient evidence in the record relating respondent's emotional and psychological problems to the most serions misconduct found, namely the misappropriation of the proceeds of the Allen property sale totaling approximately $6,900, and the misleading information given to her clients concerning the status of their cases.

[42] Acute depression and other psychological problems can explain, but not excuse, inattention to the demands of a law practice and the ethical improprieties that result. (*Silva-Vidor* v. *State Bar, supra*, 49 Cal.3d at pp. 1078-1079; *Frazer* v. *State Bar* (1987) 43 Cal.3d 564, 577-578.) Therefore, to the degree that her emotional problems underlay respondent's failure to provide competent legal services, to apprise her clients of significant developments in their cases and to protect them and their rights from prejudice when she closed her law office and left California, evidence of her recovery from and unlikely recurrence of these ailments is mitigating. (*Hawes* v. *State Bar, supra*, 51 Cal.3d at p. 595; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Respondent refunded monies to settle with five of her six clients and refunded $3,000 of $6,881.60 owed to Allen, but did not restore the funds until after the notice to show cause had been filed in this matter, and, in the case of Messrs. Day and Jackson, the settlements were not reached until shortly before the start of the disciplinary hearing in May 1989. Respondent's restitution to her former clients has little significance as a factor in mitigation, since the payments were prompted by the institution of disciplinary proceedings against her. (*Rosenthal* v. *State Bar* (1987) 43 Cal.3d 658, 664.) Her misconduct began soon after she was admitted to practice, thus the lack of any prior record of discipline is not a factor in mitigation. (See discussion *ante*; *Amante* v. *State Bar, supra*, 50 Cal.3d at p. 256.) [43] Nor is her inexperience a factor to be weighed; where the misconduct involves misappropriation, inexperience is an irrelevant consideration. (*Id.* at p. 254.) [44] The lack of any misconduct charges against respondent since her move to New York is not compelling, in our view. Respondent has removed herself from California clients and is performing legal services only in New York on a limited basis on *pro hac vice* admission. Misconduct allegations arising in New York would not necessarily be reported to discipline authorities in California.

Respondent's attorneys' characterization of respondent's practice in California as one servicing poor and underrepresented persons is not established by convincing evidence in this proceeding. We know that among the clients who were abandoned by respondent in the matters before this court were the owner of a board and care facility (Allen), an employee of a moving company which provided services for respondent (Peterson), a college professor (Day) and a federal government scientist (Jackson). [45] Even if respondent's California practice did serve people of limited or no means, they are entitled to able, responsive and trustworthy counsel from the attorney they hired. Representing those of limited means does not excuse improper or unethical conduct. (*Jones* v. *State Bar* (1989) 49 Cal.3d 273, 289.)

IV. APPROPRIATE LEVEL OF DISCIPLINE

The hearing referee recommended that respondent be disbarred, in light of the findings of wilful misappropriation of substantial funds and acts of moral turpitude toward clients, without substantial mitigation, and under standards 2.2(a) (wilful misap-

propriation of entrusted funds) and 2.3(a) (offenses involving moral turpitude). The examiner concurs in that judgment. Respondent maintains that the matter should be dismissed but contends in a footnote in her brief that should culpability be found on any of the counts, no actual suspension should be imposed and respondent should be permitted to continue in practice.

The purpose of attorney discipline proceedings is not to punish the attorney but rather to protect the public, preserve public confidence in the legal profession and maintain the highest possible standards for the profession. (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 111; std. 1.3.) The standards are guidelines (*In re Young* (1989) 49 Cal.3d 257, 268) and any recommended discipline should be consistent with prior Supreme Court case law as well. (*Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

There have been a number of recent cases which have dealt with claims of emotional problems underlying and mitigating serious attorney misconduct. In *Silva-Vidor* v. *State Bar, supra,* 49 Cal.3d 1071, the attorney stipulated to misconduct affecting 14 clients, involving numerous instances in which she abandoned clients, failed to provide competent legal services, failed to refund or account for unearned fees and misappropriated $760 in client funds. Most of her misconduct took place in a two-year period and demonstrated a common pattern of willful misconduct. (*Id.* at pp. 1077-1078.) During this same period, Silva-Vidor was beset with a series of emotional problems, beginning with a severe depression, an unstable relationship with her drug-abusing husband, the break-up of her marriage after her husband was diagnosed with a brain tumor, and one automobile and two slip-and-fall accidents resulting in serions injury to the attorney, and adding to her depression. She also had a difficult pregnancy which required bed rest for the final four months and her daughter was born with cerebral palsy. She sought help from a licensed clinical social worker to overcome her debilitating depression, became employed as a legal services attorney, and volunteered her services to three organizations helping the underrepresented. She cooperated fully with the State Bar, stipulating to facts and discipline in her disciplinary proceeding, and offered remorse and restitution to her former clients. The Court found that the evidence demonstrated personal difficulties for which her inattention to her practice was not condoned, but understood. It imposed a five-year suspension, stayed, with a five-year probation period and one-year actual suspension.

In *In re Naney, supra,* 51 Cal.3d 186, the Supreme Court considered and rejected evidence of emotional and fiscal problems as mitigating circumstances. Naney had been convicted of three counts of grand theft for misappropriating $17,950 in client trust funds over a period of less than one year. During this same period, Naney had increasing marital problems resulting in separation from his wife and children, for which he sought the help of a psychologist, and suffered financial difficulties. Noting that the misappropriations occurred after two years of weekly therapy, the Court concluded that his emotional problems stemming from his marital difficulties were either not directly responsible for his misappropriations or that his problems were so deep seated to negate any showing of rehabilitation. (*Id.* at p. 197.) The Court disbarred Naney.

The mitigating evidence presented in *Porter* v. *State Bar, supra,* 52 Cal.3d 518, involved "stresses far in excess of those usually associated with a dissolution" (*id.* at p. 528) and were coupled with the theft of his client files and his eviction from his home and office, all occurring between 1983 and 1985. The bulk of Porter's misconduct, to which he stipulated, took place during that same time and involved abandonment of clients, failure to provide competent legal services, retention of unearned fees and multiple acts of moral turpitude, including misappropriating over $14,500 in trust funds. Porter also practiced law while suspended for nonpayment of fees. He demonstrated an outstanding record of community involvement and service both prior and subsequent to his misconduct. (*Id.* at pp. 524-526.) Porter sought psychological treatment for his emotional difficulties beginning in 1987 and his psychoanalyst concluded at the hearing that Porter was fully recovered. (*Id.* at pp. 525-526.) Balancing the seriousness of his misconduct against his evidence in mitigation, the Court imposed a five-year suspension, stayed, five years on probation and a two-year actual suspension.

The most recent case of emotional and psychological disability involving a number of matters of misconduct is *Read* v. *State Bar, supra*, 53 Cal.3d 394. In that case the attorney engaged in 13 instances of misconduct, involving multiple acts of bad faith, dishonesty, misappropriation of entrusted funds, concealment and misrepresentations to the court, abandonment of clients and, at one point, counselling a client to perjure herself. Read did not provide restitution to her clients until shortly before her disciplinary case was heard, although she had the financial resources to do so earlier. (*Id.* at pp. 424-425.) In mitigation, Read emphasized her severe emotional and financial problems stemming from the breakdown of her marriage and the criminal conduct of one of her sons, who was abusing drugs. These events resulted in the financial ruin of her family and law practice, and threw Read into a deep depression. (*Id.* at p. 424.) However, the Court concluded that not all of Read's misconduct could be traced to these difficulties and although she may have recovered her psychological health, she had not sufficiently established her rehabilitation or demonstrated recognition and acceptance for her serious misdeeds. (*Id.* at p. 425.) The Court ordered that she be disbarred.

The Supreme Court has considered cases involving multiple abandonments of clients or abandonment of clients coupled with other serious misconduct to warrant significant discipline, even when the attorney has no prior record of discipline. However, *Read* v. *State Bar* is the only recent one where the Court found it necessary to disbar the attorney to protect the public's interest. In *Borre* v. *State Bar* (1991) 52 Cal.3d 1047, the attorney abandoned the appeal of an incarcerated client and fabricated evidence to support his lies to the contrary before the State Bar during its investigation and at the hearing. The Court found the "fraudulent and contrived misrepresentations to the State Bar" to be more egregious conduct than the serious matter of the abandonment of the incarcerated client. (*Id.* at p. 1053.) However, the Court concluded that a five-year suspension, stayed, a five-year probationary term and a two-year actual suspension recommended by the State Bar Court was sufficient under the facts. The Court in *Bledsoe* v. *State Bar* (1991) 52 Cal.3d 1074, found that four instances of client abandonment (one involving misrepresentations to the client and two cases where Bledsoe failed to return unearned fees), coupled with a finding that Bledsoe did not cooperate with the State Bar, did not merit the attorney's disbarment, as recommended by the State Bar Court. The Court did not find a pattern to the abandonments and gave some mitigating weight to Bledsoe's 17 years in practice. Again, a five-year suspension, stayed, a two-year actual suspension, with a five-year probation term was deemed sufficiently severe discipline for the misconduct found. Finally, in *Martin* v. *State Bar, supra*, 52 Cal.3d 1055, the attorney abandoned four clients, making misrepresentations to clients in two cases and improperly retaining a client's personal property in another. He also used an NSF check in a fifth case to pay filing fees. Disbarment was rejected again by the Court, finding that a five-year suspension, stayed and probation reporting for five years, with a two-year actual suspension, was appropriate.

We do not find that disbarment is warranted in this case. The misconduct at issue is neither as extensive as that present in the *Read* case nor is the case for rehabilitation as weak as in *Naney*. However, as the Court noted in *Porter*, "Though we are persuaded by [respondent's] showing of mitigation, we are nonetheless constrained to observe our responsibility to preserve confidence in the legal profession and maintain the highest possible professional standards for attorneys." (*Porter* v. *State Bar, supra*, 52 Cal.3d at p. 528.) Respondent commenced her misconduct just over a year after her admission to practice of law, misappropriated a substantial amount of entrusted funds, did not provide competent legal services and took cases when she knew she would be unable to devote sufficient time and energy to them, did not communicate with her clients and, in some instances misled them as to the status of their cases, finally abandoning her law practice with no notice to her clients. Substantial discipline is warranted.

Therefore, we recommend that respondent be suspended for five years, stayed, with probation for five years on conditions which include that she actually be suspended for three years and until she has demonstrated her rehabilitation, fitness to practice and learning and ability in the general law to the satisfaction of the State Bar Court pursuant to stan-

dard 1.4(c)(ii) and has made restitution to Evelyn Allen of $3,881.60 plus interest. Imposition of the showing of fitness under standard 1.4(c)(ii) is necessary, in our view, to establish respondent's progress in rehabilitation over the lengthy period of her suspension from the practice of law and to safeguard the public interest in the legal profession and assure the competency of its practitioners. The restitution condition is consistent with the goals of furthering respondent's rehabilitation and the public's confidence in the legal profession. (*Sorensen* v. *State Bar* (1991) 52 Cal.3d 1036, 1044.) In light of respondent's current residency in New York and professed intent to remain there for the foreseeable future, we recommend also that respondent be required to pass the multistate professional responsibility examination required of applicants for admission to practice in California, available nationally, rather than the California professional responsibility examination tailored for members of the California State Bar, and that she do so prior to the end of her actual suspension. Further, we recommend that she be required to comply with rule 955, California Rules of Court, and to perform the acts specified within subsections (a) and (c) within 30 and 40 days, respectively after the effective date of the Supreme Court's order in this case.

V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent Alvaader Frazier be suspended from the practice of law in California for a period of five years, that execution of the suspension order be stayed, and respondent be placed on probation for five years under the following conditions:

1. That respondent shall be suspended from the practice of law in the State of California during the first three years of said period of probation and until: (a) respondent has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law pursuant to Standard 1.4 (c)(ii), Standards for Attorney Sanctions for Professional Misconduct, and (b) respondent has made restitution to Evelyn Allen in the sum of $3,881.60 with interest of 10% per annum from March 1984 until paid in full and provided satisfactory evidence of said restitution to the Probation Department, State Bar Court, Los Angeles;

2. That during the period of probation, she shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, she shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, she shall file said report on the due date next following the due date after said effective date):

(a) in her first report, that she has complied with all provisions of the State Bar Act and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that she has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

4. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of her probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning her compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Transitional Rules of Procedure of the State Bar;

5. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and

truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

6. That respondent shall promptly report, and in no event in more than ten days, to the membership records office of the State Bar and to the Probation Department all changes of information including current office or other address for State Bar purposes as prescribed by section 6002.1 of the Business and Professions Code;

7. That if she is in possession of clients' funds, or has come into possession thereof during the period covered by each quarterly report, she shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books or other permanent accounting records in connection with her practice as are necessary to show and distinguish between:

(1) Money received for the account of a client and money received for the attorney's own account;

(2) Money paid to or on behalf of a client and money paid for the attorney's own account;

(3) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account designated as a "trust account" or "clients' funds account" in a bank authorized to do business in the State of California or in conformance with the rules governing trust accounts in the jurisdiction in which respondent is practicing *pro hac vice*;

(c) That respondent has maintained a permanent record showing:

(1) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof:

(2) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "clients' funds account(s)" as appears in monthly bank statements of said account(s)

(3) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

8. Respondent shall maintain with the Probation Department a current address and a current telephone number at which telephone number respondent can be reached and respond within 12 hours;

9. That respondent shall provide satisfactory evidence of completion of a course on law office management which meets with the approval of her probation monitor within the period of her actual suspension;

10. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective;

11. That at the expiration of the period of this probation if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of five years shall be satisfied and the suspension shall be terminated.

We further recommend that within the period of actual suspension, respondent be required to take and pass the multistate examination in professional responsibility administered by the National Conference of Bar Examiners and provide proof thereof to the Clerk of the State Bar Court, Los Angeles.

Finally we recommend that respondent be required to comply with the provisions of rule 955, California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this case.

We concur:

PEARLMAN, P. J.
NORIAN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD LEE ROBINS

A Member of the State Bar

[No. 86-O-14822]

Filed October 17, 1991

SUMMARY

For a number of years, respondent took in more cases than he could handle and did not supervise his staff. He stipulated to culpability on six counts of grossly negligent misappropriation of trust funds consisting of medical liens which his office failed to pay timely, and to one count each of failure to perform legal services competently and failure to return a file to a client. The hearing judge found substantial aggravating factors and compelling mitigating factors and recommended one year actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Arguing that the recommended sanction was too severe, respondent sought review. The review department held that the recommended sanction was appropriate based on the record, the applicable disciplinary standard and comparable case law.

COUNSEL FOR PARTIES

For Office of Trials: Carol Zettas

For Respondent: Arthur L. Margolis

HEADNOTES

[1] **221.00 State Bar Act—Section 6106**
Under the case law, the repeated dipping of a respondent's trust account below the required balance constitutes a sufficient basis for a finding of moral turpitude.

[2] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Failure to honor medical liens violates the rule of professional conduct requiring prompt payment of client funds upon demand.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **130 Procedure—Procedure on Review**
151 Evidence—Stipulations
On review, a respondent cannot challenge culpability of misconduct to which the respondent stipulated at the hearing level.

[4] **204.90 Culpability—General Substantive Issues**
280.00 Rule 4-100(A) [former 8-101(A)]
280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]
280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.00 Misappropriation
430.00 Breach of Fiduciary Duty
The duty to keep clients' funds safe is a personal, nondelegable obligation of an attorney.

[5] **166 Independent Review of Record**
745.51 Mitigation—Remorse/Restitution—Declined to Find
Belated restitution is not an appropriate basis for a finding in mitigation, and review department declined to adopt such finding even though not challenged by the parties.

[6 a, b] **106.90 Procedure—Pleadings—Other Issues**
531 Aggravation—Pattern—Found
Finding a pattern in aggravation is not limited to consideration of the counts pleaded. Where respondent stipulated to misconduct involving eight clients over six years, that number of cases only, in a high volume practice, might not have constituted a pattern. However, where respondent also testified to his prolonged, systematic failure to supervise his staff, his staff's inability to handle the caseload, and numerous other problems besides the ones listed in the notice to show cause, he had no grounds to challenge the finding in aggravation based thereon that a pattern of neglect existed.

[7] **571 Aggravation—Refusal/Inability to Account—Found**
591 Aggravation—Indifference—Found
802.62 Standards—Appropriate Sanction—Effect of Aggravation
822.32 Standards—Misappropriation—One Year Minimum
Where respondent took up to two years to pay outstanding medical liens after he discovered them, such delay was the most significant factor in justifying a sanction of one year's actual suspension. Respondent's preoccupation with remedying other unspecified problems in his caseload did not justify his delay in remedying these negligent misappropriations.

[8] **165 Adequacy of Hearing Decision**
420.00 Misappropriation
801.30 Standards—Effect as Guidelines
822.32 Standards—Misappropriation—One Year Minimum
Where hearing judge's decision was issued prior to relevant Supreme Court and review department opinions, and did not discuss whether gross negligence resulting in misappropriation should be subjected to same suggested minimum sanction of one year actual suspension as is applied for intentional misappropriation, but hearing judge's recommendation of one-year minimum was justified by facts in record making suspension appropriate for public protection, review department concluded that hearing judge's discipline recommendation was based on an analysis of the record in light of the objectives of discipline rather than on a rigid application of the Standards for Attorney Sanctions for Professional Misconduct.

[9] **420.00 Misappropriation**
801.30 Standards—Effect as Guidelines
822.32 Standards—Misappropriation—One Year Minimum
1092 Substantive Issues re Discipline—Excessiveness
In requiring an invariable minimum of one year's actual suspension, standard 2.2(a) is not faithful to the teachings of the Supreme Court's decisions. Negligent misappropriation quickly and voluntarily remedied may require no actual suspension or only a short suspension.

[10] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
420.00 Misappropriation
Misappropriation resulting from serious, inexcusable violation of a lawyer's duty to oversee trust funds is deemed wilful even in the absence of deliberate wrongdoing.

[11 a-c] **420.00 Misappropriation**
571 Aggravation—Refusal/Inability to Account—Found
591 Aggravation—Indifference—Found
822.32 Standards—Misappropriation—One Year Minimum
822.34 Standards—Misappropriation—One Year Minimum
Where respondent's gross negligence resulted in several incidents of misappropriation over a number of years, and where the record established both compelling mitigating factors and substantial aggravating factors, including prolonged delay in making restitution, discipline including one year's actual suspension was appropriate.

[12] **173 Discipline—Ethics Exam/Ethics School**
Where California Professional Responsibility Examination ("CPRE") had not yet been available when case was decided by hearing judge, review department modified hearing judge's discipline recommendation to substitute CPRE requirement for requirement to take and pass national professional responsibility examination.

ADDITIONAL ANALYSIS

Culpability
Found
221.12 Section 6106—Gross Negligence
270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.12 Misappropriation—Gross Negligence
Not Found
213.15 Section 6068(a)
Aggravation
Found
582.10 Harm to Client
Mitigation
Found
710.10 No Prior Record
725.12 Disability/Illness
735.10 Candor—Bar

745.10 Remorse/Restitution
750.10 Rehabilitation
765.10 Pro Bono Work
791 Other

Discipline

1013.08 Stayed Suspension—2 Years
1015.06 Actual Suspension—1 Year
1017.09 Probation—3 Years

Probation Conditions

1024 Ethics Exam/School

OPINION

PEARLMAN, P.J.:

This case involves stipulated culpability on six counts of grossly negligent misappropriation of trust funds totalling over $20,000 in medical liens that respondent's office failed to pay timely. The parties also stipulated to culpability on two other counts: violation of former rule 6-101(A)(2) of the Rules of Professional Conduct[1] for reckless or repeated failure to perform legal services competently and failure to return the file to the client in violation of rule 2-111(A)(2). Two other counts were dismissed. In aggravation, among other things, the hearing judge found that the misconduct constituted a pattern spanning several years. However, the hearing judge also found compelling mitigating evidence which justified a sanction less than disbarment, but not less than the one-year actual suspension minimum called for by the Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.) The respondent challenges the recommendation of one year's actual suspension as too severe a sanction. We agree with the examiner that the sanction recommended below was appropriate under the relevant precedent.

PROCEEDINGS BELOW

This case involves stipulated culpability on five counts of the notice to show cause (counts two, three, four, five and seven) plus one investigative count (designated as count nine) of misappropriation of trust funds totalling over $20,000 in medical liens, each constituting a violation of section 6106 and rule 8-101(B)(4).[2] The parties also stipulated to culpability on count five of violation of rule 6-101(A)(2). Counts one and eight were dismissed. Count six resulted in stipulated culpability for failure to return the file to the client in violation of rule 2-111(A)(2). A two-day hearing ensued in which the hearing judge determined that the misappropriations were the result of gross negligence rather than intentional misconduct and heard evidence in aggravation and mitigation. We adopt all of the findings made by the hearing judge in her carefully reasoned decision, and set forth a brief summary of the facts below.

[1] The conclusion that the repeated dipping of respondent's trust account below the required balance constituted a basis for a finding of moral turpitude under section 6106 is well supported in the case law. (See, e.g., *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, 474-475.) [2] Failure to honor medical liens is also a violation of former rule 8-101(B)(4). (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 10, recommended discipline adopted Nov. 28, 1990 (S016265).) Nonetheless, the evidence presented on the trust account violations was that none of the misappropriations were for respondent's own personal use. (R.T. p. 176.) Respondent generally dealt with very poor uneducated clients whom he often paid a few days before the settlement check cleared. Sometimes, he made substantial advances to them before the settlement check came in. These advances came out of his trust account. (R.T. p. 172.) Respondent himself was unaware of any specific problem with his trust account balance because he had an arrangement with his bank for overdraft protection on the trust account and it never returned a check. (R.T. pp. 170-172.) He had no knowledge of the impropriety of such arrangement or any background knowledge of how trust accounts should properly be handled when he opened his own practice. He has since learned the seriousness of the responsibility and has instituted procedures to ensure that his trust account is properly maintained. However, during the lengthy time in question, he simply let his staff oversee payments without his personal supervision. (R.T. p. 191.)

In aggravation, the hearing judge found: (1) that the misconduct evidences or demonstrates a pattern of misconduct from late 1983 to 1990 (std. 1.2(b)(ii), Stds. for Atty. Sanctions for Prof. Misconduct, Trans.

1. Unless otherwise noted, all further references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989, and all further statutory references are to the Business and Professions Code.

2. The hearing judge also concluded that respondent violated Business and Professions Code section 6068 (a) in counts 2-7 and 9. We are unable to find in the record a sufficient factual basis for such a conclusion separate and distinct from the other statute and rule violations. (See *Middleton* v. *State Bar* (1990) 51 Cal.3d 548, 561.)

Rules Proc. of State Bar, div. V [hereinafter "standard(s)" or "std."]); (2) that respondent was grossly negligent in accounting for client funds in addition to his culpability for gross negligence in failure to disburse such funds (std. 1.2(b)(iii)); and (3) that respondent significantly harmed one client who was sued by a collection agency for failure to pay a medical lien. (Std. 1.2(b)(iv).)

In mitigation, the hearing judge found that: (1) respondent had no prior record of discipline (std. 1.2(e)(i)); (2) respondent had extreme physical disabilities at the time of the misconduct in counts seven and nine (std. 1.2(e)(iv)); (3) respondent was candid and cooperative (std. 1.2(e)(v)); (4) respondent made belated restitution; (5) respondent performed extensive pro bono legal services (*Rose* v. *State Bar* (1989) 49 Cal.3d 646, 667; *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 602); (6) after the problems were brought to light, respondent diligently worked to improve his law office management practices; (7) respondent has changed his values through a spiritual reawakening; and (8) respondent evinced sincere remorse for his wrongdoing. (Decision p. 37.)

The hearing judge rejected disbarment because of the compelling mitigation and because respondent had no dishonest intent, but rather was grossly negligent in managing his trust account and supervising staff and acted with reckless disregard of whether his clients' medical bills were paid. She also rejected respondent's argument for no actual suspension because of the lengthy time period of his misconduct; his continued failure to pay medical liens long after demand was made and two years after his spiritual reawakening; the fact that he knowingly subjected his client to a collection action; and his delay in returning another client's file. (Decision pp. 38-39.)

DISCUSSION

[3] On review, the respondent cannot challenge his culpability of trust account violations and other stipulated misconduct. [4] The duty to keep clients' funds safe is a personal obligation of the attorney (*Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795), which is nondelegable (*Coppock* v. *State Bar* (1988) 44 Cal.3d 665, 680). He argues that the trial judge erroneously concluded there was a pattern of misconduct; erroneously considered the delay in rectifying problems as an aggravating circumstance; and was unduly influenced by the one-year minimum of actual suspension set forth in standard 2.2(a), since disapproved in *Edwards* v. *State Bar* (1990) 52 Cal.3d 28. His brief also summarizes at great length character witness testimony that was accepted by the hearing judge and taken into account in rendering her decision. It concludes by arguing that at most respondent should receive no more than 60 days actual suspension and no rule 955 requirement should be imposed. (Cal. Rules of Court, rule 955.) The examiner defends the hearing judge's decision as supported by the case law as well as the standards.

[5] The findings in mitigation are essentially not challenged. We adopt them, except for the finding in mitigation based on belated restitution. (See, e.g., *Rosenthal* v. *State Bar* (1987) 43 Cal.3d 658, 664.)

EVIDENCE SUPPORTING A PATTERN OF MISCONDUCT

[6a] Respondent's counsel argues that "the misconduct in this case involved a total of eight clients over a period of about six years," during which time respondent's law office processed "literally thousands of cases." Negligence in only that number of cases over that many years in a high volume practice might well not constitute a pattern, but the evidence here was that the negligence was far more pervasive. Indeed, his counsel also argues that respondent's lengthy delay in responding to the complaining witnesses was due to numerous other client problems caused by his office which he had to correct. By his own admission, his staff could not handle his overwhelming caseload, 95 percent of which was for Spanish-speaking clients. (R.T. p. 146.) When he finally reviewed his 3,500 cases personally, he was "taking care of lots of other problems" (R.T. p. 231), which would have resulted in new State Bar complaints for mishandled cases other than the ones to which he stipulated culpability. (R.T. pp. 231-232.) To quote from his own counsel's brief before us, "Some settlements were distributed improperly, some files were closed without closing numbers, some medical liens were missed, and his trust account dipped below the levels it should have been at for various periods of time." (Citing R.T. pp. 146-147.)

Respondent's counsel summarized the pervasiveness of the problem as follows: "In short, faced with a problem greater in scope than just the eight complaints at issue here, Respondent chose to tackle the problems globally, and remedy them in a systematic, hands-on fashion. By necessity, this process took a long time to complete."

[6b] Finding a pattern in aggravation is not limited to consideration of the counts pleaded. (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 34.) Since respondent himself testified to his prolonged, systemic failure to supervise his staff, his staff's inability to handle the caseload and numerous other problems besides the ones listed in the notice to show cause, he has no grounds to challenge the finding in aggravation based thereon that a pattern of neglect existed. (*Id.*; cf. *Edwards* v. *State Bar*, *supra*, 52 Cal.3d at pp. 35-36.)

[7] The delay in rectifying the problem was also properly taken into account in aggravation. Indeed, we agree with the hearing judge that this delay is the most significant factor in justifying the length of the suspension. After respondent found out about his office's failure to pay liens, he still took up to two years to pay them. Respondent's preoccupation with other unspecified problems involving his prior caseload is no justification for his delay in remedying the negligent misappropriations set forth in the charges heard below. (See, e.g., *Garlow* v. *State Bar* (1988) 44 Cal.3d 689, 711; *Farnham* v. *State Bar* (1988) 47 Cal.3d 429, 445.)

Finally, respondent's counsel argues that the hearing judge was unduly influenced by standard 2.2(a) which calls for a minimum of a one-year actual suspension for misappropriation. [8] The hearing judge issued her decision prior to *Edwards* v. *State Bar*, *supra*, 52 Cal.3d 28 and *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404 and does not address the question of whether gross negligence resulting in misappropriation should be subject to a suggested one-year minimum actual suspension the same as is applied in intentional misappropriation cases. Nor does the decision make reference to any prior cases involving grossly negligent misappropriation. Rather, in applying the suggested guideline of one year actual suspension, the hearing judge justified her decision based on facts in the record making some suspension appropriate for public protection (decision pp. 38-39), stating that such factors "preclude my departure from the Standards." (*Id.* at p. 39.) Despite such language, we do not find her to have rigidly applied the standards, but to have reached her discipline recommendation based on an analysis of the record in light of the objectives of discipline for protection of the public, the legal profession and the courts.

[9] Respondent's counsel is correct that the Supreme Court rejected the one-year minimum actual suspension in *Edwards* v. *State Bar*: "In requiring that a minimum of one year of actual suspension *invariably* be imposed . . . the standard is not faithful to the teachings of this court's decisions." (*Edwards* v. *State Bar*, *supra*, 52 Cal.3d at p. 38, emphasis supplied.) Negligent misappropriation quickly and voluntarily remedied may not require any actual suspension (*Waysman* v. *State Bar* (1986) 41 Cal.3d 452), or only a short suspension (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, recommended discipline adopted Feb. 14, 1991 (S017463)). [10] Nevertheless, in *Edwards* v. *State Bar*, the Supreme Court specifically reaffirmed that misappropriation caused by serious, inexcusable violation of a lawyer's duty to oversee entrusted funds is deemed willful even in the absence of deliberate wrongdoing. Even with Edwards's 18-year clean discipline record, full restitution and voluntary steps to improve his management of trust funds, the Supreme Court ordered one year of actual suspension. (*Edwards* v. *State Bar*, *supra*, 52 Cal.3d at pp. 38-39.) Thereafter, we recommended six months actual suspension of respondent Bouyer for grossly negligent misappropriation resulting from mishandling four cases and not correcting the problem for a year. Bouyer's gross negligence was for a far lesser period and merited a shorter period of suspension than the misconduct demonstrated here.

The attempts of respondent's counsel to distinguish *In the Matter of Bouyer*, *supra*, 1 Cal. State Bar Ct. Rptr. 404, and *Edwards* v. *State Bar*, *supra*, 52 Cal.3d 28, are unpersuasive. [11a] There is far more mitigation evidence here in terms of respondent's subsequent religious conversion, pro bono activities and character witness testimony, but there were also

far more incidents of misappropriation over a far greater period of time. Indeed in *Rose* v. *State Bar* (1989) 49 Cal.3d 646, extensive pro bono activities prevented disbarment, but did not preclude two years actual suspension for multiple serious acts of misconduct. Here, apart from the gross negligence which resulted in the original misappropriations, there was prolonged delay in making restitution after knowledge of the problem. That was not true in *In the Matter of Bouyer* or *Edwards* v. *State Bar*.

Edwards was charged with misappropriating funds of one client for a short period of time, writing her a check drawn on insufficient funds, which he repaid within three months. The misappropriation in *Edwards* v. *State Bar* was not proved to have been intentional. Rather Edwards testified that "he had believed there were sufficient funds in the account to cover the check, but that he had not known the exact balance. He said he 'would kind of keep a mental idea' as to the balance, rather than maintaining a record of the exact balance.... [H]e did not maintain a chart of the client funds in his trust account and did not promptly withdraw funds to which he became entitled as fees or as reimbursement for costs. He would allow his own funds to accumulate in the account and would draw on them as needed, sometimes by means of automated teller machines." (*Edwards* v. *State Bar*, *supra*, 52 Cal.3d at p. 33.) The Supreme Court cited with approval the hearing department's findings that "petitioner's dealings in his trust account, by his own admission, involve multiple acts of inappropriate record keeping and use of funds for personal matters." (*Id.* at p. 34.) This evidence of uncharged misconduct was properly considered in aggravation.

As here, Edwards thereafter greatly improved his handling of the trust account, voluntarily employed a certified public accountant to manage his trust account and ceased the practice of commingling his own funds in that account. The hearing panel took this into account as well as Edwards's lengthy prior period of law practice without any discipline and recommended no actual suspension. The former volunteer review department instead recommended two years actual suspension. The Supreme Court rejected the former recommendation as too lenient and the latter as too harsh, deeming one year of actual suspension necessary for the protection of the public, the courts and the legal profession. (*Edwards* v. *State Bar*, *supra*, 52 Cal.3d at p. 39.)

[11b] We conclude that respondent should be suspended for a similar period. By his own admission, for a number of years he took in more cases than he could handle and failed to supervise his staff in derogation of his responsibilities as an attorney toward his clients and lienholders. His belated reformation is a giant step in the right direction, but is not enough to justify reducing the suspension recommendation, particularly in light of his failure to make complete restitution until after the State Bar proceedings were instituted.

CONCLUSION

[11c] For the reasons discussed herein, we therefore recommend that the Supreme Court adopt the hearing judge's recommendation of two years suspension, stayed, and three years probation, on the conditions set forth in her decision, including one year of actual suspension, and compliance with rule 955 of the California Rules of Court. **[12]** We also recommend a requirement of passage of the new California Professional Responsibility Examination within one year instead of the examination given by the National Conference of Bar Examiners which was recommended by the hearing judge at a time when the California Professional Responsibility Examination was not yet available.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT E

A Member of the State Bar

[No. 88-O-11634]

Filed October 17, 1991
Reconsideration denied, December 9, 1991 (see separate opinion, *post*, p. 732)

SUMMARY

Respondent was aberrationally negligent in handling a client's check. Although respondent had an elaborate bookkeeping system, a new employee mistakenly billed the client without respondent's knowledge for an expert witness fee which respondent had not paid. The client paid the bill, and the check was deposited into respondent's general operating account. Almost three years later, after the client had hired new attorneys, respondent discovered the mistaken billing, and told the new attorneys that he would take care of the expert witness fee matter in connection with an overall settlement of disputed fees and costs. When no settlement was reached, arbitration followed. During the arbitration proceeding, respondent offered to credit the client in the amount of the mistaken bill, by way of offset against other unpaid costs in almost the same amount. The client's new attorneys did not object, and the arbitration award stated that the client had already reimbursed respondent for all actual costs.

Respondent was initially charged with misappropriation, and the notice to show cause was later amended to charge commingling. The hearing judge found that respondent had no intent to misappropriate the client's check and engaged in no acts of deceit toward the client. She concluded that respondent was culpable of commingling, and that respondent's negligence in failing to become aware of the problem sooner and to handle it more quickly amounted to moral turpitude. She also interpreted the arbitration award as not having resolved the issue of the restitution of the expert witness fee. Considering failure to make restitution an aggravating factor, and finding respondent not to have been candid in portions of his testimony, she recommended restitution and three months actual suspension. (Hon. Jennifer Gee, Hearing Judge.)

Respondent sought review. The review department concluded that respondent was culpable only of commingling and failing to retain disputed funds in trust. Respondent was not culpable of moral turpitude, because the misconduct arose from an isolated mistake in an otherwise careful bookkeeping system. The review department also held that restitution had been made via the arbitration offset, and that the evidence did not support the finding of lack of candor in respondent's testimony. Rejecting all of the hearing judge's findings in aggravation, and placing greater weight than the hearing judge on the extensive mitigating evidence, the review department imposed only a private reproval, conditioned on passage of the professional responsibility examination.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Daniel Drapiewski

HEADNOTES

[1] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
1099 Substantive Issues re Discipline—Miscellaneous
A respondent who receives a private reproval is entitled to have his or her name omitted from the published review department opinion, although the disciplinary proceeding itself is, and remains, public. (Trans. Rules Proc. of State Bar, rule 615.)

[2] **106.20 Procedure—Pleadings—Notice of Charges**
106.40 Procedure—Pleadings—Amendment
192 Due Process/Procedural Rights
204.90 Culpability—General Substantive Issues
280.00 Rule 4-100(A) [former 8-101(A)]
Where the original notice to show cause alleged misappropriation, and the examiner amended the notice to charge respondent with commingling resulting from his bookkeeper's negligence, and there was no evidence that respondent's defense was thereby prejudiced, respondent had sufficient notice of the charges to satisfy his due process rights, because the duty to keep client funds safe is a personal obligation of the attorney and nondelegable, and the attorney was therefore on notice that he could be culpable if his staff's conduct resulted in a violation of that duty.

[3] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
The review department gives great weight to credibility determinations by hearing judges. (Trans. Rules Proc. of State Bar, rule 453.)

[4] **148 Evidence—Witnesses**
162.90 Quantum of Proof—Miscellaneous
165 Adequacy of Hearing Decision
Where respondent's testimony was plausible and uncontradicted, it should have been regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available, but was not offered.

[5] **148 Evidence—Witnesses**
162.90 Quantum of Proof—Miscellaneous
166 Independent Review of Record
Where respondent's client's testimony contradicted respondent's testimony, and the hearing judge found the client's testimony to be more credible on the disputed point, but other circumstances revealed by the record nonetheless limited the effect of the client's testimony, the review department held that the record did not establish by clear and convincing evidence that respondent's testimony was a lie.

[6 a, b] **221.00 State Bar Act—Section 6106**
Where respondent failed to catch an isolated mistake in the billing of a single matter, but had an accounting system in place which was otherwise apparently working extremely well, and there was evidence that respondent had a long history of accurate and careful handling of client funds, respondent's isolated mistake in the billing of the single matter did not amount to gross negligence constituting moral turpitude.

[7] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
221.00 State Bar Act—Section 6106
430.00 Breach of Fiduciary Duty
Although attorneys cannot be held responsible for every detail of office operations, fiduciary violations resulting from serious and inexcusable lapses in office procedure may be deemed wilful for disciplinary purposes even in the absence of deliberate wrongdoing.

[8] **163 Proof of Wilfulness**
204.10 Culpability—Wilfulness Requirement
221.00 State Bar Act—Section 6106
801.10 Standards—Effective Date/Retroactivity
801.30 Standards—Effect as Guidelines
The analysis of gross negligence in cases decided before the adoption of the Standards for Attorney Sanctions for Professional Misconduct is not affected by the adoption of the standards, but the discipline imposed now takes into account guidelines provided by the standards, although they are not rigidly applied.

[9 a, b] **280.00 Rule 4-100(A) [former 8-101(A)]**
Where respondent was involved in a dispute with a former client over the fees and costs incurred for the client, and discovered that three years earlier the client had mistakenly been billed for, and had paid, an expert witness fee which respondent had not paid, respondent should have either paid the bill, reimbursed the client, or, pending the resolution of the dispute, put the erroneous cost reimbursement into a trust account. Having instead kept the funds in his general account, respondent was culpable of commingling and of failing to maintain the funds in trust.

[10] **213.10 State Bar Act—Section 6068(a)**
220.10 State Bar Act—Section 6103, clause 2
221.00 State Bar Act—Section 6106
Section 6106, in contrast to sections 6068 (a) and 6103, does state a chargeable offense for which discipline may be imposed.

[11] **280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]**
Where respondent's client made a belated demand for repayment of an improperly billed cost, by raising the issue during an arbitration proceeding concerning fees and costs owed by the client, and in response, respondent offered the client credit against other fees in the arbitration, respondent was not culpable of failing to pay or deliver the funds promptly.

[12 a, b] **139 Procedure—Miscellaneous**
147 Evidence—Presumptions
191 Effect/Relationship of Other Proceedings
It is generally presumed that the arbitrators heard and decided all disputed issues in an arbitration. Where issue regarding costs was raised in an attorney's fees arbitration, and the arbitration award

showed on its face that it covered costs as well as fees, and neither party contested the arbitrators' jurisdiction to consider issues of costs, issue of whether costs had been reimbursed should not have had to be relitigated in subsequent State Bar disciplinary proceeding.

[13 a, b] **139 Procedure—Miscellaneous**
191 Effect/Relationship of Other Proceedings
The doctrine of res judicata seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration. Mistakes of fact or law do not affect the conclusive nature of an arbitration award against collateral attack. If the contending parties had a full and fair opportunity to litigate, there must be compelling reasons to sustain a plea for a second chance.

[14] **159 Evidence—Miscellaneous**
169 Standard of Proof or Review—Miscellaneous
191 Effect/Relationship of Other Proceedings
Although an arbitrator's testimony is admissible on the question of what issues were tried in the arbitration, the arbitrator's expression of his own belief does not bind the State Bar Court in adjudicating the effect of the arbitration award.

[15] **710.10 Mitigation—No Prior Record—Found**
Where respondent had practiced law for over 30 years before his current misconduct and where respondent's prior disciplinary record consisted solely of a private reproval for minor misconduct early in his career, respondent was entitled to a finding in mitigation based on his long years of practice.

[16] **165 Adequacy of Hearing Decision**
765.10 Mitigation—Pro Bono Work—Found
Evidence of respondent's extensive pro bono activities and community involvement was entitled to greater weight as mitigating evidence than given to it in the hearing judge's decision, in which it was not mentioned.

[17] **740.10 Mitigation—Good Character—Found**
Where a great number of character witnesses, including two judges who had known respondent for a very long time, testified about respondent's impeccable honesty and reliability and where two of the character witnesses were very knowledgeable about the nature of respondent's misconduct and it had no effect on their opinion, it was extremely unlikely that the extraordinarily high opinion of respondent's honesty and trustworthiness expressed by the character witnesses would change much with knowledge of the details.

[18] **615 Aggravation—Lack of Candor—Bar—Declined to Find**
Where the review department rejected the hearing judge's finding that respondent had lied, it also rejected the hearing judge's finding in aggravation that respondent had lacked candor in part of his testimony.

[19] **735.10 Mitigation—Candor—Bar—Found**
Where respondent appeared to have cooperated fully with the State Bar's investigator, and stipulated at the hearing to facts demonstrating culpability on one charge, respondent's cooperation with the State Bar was a mitigating factor.

[20] **595.10 Aggravation—Indifference—Declined to Find**
Where respondent had already tendered restitution to a former client in an arbitration proceeding, and nevertheless, after a culpability determination by the hearing judge, placed funds in a trust account to cover the amount which the hearing judge considered to be still at issue, the review department rejected the hearing judge's finding in aggravation that respondent displayed indifference toward rectification.

[21] **582.50 Aggravation—Harm to Client—Declined to Find**
Where, as soon as respondent's client discovered a billing error and brought it to respondent's attention, respondent recognized the error and offered to take care of it, and where respondent offered the client credit for the erroneous billing as part of a fee arbitration, the review depart rejected the hearing judge's finding that the client was significantly harmed by respondent's negligence with respect to the error.

[22 a, b] **824.59 Standards—Commingling/Trust Account—Declined to Apply**
1091 Substantive Issues re Discipline—Proportionality
Although standard 2.2(a) calls for 90 days minimum suspension for commingling, the Supreme Court has declined to impose suspension if the commingling results from a good faith fee dispute. Where respondent's trust fund violation was no more serious than trust fund violations in a prior Supreme Court case in which a public reproval was imposed, and where respondent presented far greater evidence in mitigation than the attorneys in that case, the appropriate discipline was a private reproval on condition of taking and passing the Professional Responsibility Examination.

[23] **139 Procedure—Miscellaneous**
175 Discipline—Rule 955
178.50 Costs—Not Imposed
Where the review department rejected the hearing judge's recommended discipline of three months actual suspension and imposed a private reproval, this rendered moot respondent's arguments against the hearing judge's recommended imposition of notification requirements pursuant to rule 955 of the California Rules of Court and the imposition of costs.

ADDITIONAL ANALYSIS

Culpability
Found
280.01 Rule 4-100(A) [former 8-101(A)]
Not Found
213.15 Section 6068(a)
220.15 Section 6103, clause 2
221.50 Section 6106
280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]
420.52 Misappropriation—Excusable Negligence
Discipline
1051 Private Reproval—With Conditions
Probation Conditions
1024 Ethics Exam/School

OPINION

PEARLMAN, P.J.:

This case involves aberrational negligence in handling one client check intended for reimbursement of an expert witness fee that had not in fact been paid by respondent. Respondent is a highly respected attorney with over 40 years of practice handling close to 10,000 cases in his career. If respondent had promptly resolved the matter after it was brought to his attention, no discipline would have been appropriate. However, he delayed for a year in resolving the matter, treating it as part of an ongoing fee dispute and leaving the disputed sum of $1,754 in his general account when it should have been placed in his trust account or returned to the client. For that reason, discipline is appropriate and, in light of very strong mitigation, we impose a private reproval.[1] [1 - see fn. 1]

Unfortunately, at the trial below the examiner treated the case as one involving intentional misappropriation—which it did not—and sought disbarment or lengthy suspension. The hearing judge carefully considered all of the evidence and found that respondent had an elaborate bookkeeping system; that respondent's staff made the mistake without his knowledge; that there was no intent to misappropriate; and that respondent engaged in no acts of deceit towards his client. However, she reached the mistaken conclusion that his negligence in not becoming aware of the problem sooner and in handling the matter after the dispute came to light amounted to moral turpitude under the case law. At the trial examiner's urging, she also interpreted a 1986 fee arbitration award as not having resolved the issue of restitution of the expert witness payment. As a consequence, the hearing judge found failure to make restitution as an aggravating factor, ordered restitution and recommended three months actual suspension. The examiner assigned to the case on review has stipulated that restitution is unnecessary because it has already been made.

We conclude that respondent commingled trust funds with operating funds in violation of former rule 8-101(A) of the Rules of Professional Conduct (now rule 4-100);[2] that he did not commit an act of moral turpitude in violation of Business and Professions Code section 6106; and that extensive mitigating evidence justifies imposition of a private reproval with a requirement of passage of the professional responsibility examination.

THE FACTS

With few exceptions, noted below, we adopt the hearing judge's findings of fact. Respondent was admitted to practice law in California in 1951. He has been in private practice since 1955 concentrating in business and commercial law. (R.T. Vol. V p. 10.) Half of his law practice has been litigation. As of the time of trial, he had represented over 9,500 clients in his 40-year career and had never had any claim brought for any financial impropriety other than the instant case. (R.T. Vol. V p. 17.) The hearing judge found that he maintained "an elaborate bookkeeping" system which "fell apart" for one client matter due to the number of bookkeepers and failure to closely supervise them (decision pp. 14-15), but no other clients were found to have been adversely affected. (Decision p. 28; R.T. Vol. V p. 11.) The hearing judge concluded that the instant problem was "aberrational." (Decision p. 28.)

In about July 1980, respondent began handling a number of matters for the client who became the complaining witness in this case. The client was president of a small corporation and had been sued individually in a business matter for which his employer had refused to take over his defense. Respondent represented him in that action and also brought suit against the employer for indemnification. Thereafter, the client was fired by the corporation and his stock was diluted. (R.T. Vol. I pp. 168-169.) While other matters were handled by respondent on an oral fee arrangement, the client employed respondent to bring a wrongful termination suit under a

1. [1] In light of the disposition of this matter as a private reproval, respondent is entitled to have his name omitted from this published opinion, although the proceeding itself was, and remains, public. (Rule 615, Trans. Rules Proc. of State Bar.)

2. Unless otherwise noted, all further statutory references are to the Business and Professions Code, and all further references to rules are to the former Rules of Professional Conduct in effect from January 1, 1975, to May 26, 1989.

written contingent fee agreement (R.T. Vol. I pp. 29-30), which provided, among other things, for a 40 percent contingent fee of all sums collected and a provision for a reasonable additional fee on appeal. (State Bar exh. 1.) The agreement required the client to pay all costs within 30 days of billing, including fees of expert witnesses.

In the spring of 1981, respondent suggested that a prominent Bay Area law firm be retained for provision of a possible expert witness in the upcoming trial in the wrongful termination suit. Respondent had a law school friend who was now a partner at that firm. Respondent consulted his friend who referred him to another business partner for his expertise. (R.T. Vol. I pp. 36-39.) A short meeting was held between that partner and an associate or paralegal and respondent and his client in May 1981, in which they discussed the possibility of the partner testifying as an expert witness at the trial. No decision was made at that meeting. (R.T. Vol. I pp. 39-46.) Thereafter, the law firm did some research on the relevant provisions of the Business and Professions Code and wrote two letters to respondent in May 1981, followed by a letter dated June 25, 1981, indicating that expert testimony might be permissible, but that the firm did not consider itself to be in a position to act as an expert witness for the trial. (R.T. Vol. I pp. 138-139.) No bill accompanied the letter.

On September 29, 1981, a bill was issued summarizing the law firm's services and indicating that the total hours spent in May and June 1981 were 82.05 and services were $1,500 plus costs of $253.94, for a total bill of $1,753.94. (State Bar exh. 3.) Respondent's bookkeeper wrote a check for respondent to sign to pay for it. Respondent testified that he was "appalled" by the bill. (R.T. Vol. I p. 48.) He found it incomprehensible and testified that he discussed it with his client who also found it incomprehensible and agreed that the invoice should not be paid. (R.T. Vol. I pp. 49-50.) The client denied having such conversation. (R.T. Vol. I p. 188.) Respondent voided the check which his bookkeeper had prepared. (R.T. Vol. I p. 52.) He further testified that he thereafter objected to the bill at a luncheon meeting in November 1981 with his friend at the firm and that his friend promised to take it up with others at the firm and get back to him. (R.T. Vol. I pp. 48-50.) Nothing further was heard from the law firm with regard to this bill for nearly four years. (R.T. Vol. III p. 55; see exh. 10a.) Respondent interpreted the law firm's silence as recognition that the bill was disputed and the client did not intend to pay it. (R.T. Vol. III p. 121.)

In early 1982, respondent conducted a three and one-half week jury trial in the wrongful termination case and obtained a $340,000 judgment in favor of the client. (R.T. Vol. II p. 160.) The quality of his services in regard to that litigation has never been questioned by the client's new counsel. (R.T. Vol. V p. 172.) Meanwhile, unbeknownst to respondent, respondent's newly hired bookkeeper mistakenly recorded the expert witness bill as a cost advanced in the litigation and in February 1982, when respondent was vacationing in Europe, his office sent the client an invoice which included the unpaid bill as a cost advanced. (State Bar exh. 5; R.T. Vol. I pp. 58-63; resp. exh. I.) The client paid it. Since the payment was intended as reimbursement of a cost advanced, the check was deposited into respondent's general operating account. (*Id.*) The hearing judge found that these funds were justifiably deposited into that account. (Decision p. 17.)

In the ensuing two years, neither respondent's bookkeeper nor CPA picked up on the prior billing error to the client and respondent remained unaware of it. (R.T. Vol. II p. 159.) Respondent initiated additional litigation on the client's behalf in attempts to collect the judgment, but such litigation was halted when the client refused to pay the costs of any further collection efforts because he thought the likelihood of collection was too low. A dispute also arose regarding attorney's fees owing to respondent. (R.T. Vol. III pp. 2-9.)

In the spring of 1984 the client hired a new law firm to represent him in connection with his dispute with respondent over attorney's fees and costs in the five then-pending suits. (R.T. Vol. II pp. 23-24.) In December of that year, in response to a letter from the client's new lawyers, respondent directed his current bookkeeper to review unbilled costs and to produce a bill for fees and costs. (R.T. Vol. III pp. 46-47.) He included it with a letter (resp. exh. I) stating his position regarding his entitlement to fees and costs,

including both the reasonable value of his time in the contingency case and fees payable for appellate work.

The bill respondent's bookkeeper prepared in December 1984 included the amount of "$1,753.94" as the cost demanded and "other costs to date" of $3.50. (Resp. exh. I; R.T. Vol. II p. 46.) Respondent did not himself review the cost records at that time. (R.T. Vol. II pp. 47-48.) By letter dated January 15, 1985 (State Bar exh. 13), the client's new attorneys responded to the December letter and pointed out that on February 3, 1982, the client was billed for the expert witness consultation in that exact amount—$1,753.94—and paid it at that time. It was only upon receipt of the January 15, 1985 letter that respondent learned that his bookkeeper had billed the client in 1982 for the expert witness consultation invoice which respondent had not paid. (R.T. Vol. III p. 92.)

Respondent sent a letter dated April 16, 1985, to the client's new attorneys reviewing the dispute regarding collection efforts. The letter included a request for $1,176.85 in costs; demand for $6,495 for reasonable fees on appeal pursuant to the written agreement; cooperation in the prosecution of the actions instituted for purposes of collection or in the alternative, payment in excess of $100,000 at the hourly rate of $100. Also included in the letter was a statement "I have checked the records and will take care of the [expert witness consultation] matter." The letter concluded by requesting that the parties meet to attempt settlement. Absent a settlement he indicated his intention to sue for declaratory relief on the various agreements.

No settlement was thereafter reached and an arbitration clause in the parties' fee agreement was invoked. (Exh. 1.) In the hearing below, in the present proceeding, the examiner argued that the April 1985 letter was deceitful because respondent did not thereafter "take care of" the bill. Respondent testified that the statement was only included as part of a settlement offer which was not accepted. The hearing judge rejected respondent's explanation, concluding the statement was not a misrepresentation, but merely an unkept promise. (Decision pp. 12-13.)

At the arbitration proceeding in April 1986, the arbitrators considered fees and costs owed to date. Respondent put on evidence of unbilled costs totalling $1,733.11. The client's new attorneys countered that the bill for expert witness consultation had never been paid to the consulting law firm (R.T. Vol. V p. 72), and respondent offered to credit the client in the amount thereof, leaving a $20.83 credit for costs owing to the client. (State Bar exh. 16.) The client's new attorneys wrote back to the arbitrators questioning some of the costs, but did not voice any objection to the suggestion of crediting the amount erroneously paid to respondent as reimbursement for the expert witness bill. (State Bar exh. 17.)

The arbitrators issued an award in June 1986 to respondent in the amount of $8,300 which was denominated "fees and costs reimbursement." (State Bar exh. 8.) The accompanying description of the award states that the award is composed of attorney's fees at $100 per hour on two appeals. The arbitration award concludes: "All actual costs have been paid by the client." On the client's petition, that award was confirmed by the superior court by order dated December 12, 1986. (Resp. exh. Q.)

In January 1987, the client paid the $8,300 arbitration award plus interest. (Resp. exh. Q p. 5.) The issue of the continuing rights and obligations of the parties with respect to collection efforts remained pending in a declaratory relief action. For three years thereafter, the client litigated with respondent on appeal (see resp. exh. Q) and on remand, whether respondent had a cause of action against the client for breach of an obligation to pay for costs in order to pursue collection of the judgment and, if so, any resulting damages to respondent. (Resp. exh. Q.) That action was tried in 1990 and has since settled.

THE STATE BAR PROCEEDING

In May 1988, the client's new attorneys filed a complaint with the State Bar asserting that respondent had misappropriated the $1,753.94 the client had intended as reimbursement for the payment of the expert witness bill. Neither the client nor his new attorneys had ever specifically directed respondent to pay the bill or accused him of misappropriating the

funds. In fact, no mention was made of the bill in the three years following the arbitration in which they exchanged numerous letters about other issues. (R.T. Vol. II pp. 65-67.) The first time that respondent became aware that the client was charging him with misappropriation was when he heard from the State Bar investigator. Respondent wrote back a lengthy letter, complete with attachments, explaining the mistake that had occurred and noting that credit was given therefor in the arbitration proceeding. (R.T. Vol. I p. 112; State Bar exh. 7.)

The original notice to show cause alleged violation of sections 6068 (a), 6103 and 6106 and former rule 8-101(B)(4) by misappropriating to his "own use and purposes" $1,753.94 promptly paid by his client upon billing in 1982 for the cost of an opinion letter from another law firm. The notice specifically charged that "Although the law firm repeatedly billed you and tried to collect their fee, you failed to pay the $1,753.94 to them or to refund the money to your client." On January 19, 1990, the examiner moved to amend the notice to allege commingling in violation of rule 8-101(A) in accordance with facts adduced at the hearing. This motion was granted (R.T. Vol. II pp. 19-21), and respondent was told that he could move for a continuance if he needed additional time to respond. He elected to proceed.

Five days of hearing were conducted in the court below in two phases. Culpability hearings were conducted over a period of three days in January 1990 and an order was issued March 13, 1990, finding respondent culpable of violating rule 8-101(A) and committing misconduct covered by sections 6103 and 6106. No violation of section 6068 (a) or former rule 8-101(B)(4) was found. Two days of hearing on the issue of discipline were held in June and July 1990, and the hearing judge issued her decision on November 27, 1990. Respondent sought review.

DISCUSSION

A. Sufficiency of Notice.

[2] Respondent argues that his due process rights were violated because he was originally charged with a single act of misappropriation in 1982; he was not charged with failure to supervise his bookkeepers, which was the basis of the culpability determination. Respondent does not claim that the granting of the motion to amend was improper, but that the amendment, like the original pleading, did not put him on notice of the misconduct of which he was found culpable. We disagree. The duty to keep client funds safe is a personal obligation of the attorney (*Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795), and nondelegable. (*Coppock* v. *State Bar* (1988) 44 Cal.3d 665, 680.) Respondent was thus at all times on notice of potential culpability for failure to supervise conduct by his staff if their conduct resulted in violation of the Rules of Professional Conduct and cited provisions of the Business and Professions Code. There is no evidence that respondent was prejudiced in putting on his defense. However, as discussed *post*, the evidence did not support the hearing judge's finding of gross negligence amounting to moral turpitude under the controlling case law.

B. Disputed Findings of Fact in Aggravation.

Respondent also challenges two findings in aggravation that he was untruthful in giving background testimony regarding the history of the billing dispute over the expert witness fee. (Decision p. 24.)

Finding No. 9.

In finding number 9, the hearing judge found that, contrary to respondent's testimony, "respondent never contacted the firm to dispute the bill." The hearing judge noted that respondent's appointment calendar (resp. exh. E) "at most establishes" that he did meet with his original contact at the firm, his law school friend, in November 1981, about a month after receiving the bill he had refused to pay. The hearing judge rejected respondent's testimony "as uncorroborated" that he told his friend at that November meeting that he objected to the bill. (Decision p. 4.) [3] Although we give great weight to credibility determinations by hearing judges pursuant to rule 453 of the Transitional Rules of Procedure and the case law (see, e.g., *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055), the hearing judge appears to have mistakeuly believed that respondent's testimony was controverted by the State Bar when it was not. Respondent contends that she also applied the wrong burden of proof.

Upon our own review of the record, we find that respondent's testimony was not controverted and was consistent with his voiding of the check prepared by his bookkeeper and his non-payment of the bill. His friend was not called to testify by either side. The State Bar did call the potential expert witness who was in charge of the billing for his firm's consultation services. (R.T. Vol. I pp. 136-147.) He testified that "he did not recall" any objection to the bill. (R.T. Vol. I p. 146.) He and another partner also testified (R.T. Vol. I pp. 147-165) as to the firm's general billing and collection practices to the effect that the firm did not have any written record of objections to the bill and that objection would be recorded in the ordinary course of business and brought to the attention of the partner in charge of billing. (R.T. Vol. I pp. 145, 149, 155-157.)

None of this evidence contradicted respondent's testimony that he conveyed to his friend an oral objection to the bill. When the bill remained unpaid, no follow-up bill was sent by the law firm for more than three years.[3] This is circumstantial evidence unmentioned by the hearing judge which tends to support respondent's testimony that he did communicate his objection to the bill. [4] Since respondent's testimony is plausible and uncontradicted, it "'should be regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available but was not offered.'" (*Edmondson* v. *State Bar* (1981) 29 Cal.3d 339, 343, quoting *Am-Cal Investment Co.* v. *Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 543; see also *Davidson* v. *State Bar* (1976) 17 Cal.3d 570, 574.)

We therefore modify finding 9 to reflect that "no clear and convincing evidence was presented to contradict respondent's testimony that an informal objection to the bill was raised by respondent to his friend at a meeting in November 1981. Although no notation of an objection to the bill was ever made on the firm's file, no further billing was sent by the firm for its services in the case in the ensuing three years." *Finding No. 23.*

[5] We also find no clear and convincing evidence that respondent "falsely testified" that in the fall of 1981, his client agreed that the bill should not be paid as submitted. (Decision pp. 7, 16, 24; finding no. 23.) The hearing judge found the client to be more credible on this point because the client thereafter paid the respondent the February 1982 bill, which included the amount of the invoice, without questioning it. (Decision p. 7.) Nevertheless, there are other circumstances revealed by the record which limit the effect of the client's testimony and actions.

First of all, it was undisputed that respondent met with the client weekly in the fall of 1981 preparing for the trial. Respondent's testimony that at one of those meetings they discussed and agreed not to pay the bill as submitted is plausible. Second, the client testified to having had a stroke in 1986, which temporarily destroyed his entire memory after which he "substantially" recovered his memory. (R.T. Vol. IV p. 66.) It is thus very possible that he forgot any conversation in the fall of 1981 with respondent on the subject of the bill. Third, the client was specifically found to have grossly exaggerated other testimony regarding the cost of his new attorneys. He testified that he had spent $30,000 on their services; they testified that they had billed him approximately $12,000, and the hearing judge so found. (Decision p. 25.) With regard to the expert witness bill, the client testified that he "always told everybody that it [the bill] was a just bill and should be paid." (R.T. Vol. V p. 65.) This testimony contradicted the client's action in never directing respondent to pay the bill once the client discovered it had not been paid. He instead permitted respondent to offer the amount as a credit in arbitration against respondent's other bills.

Thus, we find that the record does not establish by convincing proof that respondent lied about his recollection of a conversation with his client in the

3. Apparently only after the client's new attorneys made inquiry of the law firm regarding the issue did the law firm send belated bills in 1985 and 1986 to respondent for payment, which respondent refused to pay. (State Bar exhs. 10 a-j.) In response to collection efforts in 1986, respondent asserted the bills were barred by the statute of limitations (R.T. Vol. I p. 51), and the law firm thereafter wrote the bill off.

fall of 1981. *Davidson* v. *State Bar*, *supra*, 17 Cal.3d at p. 574 is right on point. There the court noted that testimony of one witness was hedged by admission that he could not accurately recall the events in question and was uncertain of their sequence. Another witness's testimony was less equivocal, contradicting petitioner's version. The court concluded, "Petitioner's testimony, however, is plausible and not otherwise contradicted by the record. The evidence when viewed in the context of the entire record supports a reasonable inference of petitioner's lack of misconduct." (*Id.*)

C. Gross Negligence As Moral Turpitude.

[6a] The hearing judge based her finding of gross negligence on respondent's failure to catch the billing error in this single case despite having an accounting system in place which was otherwise apparently working extremely well. [7] In *Palomo* v. *State Bar*, *supra*, 36 Cal.3d at pp. 795-796, the Supreme Court reviewed the standard of supervision of office operations required of attorneys and concluded that "Attorneys cannot be held responsible for every detail of office operations. (*Vaughn* v. *State Bar* (1972) 6 Cal.3d 847, 857.) However, where fiduciary violations occur as the result of serious and inexcusable lapses in office procedure, they may be deemed 'wilful' for disciplinary purposes, even if there was no deliberate wrongdoing. [Citations.] . . . [¶] Some decisions imply that only 'gross' negligence or 'habitual' disregard of client interests warrants discipline. [Citations.] But the record demonstrates such pervasive carelessness here." The record in *Palomo* v. *State Bar*, *supra*, 36 Cal.3d 785, showed that the client's signature to a settlement check was forged by Palomo's bookkeeper. Palomo testified that his bookkeeper had complete, unsupervised control of the office banking and bookkeeping. She routinely used a stamp for his signature on checks without needing to obtain specific approval. He "*never* instructed her on trust account requirements" and "*never* examined either her records or the bank statements for any of the office accounts." (*Id.* at p. 796, emphasis in original.) The Supreme Court therefore found a pattern of gross negligence and ordered the recommended one-year fully stayed suspension coupled with probation.

[6b] On review, the examiner strives to characterize the instant case as likewise not involving "a single error, or even a small number of isolated errors, in office procedure by Respondent or his staff," but "a chain of events supportive of the Hearing Department's conclusion that respondent's 'elaborate bookkeeping system' 'fell apart'." We disagree. However inexcusable, these isolated mistakes do not indicate that the system respondent set up was improper any more than his consultant's failure to pursue its billing in the matter from 1981 until sometime in 1985 indicated that its office billing system was poorly designed. The record showed that as of the time of the trial respondent had represented over 9,500 clients in the course of his practice and that he had set up a bookkeeping system with both an independent CPA and a trained in-house bookkeeper. No evidence of any billing errors in other cases was presented. To the contrary, respondent produced a number of clients, his CPA for 33 years and his current bookkeeping service testifying to a long history of accurate and careful handling of client funds. His CPA also testified to his honesty, conservatism and accuracy in reporting income for tax purposes. (See R.T. Vol. IV pp. 179-184; pp. 189-193; pp. 211-214; pp. 216-221; pp. 221-224; pp. 226-229; pp. 231-236; pp. 238-241.)

The hearing judge cited several cases finding gross negligence, all of which were predicated on grossly inadequate recordkeeping practices. In *Vaughn* v. *State Bar*, *supra*, 6 Cal.3d 847, it was found that Vaughn's trust account repeatedly fell below the balance required to be maintained and that Vaughn kept trust fund cash at his home. Vaughn also was charged with culpability for applying for a writ of execution and garnishing a client for fees already paid and ignoring a court order quashing the writ and ordering repayment of the excess amount already garnished. Vaughn's defense was that his office manager signed Vaughn's name to court documents in connection with the garnishment, and that Vaughn himself had no knowledge of the proceeding or the client's prior payment because of the inefficiency of his office procedures and the chaotic records produced by low caliber secretarial staff and frequent burglaries in which files were "dumped on the floor and irreparably disarranged." (*Id.* at p. 856.)

The Supreme Court held him accountable for gross negligence and imposed a public reproval.[4] [8 - see fn. 4]

In *Murray* v. *State Bar* (1985) 40 Cal.3d 575 and *Giovanazzi* v. *State Bar* (1980) 28 Cal.3d 465, the respondents both generally failed to maintain adequate office records and their trust accounts, as Vaughn's, repeatedly fell below the balance necessary to cover entrusted funds. In *Murray* v. *State Bar*, the respondent argued that because he did not keep adequate records, he could not be certain of the appropriate balance. (*Murray* v. *State Bar*, *supra*, 40 Cal.3d at p. 581.) The Supreme Court noted that it did not matter to the client whether the funds were deliberately misappropriated or unintentionally lost. (*Id.* at p. 582.) Here, in contrast, there was no loss of funds or any suggestion by the examiner of a risk of loss. The funds were never used by respondent for his own purposes, but apparently were maintained in respondent's firm general account or firm savings account throughout the entire time. They were just not segregated. (R.T. Vol. I p. 114.) Thus, even if this incident is attributable to extremely poor supervision of this one account, respondent's lapse in supervision does not compare to the wholesale office mismanagement which the court found in *Murray* v. *State Bar*, *Giovanazzi* v. *State Bar* and *Vaughn* v. *State Bar*.

The record in *Waysman* v. *State Bar* (1986) 41 Cal.3d 452 also disclosed a pervasive operational problem. Waysman, while trying a case out of town, instructed his secretary to place a $24,000 settlement check in his general account so that it would clear faster than in the trust account. He returned to the office to find she had quit after using a set of presigned checks to pay office expenses. Waysman's office was found to be, at the time of the misappropriation, "in a financial disaster" (*id.* at p. 455), due in part to Waysman's poor judgment resulting from dependence on alcohol and confusion resulting from Waysman's own complicated banking transactions and heavy trial expenses for which he had written checks while out of town. In view of mitigating factors, Waysman received no actual suspension, but six months stayed suspension and one year probation on conditions including restitution and abstention from alcohol.

The facts here also show far less of a lapse than those in *Fitzsimmons* v. *State Bar* (1983) 34 Cal.3d 327, 331-332, cited by the hearing judge, in which the attorney failed to maintain adequate records relating to estate assets and expenses including $2,000 in reimbursed expenses; failed to give a receipt for a $31,000 payment of attorneys fees or to obtain a receipt for disbursement of $18,000 to a third party on the asserted oral instructions of his client, both of which disbursements required court approval which Fitzsimmons had not obtained in advance. Fitzsimmons was held grossly negligent, but, like Vaughn, received a public reproval.

Here, respondent was *not* found to have an inadequate accounting system, nor was he found to have any knowledge until 1985 of the mistaken billing and payment. Until that time, it is difficult to see how he had committed any culpable act. (Cf. *Palomo* v. *State Bar*, *supra*, 36 Cal.3d at p. 795.) [9a] His only culpability appears to be his commingling of the funds thereafter in violation of rule 8-101(A). Upon discovery of the error in 1985, he should have either paid the bill or reimbursed the client, or in the alternative, put the erroneous cost reimbursement into a trust account while he was disputing other fees and costs.

D. Alleged Violation of Business and Professions Code Sections 6068 (a) and 6103.

[10] The hearing judge correctly concluded that respondent did not violate section 6068 (a). She also correctly concluded that he did not violate sections 6103 or 6106 although she concluded that respondent was still subject to discipline under sections

4. [8] *Vaughn* v. *State Bar*, *supra*, and the other gross negligence cases discussed in this section were all decided before the adoption of the Standards for Attorney Sanctions for Professional Misconduct ("standards") (Trans. Rules Proc. of State Bar, div. V). While the analysis in these cases of what conduct constitutes gross negligence is unaffected by the adoption of the standards, the discipline imposed now takes into account guidelines provided by the standards although they are not rigidly applied. (See discussion on degree of discipline, *post*.)

6103 and 6106. We find section 6103 inapplicable pursuant to the authority of *Baker* v. *State Bar* (1989) 49 Cal.3d 804, 815 and its progeny. Section 6106, in contrast, does state a chargeable offense (see *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343), but, as discussed above, was not violated here.

E. Former Rule 8-101(B)(4).

[11] We agree with the hearing judge's conclusion that former rule 8-101(B)(4) was not violated, but we do not agree that there was no demand made. None was made prior to the arbitration, but the client's new attorneys admittedly sought credit on the client's behalf for the expert witness bill in the arbitration proceeding (R.T. Vol. V p. 72) and credit was clearly offered by respondent there. (Resp. exh. G.) We find no violation of rule 8-101(B)(4) because, upon demand, respondent did not fail to promptly pay or deliver the funds.

F. Former Rule 8-101(A).

[9b] The hearing judge found a violation of former rule 8-101(A) for commingling, but not a violation of former rule 8-101(A)(2). She interpreted the issue as solely involving the alleged dispute over the amount of the expert witness bill which she found not to have been communicated. We conclude that there was a former rule 8-101(A)(2) violation. When respondent realized the billing error in 1985, he had knowledge that the client had advanced costs not yet paid. Pending resolution of the fee and cost dispute, he was clearly obligated under former rule 8-101(A) to put the money in trust except to the extent his interest therein had become fixed. Respondent is wrong in arguing that money erroneously placed in a general account cannot ever be retrieved. The exact same funds could not be retrieved, but the exact amount could have been placed in a separate trust account in 1985, just as respondent ultimately did in 1990. (Exh. P.)

G. Restitution.

In the State Bar proceeding, the client's new attorneys contended that while the issue of the unpaid expert witness bill had been presented at the arbitration hearing, the arbitrators did not in fact offset that unpaid bill against other outstanding costs and that the bill remained an obligation thereafter either to be paid by respondent to the expert's law firm or reimbursed to the client. No such reservation of a claim for cost reimbursement was ever articulated when the arbitration award was confirmed, nor was any demand ever made to respondent by the client's new attorneys in numerous correspondence between the parties following the arbitration. Based on the evidence in the record, the hearing judge found that respondent reasonably believed that an offset had occurred in the arbitration.

The State Bar put on the testimony of an attorney who served as the chair of the three-person panel of arbitrators to prove that an offset for the amount of the bill had not in fact been made in the arbitration. (R.T. Vol. I pp. 118-135.) This view first came to light in a private conversation the client's new counsel had with the arbitrator shortly before he testified at the hearing in January 1990. (R.T. Vol. II pp. 84-85.) The arbitrator's testimony was somewhat vague about what had happened four years earlier and ambiguous as to what costs were considered. He testified, however, that no offset occurred.[5] Based on

5. It is far from clear upon reading the transcript whether the arbitrator understood what he was being asked. His answer that no offset occurred was expressly predicated on the fact that the award itself consisted solely of attorney's fees. (R.T. Vol. I p. 125.) There were two types of offsets that could have occurred with respect to costs and no clarification appears on the record as to which the arbitrator was being questioned about. The first type of offset would have been the one proposed by respondent: offsetting the expert witness bill against unbilled costs for which he produced documentation at the arbitration hearing. Because of the amounts involved an offset of that type could have resulted in a virtual "wash" and only attorney's fees would have been awarded. The other type of offset would have occurred if the arbitrators had rejected the evidence of unbilled costs and had credited the admitted erroneous receipt of $1,753.94 from the client for the expert witness bill against attorney's fees then owing. In that event, the award, which expressly included the issue of costs, would presumably have been reduced from $8,300 to approximately $6,546. The fact that such did not occur is obvious from the face of the award and the arbitrator's testimony sheds little, if any, additional light on the subject. In contrast, the client's payment of the entire award without again claiming entitlement to credit for the cost bill appears to indicate that, like respondent, he interpreted the award as having already credited the expert witness fee against unbilled costs in reaching the amount awarded.

the arbitrator's testimony, the hearing judge found that an offset had not actually occurred and that respondent still was obligated to make restitution. Respondent disputed that conclusion but, after receiving the culpability determination, he put that amount of money in a trust account. (Resp. exh. P.)

[12a] It is generally "presumed that all issues in the dispute were heard and decided by the arbitrators." (*Horn* v. *Gurewitz* (1968) 261 Cal.App.2d 255, 262.) Credit for advancing the cost of the bill was clearly presented by respondent and the client's new counsel to the arbitrators as one of the cost issues. (R.T. Vol. I. p. 124; exhs. 16, 17.) The arbitration award showed on its face that it covered costs as well as fees. Neither party ever contested the jurisdiction of the arbitrators to consider issues of costs as well as fees. Indeed, it was the client who petitioned for confirmation of the award (resp. exh. Q p. 5) and the award, which expressly covered issues of costs as well as fees, was duly confirmed by a superior court and became final and binding. (*Goldkette* v. *Daniel* (1945) 70 Cal.App.2d 96; 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 219, p. 656.)

[13a] The doctrine of res judicata "seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration." (7 Witkin, Cal. Procedure (3d ed. 1985) Res Judicata, § 188, p. 621.) The conclusive nature of the award against collateral attack is unaffected by mistakes of fact or law. (*Id.*, Judgment, § 217, at p. 655.) [14] While an arbitrator's testimony is not inadmissible on the question of what issues were tried (*Sartor* v. *Superior Court* (1982) 136 Cal.App.3d 322, 327), his expression of his own belief is not binding on our court in adjudicating the effect of the arbitration award. (Cf. *Goddard* v. *Security Title Insurance and Guarantee Company* (1939) 14 Cal.2d 47, 54.) [13b] If the contending parties had a full and fair opportunity to litigate, "there must be compelling reasons to sustain a plea for a second chance." (7 Witkin, Cal. Procedure (3d ed. 1985) Res Judicata, § 192, at p. 626.) None was demonstrated here. After the arbitration award was confirmed and paid, the client's attorneys waited three years before raising the cost reimbursement issue in a different forum. Following oral argument on review, the examiner stipulated that restitution of the erroneously advanced cost is not an issue. [12b] It should not have had to be relitigated.

H. Findings in Mitigation.

[15] The hearing judge found in mitigation that respondent had been in practice since 1951 with only one prior private reproval in 1957 or 1958 for contacting the spouse directly in a divorce action he handled for a friend. Since it was so remote in time and minor in nature, the examiner had not offered it as evidence in aggravation and the hearing judge properly found that respondent was entitled to a finding in mitigation based on his long years of practice. (Decision p. 19.)

[16] Other mitigating evidence established by the record is entitled to greater weight than given to it in the decision below. The hearing judge gave no mention at all to the mitigating effect of respondent's extensive pro bono activities and community involvement. (See, e.g., *Rose* v. *State Bar* (1989) 49 Cal.3d 646, 665, fn. 14.) Among other things, he has been a director and pro bono attorney for many years for a mental health facility, pro bono attorney for other charitable organizations, and a consultant for many school districts. He has received a number of community awards, and contributes financially to numerous local charitable and educational organizations. (R.T. Vol. V pp. 15-16.) In addition, he has served as an unpaid judge pro tem many times over a seven- to eight-year period for a local superior court. (R.T. Vol. V p. 13.)

[17] A great number of character witnesses, including two judges who have known respondent for a very long time, testified about his impeccable honesty and reliability. While the hearing judge correctly points out that most of the character witnesses were unaware of the precise nature of respondent's misconduct, it is extremely unlikely that the extraordinarily high opinion of respondent's honesty and trustworthiness expressed by the character witnesses would change much with knowledge of the details. Indeed, two witnesses were very knowledgeable about the facts and it had no effect on their opinion. (See R.T. Vol. IV pp. 184, 193-202, 220-221.)

I. Findings in Aggravation.

[18] We decline to adopt any of the hearing judge's findings in aggravation. The finding that in part of his testimony respondent lacked candor (std. 1.2(b)(vi); decision p. 24), was predicated on State Bar witness testimony summarized in findings 9 and 23 which we find did not in fact constitute clear and convincing evidence that respondent lied. **[19]** Indeed, we find his cooperation with the State Bar as a mitigating factor. He appears to have fully cooperated with the investigator (resp. exh. I), and also stipulated at the hearing to the facts demonstrating commingling. (R.T. Vol. I pp. 19-23.)

[20] We also must reject the finding of an aggravating factor of indifference toward rectification (std. 1.2(b)(v); decision p. 23) in respondent's failure to make restitution "especially after the culpability finding." (*Ibid.*) Respondent had already tendered restitution in the 1986 arbitration proceeding. After receiving the culpability determination in March 1991, respondent nevertheless put funds in a trust account to cover the amount the court thought still to be at issue. (Resp. exh. P.)

[21] We also decline to adopt the finding that the client was significantly harmed by respondent's negligence with respect to the billing error. (Decision p. 25; std. 1.2(b)(iv).) According to the client's testimony, for three years he thought that a legitimate bill had been paid. When he discovered it had not and brought that to respondent's attention, respondent recognized the mistake and offered to take care of the matter in a letter seeking to settle their fee and cost dispute. Until shortly before the 1986 arbitration, the client had no reason to believe the bill was not resolved. At the arbitration, respondent offered the client credit for the advanced cost which ended his obligation of restitution.

DEGREE OF DISCIPLINE

[22a] Standard 2.2(a) calls for 90 days minimum suspension for commingling. However, the Supreme Court has declined to impose suspension where a good faith fee dispute is the basis for the commingling. (See, e.g., *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092.) The *Dudugjian* opinion issued two months after the hearing judge issued her decision below. Respondent also cites to our recent decision in *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, in which we recommended no actual suspension for an aggravated rule 8-101 violation in honest, but mistaken, belief the application of the trust funds to the attorney's outstanding bill was permissible.

In *Dudugjian* v. *State Bar*, *supra*, 52 Cal.3d 1092, the Supreme Court ordered public reproval for two attorneys who violated rule 8-101(A) by retaining client settlement funds in their own account and refusing to pay them to the clients in the mistaken belief the clients had given them permission to retain the funds in partial payment of their fee. The respondents were members of the bar for only eight years. One of the two clients made ambiguous oral remarks which the attorneys interpreted as permission to retain a settlement check for fees. The attorney-client relationship later deteriorated. Pending resolution of any questions about fees, Dudugjian placed the check in a desk drawer and informed the client of its receipt. Two weeks later, having not heard from the client, Dudugjian deposited the check into his firm's general account without the clients' endorsement. Shortly thereafter the client demanded the funds and the attorneys believed the client was "attempting to take back what he had already given. While waiting for the check to clear, the attorneys falsely represented that they would comply with the request." (*Id.* at p. 1096.) Two weeks later, the attorneys formally applied the funds to their outstanding bill without authorization to do so.

Both attorneys were held to have violated rules 8-101(A) and 8-101(B)(4). Their conduct was not held to involve moral turpitude or amount to wilful misappropriation. In mitigation, they offered their good faith, numerous character reference letters and their past, albeit short, blemish-free record. The hearing referee recommended public reproval on condition of restitution and taking and passing of the Professional Responsibility Examination. The volunteer review department, by a vote of 11 to 4, increased the recommendation for one attorney to two years stayed suspension and two years probation on conditions including ninety days actual suspension. The recommendation for the other attorney was

one year stayed suspension, one year probation and thirty days actual suspension. In light of the mitigation, the Supreme Court agreed with the hearing referee, stating: "Most significant, petitioners honestly believed that the Collinses had given them permission to retain the settlement funds. Also, they are not likely to commit such misconduct in the future; they have generally exhibited good moral character; their failings here are aberrational." (*Id.* at p. 1100.)

[22b] Respondent's evidence in mitigation is far greater than that in *Dudugjian* v. *State Bar*, *supra*, 52 Cal.3d 1092. We therefore impose a private reproval. We include as a condition thereof a requirement that respondent take and pass the California Professional Responsibility Examination within one year of the effective date of this reproval. A similar condition was imposed in *In the Matter of Lazarus*, *supra*, 1 Cal. State Bar Ct. Rptr. 387 and *Dudugjian* v. *State Bar*.

[23] In light of our disposition, respondent's arguments against the hearing judge's recommended imposition of a rule 955, California Rules of Court requirement and the imposition of costs are moot.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT E

A Member of the State Bar

[No. 88-O-11634]

Opinion on Motion for Reconsideration—Filed December 9, 1991

SUMMARY

Arguing that the review department used an erroneous standard of review and that the discipline imposed was insufficient, the examiner moved for reconsideration of the review department's decision to order a private reproval for aberrational negligence by respondent in handling a client's check. The review department held that the motion was timely, because the service of the original decision by mail had extended by five days the time to move for reconsideration.

On the merits, the review department declined to adopt an abuse of discretion standard for review of hearing judges' findings of fact, and explained that in conducting its de novo review, it had not rejected the credence given by the hearing judge to the complaining witness's testimony, but merely found that such testimony did not constitute clear and convincing evidence that respondent's contrary testimony was intentionally false.

Based on the imposition of a public reproval in a recent Supreme Court case involving more serious misconduct and less mitigation, the review department declined to impose greater discipline than a private reproval in this matter.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Daniel Drapiewski

HEADNOTES

[1] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
The rule extending any prescribed period of notice five days for service by mail applies to the State Bar Court's service of its decisions as well as to service of papers between parties. Thus, the time to file a motion for reconsideration of a review department decision was extended due to service of the decision by mail. (Trans. Rules Proc. of State Bar, rules 243, 455.)

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2 a, b] **166 Independent Review of Record**
167 Abuse of Discretion
Abuse of discretion is the standard generally applied to review of rulings on motions at the hearing level, but has never been the standard of review applied by the Supreme Court to findings of culpability. The review department must independently review the record as a whole. Great weight is given to credibility determinations based on testimony at the hearing, but none of the findings at the hearing level is binding upon the reviewing court.

[3] **162.11 Proof—State Bar's Burden—Clear and Convincing**
801.90 Standards—General Issues
Findings in aggravation, like findings of culpability, must be supported by clear and convincing evidence.

[4 a-c] **162.11 Proof—State Bar's Burden—Clear and Convincing**
166 Independent Review of Record
615 Aggravation—Lack of Candor—Bar—Declined to Find
Where respondent's client denied having had a certain conversation with respondent, and the hearing judge credited the client on that point, but the record as a whole showed that respondent lacked a motive to lie in testifying about the conversation, the evidence suggested that the client might have forgotten the conversation, and the client exaggerated in other testimony and was very bitter toward respondent, the review department, while not rejecting the credence given to the client's testimony by the hearing judge, did find that the client's testimony failed to constitute clear and convincing evidence of intentional misrepresentation by respondent.

[5 a, b] **162.11 Proof—State Bar's Burden—Clear and Convincing**
166 Independent Review of Record
615 Aggravation—Lack of Candor—Bar—Declined to Find
Where the hearing judge accepted as true the testimony of two State Bar witnesses, but such testimony did not contradict respondent's own plausible version of events, the review department found that State Bar had failed to prove by clear and convincing evidence that respondent had testified falsely.

[6 a-c] **280.00 Rule 4-100(A) [former 8-101(A)]**
824.52 Standards—Commingling/Trust Account—Declined to Apply
824.54 Standards—Commingling/Trust Account—Declined to Apply
Where respondent negligently committed a minor trust account violation, made voluntary restitution prior to any complaint to the State Bar, presented extensive character evidence, and was on the verge of retiring from a very respectable 40-year career, respondent was appropriately the subject of a private reproval.

ADDITIONAL ANALYSIS

[None.]

OPINION AND ORDER DENYING MOTION FOR RECONSIDERATION

PEARLMAN, P.J.:

The examiner has moved for reconsideration of the review department's decision to order a private reproval in this matter for the aberrational negligence found by the hearing judge. Respondent has opposed such motion as untimely filed and as unmeritorious. [1] We find that the motion was timely filed since rule 455 of the Transitional Rules of Procedure expressly authorizes such motions to be filed within 15 days of written notice of the filing of the review department decision and rule 243 extends any prescribed period of notice five days for service by mail. This has always been interpreted by the State Bar Court to apply to service of its decisions as well as to service of papers between parties. We would obtain the same result by interpreting the requirements of section 1013 of the Code of Civil Procedure. (See, e.g., *Citicorp North America, Inc.* v. *Superior Court* (1989) 213 Cal.App.3d 563.)

We therefore address the motion on its merits. The examiner raises two grounds for his request for reconsideration: the alleged use by the review department of an erroneous standard of review and the alleged insufficiency of the discipline imposed.

What the examiner in fact objects to is the review department's application of the existing standard of review established by the Supreme Court for review of hearing department findings. He instead urges, for the first time, that a new standard of review be adopted for findings of fact by full-time hearing judges—reversal for abuse of discretion only. The examiner's reliance on language from the review department opinion in *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47 is misplaced. In *In the Matter of Heiser*, we reviewed the dismissal of a count and found the dismissal on the referee's own motion to have been within the hearing referee's discretion. It was apparently predicated on his determination that there was insufficient evidence to support a finding of culpability based on the unconvincing nature of the sole witness's prompted recollection. [2a] Abuse of discretion is the standard generally applied to motions granted or denied at the hearing level (see, e.g., *Lister* v. *State Bar* (1990) 51 Cal.3d 1117, 1128 [upholding denial of motion to introduce additional evidence as "within the referee's discretion"]), but has never been the standard of review applied by the Supreme Court to findings of culpability. Indeed, although in the last year and a half, numerous other cases have been before the review department on review of the new full-time judges' decisions, the Office of Trial Counsel has never argued for a change in the standard of review. A motion for reconsideration before an intermediate reviewing court is not the appropriate vehicle for challenging the nature of the review function in disciplinary matters long since established by the Supreme Court and incorporated into the Rules of Procedure adopted by the Board of Governors of the State Bar.

Rule 453(a) of the Transitional Rules of Procedure contains the same operative language as its predecessor with respect to the standard on review: "In all matters before the review department, that department shall independently review the record and may adopt findings . . . at variance with the hearing department. . . . Findings of fact of the hearing department resolving issues pertaining to testimony shall be given great weight."

We place great weight on the factual determinations of the judges of the hearing department and, in fact, it is precisely because of the careful resolution of the central charges by the hearing judge below that her contrary resolution of two peripheral issues was a major focal point of the respondent's appeal. The hearing judge squarely rejected the claim, resurrected by the examiner on motion for reconsideration, that respondent intentionally failed to return client funds. She believed respondent on this crucial issue and found that he committed no intentional misconduct toward his client whatsoever. She also found that the negligent mishandling by respondent's office of the client's check intended for cost reimbursement was aberrational in the context of a 40-year career with no other evidence of accounting problems and high praise from a cross-section of credible witnesses who vouched for his honesty and integrity. In this context, we considered two findings in aggravation (findings 9 and 23) that in the course of his testimony before the hearing judge in 1990, respondent falsely testified regarding two conversations he had in 1981.

[3] Findings in aggravation, like findings of culpability, must be supported by clear and convincing evidence. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11.) Thus, in the very recent decision of the Supreme Court in *Calvert* v. *State Bar* (1991) 54 Cal.3d 765, 783-784, the Supreme Court rejected two findings of a referee in aggravation as unsupported by the record and reduced the discipline recommended by the volunteer review department accordingly. The Supreme Court applied a similar analysis in its recent decision in *Lubetzky* v. *State Bar* (1991) 54 Cal.3d 308, reversing all of the adverse findings against an applicant for admission to the State Bar. In undertaking independent review, it scrutinized the evidence and rejected all findings of incidents indicative of bad moral character, noting that the volunteer hearing panel had not, in its decision, indicated that it had assessed the probative value of exculpatory evidence or inferences that could be drawn from the entire circumstances. For example, the absence of any apparent motive to lie about a matter on which Lubetzky was found by the hearing panel to have intentionally concealed information appeared to the high court to qualify an omission from the application as an "unintentional nondisclosure of a relatively unimportant matter." (*Lubetzky* v. *State Bar, supra*, 54 Cal.3d at p. 319.) [4a] In light of the record as a whole, we found a similar lack of motive for the findings that respondent lied about two relatively minor matters when testifying below.

Both of the conversations which respondent attested to were alleged to have followed respondent's undisputed action in refusing to pay a bill for expert witness consultation on his client's behalf that he believed was invalid and his client should not have to pay. The bill was one which, if valid, the client would clearly have been liable for under his written fee agreement with respondent. Eventually, the client received credit for the amount of the client's check against fees and other costs advanced by respondent and never had to pay the disputed expert witness bill. The client thus benefitted by the respondent's objection to the bill on his behalf. [4b] Respondent testified that in the fall of 1981 he orally communicated his refusal to pay the bill to both his client and a partner at the law firm which sent the bill. The partner was never called to testify at the hearing; the client did testify that he never had such a conversation with respondent, but he also testified that he had a stroke in 1986 in which he temporarily lost his memory and "substantially" regained it thereafter. The hearing judge expressly found the client to have exaggerated his testimony in other respects and to be very bitter toward respondent.

[4c] In conducting its own de novo review of the record, the review department did not reject the credence given to the client's testimony by the hearing judge, but merely found that it did not constitute clear and convincing evidence that respondent intentionally misrepresented his own recollection of the nine-year-old conversation in light of the whole record. (Cf. *In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158 [respondent's testimony regarding events six years earlier was rejected based on documentary and other evidence, but respondent was not found to have offered such testimony in bad faith or to have lacked candor].)

[5a] The other challenged finding had even less evidentiary support. Finding number 9 was expressly based on the hearing judge's view that the testimony of two witnesses produced by the State Bar contradicted respondent's testimony. In fact, we assumed their testimony to be true based on the hearing judge's assessment of their credibility, but held that their testimony did not contradict that of respondent. The hearing judge found that respondent's testimony of a luncheon meeting with the partner in question in November 1981 was corroborated by respondent's calendar. Neither of the witnesses produced by the State Bar was present during the conversation respondent allegedly had with their partner and both testified with respect to firm practices as opposed to a clear recollection of the facts of this nine-year-old billing dispute. The partner who was the logical person to affirm or deny the contents of the conversation was never called to testify. The examiner argues that the State Bar had already submitted adequate proof and was not required to present additional evidence in the form of the testimony of the other participant in the conversation. The review department has concluded otherwise. The fact that there is no written record that A ever told B and C about a conversation which neither B nor C witnessed does not by itself provide clear and convincing proof that the conversation never took place.

Here any inference that could be drawn from the testimony of the State Bar's witnesses on this point was offset by other circumstantial evidence that the law firm did not follow ordinary procedures in the handling of its billing of this matter. Had the refusal to pay the bill never been communicated to the law firm then it would have been logical for follow-up bills to have been sent and for collection procedures to have been instituted before the statute of limitations prevented collection. The fact that no further billings were sent to respondent for over three years is more consistent with a communicated objection to the bill and the law firm's subsequent reluctance to pursue this minor matter. **[5b]** Since respondent's version was plausible and uncontradicted, the State Bar failed to meet its burden of proof that respondent testified falsely on this issue even accepting as true all of the testimony offered by the State Bar witnesses. *Edmondson* v. *State Bar* (1981) 29 Cal.3d 339 and *Davidson* v. *State Bar* (1976) 17 Cal.3d 570 are but two illustrations of the application of the independent de novo standard of review. *Lubetzky* v. *State Bar, supra,* 54 Cal.3d 308 and *Calvert* v. *State Bar, supra,* 54 Cal.3d at pp. 783-784 provide very recent examples of the required scrutiny of factual evidence by the reviewing court.

[2b] The principle applied in all of these cases is time-honored—the record as a whole must be independently reviewed. Great weight is given to credibility determinations based on testimony at the hearing, but none of the findings at the hearing level is binding upon the reviewing court.

[6a] The examiner's secondary argument that the discipline should be greater based on the findings in this case is also unpersuasive. This case clearly presents a less serious fact situation than *Dudugjian* v. *State Bar* (1991) 52 Cal.3d 1092 which resulted in a public reproval imposed by the Supreme Court in the face of similar arguments by the State Bar that more severe discipline was warranted. Unlike the short otherwise blemish-free record of the two attorneys in *Dudugjian* v. *State Bar, supra,* 52 Cal.3d 1092, respondent had a 40-year record he could point to with pride and a wide range of character witnesses. He also put on evidence of extensive pro bono activities that was not a factor in mitigation in the *Dudugjian* case.

Dudugjian itself was consistent with the prior disposition of similar cases. Indeed, in a widely publicized case heard by the former volunteer review department in 1989, the review department issued a public reproval of a prominent trial lawyer for intentionally refusing to place over $100,000 in trust while contending that he was entitled to such sum as additional fees negotiated in violation of statutory fee limitations. (*In the Matter of R. Browne Greene* (State Bar Ct. No. 84-O-13477), reproval effective Jan. 2, 1990 [reported in *State Bar Discipline*, Cal. Lawyer (Feb. 1990), at pp. 109-110].) In *Dudugjian* v. *State Bar, supra,* 52 Cal.3d 1092, the attorneys also got into a fee dispute with the client, but were found to have lied about their intention to return the money and thereafter refused to return the funds upon request.

[6b] Here, respondent was found to have negligently failed to place $1,754 in trust while arbitrating his entitlement to fees and costs of far greater magnitude. The client, who was represented by new counsel when the 1982 mistake in handling the client's check was first brought to respondent's attention in 1985, never demanded that the $1,754 be placed in trust after discovering that the bill for which it had been intended as reimbursement had never been paid. Instead, the client acquiesced in simply receiving credit for the amount in question in arbitration. Voluntary restitution occurred in 1986—three years before any complaint was filed with the State Bar. In *Dudugjian* v. *State Bar, supra,* 52 Cal.3d 1092, voluntary restitution never occurred. Restitution had to be ordered as a condition of the reproval. In *In the Matter of Greene, supra,* restitution likewise did not occur until over seven months after the appellate decision in the client's favor.

[6c] Since respondent unintentionally committed a minor violation of rule 8-101(A) of the Rules of Professional Conduct, made voluntary restitution, and is on the verge of retiring from a very respectable career, he is appropriately the subject of a private reproval. The motion for reconsideration is DENIED.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

PHILIP DEMASSA

A Member of the State Bar

[No. 86-C-19529]

Filed November 7, 1991

SUMMARY

Respondent was convicted in federal court of one count of harboring a fugitive and three counts of violating currency transaction reporting regulations. The currency charges were found not to involve moral turpitude or other misconduct warranting discipline, but the fugitive charge was held to involve moral turpitude per se. The hearing referee, based on substantial mitigating evidence, declined to recommend disbarment, but felt bound to recommend three years actual suspension and five years stayed suspension. (Gary R. Carlin, Hearing Referee.)

Respondent requested review, challenging the holding that his conviction involved moral turpitude. The review department held that the Supreme Court, by the language of its order referring respondent's federal convictions to the State Bar Court, had unambiguously and finally determined that respondent's conviction for harboring a fugitive constituted an offense involving moral turpitude per se. The review department also rejected respondent's contention that the State Bar Court's consideration of certain facts and circumstances surrounding respondent's conviction violated due process, holding that respondent was given sufficient notice of the relevance of those facts and had the opportunity to present evidence on the issue.

On the issue of discipline, the review department found that although respondent had been convicted of an offense which involved moral turpitude per se, the facts and circumstances surrounding the offense did not warrant disbarment or a lengthy suspension. The review department noted that the Supreme Court had granted respondent's petition not to be placed on interim suspension pending the disciplinary proceedings, thus rebutting his presumptive unfitness to practice. The aggravating circumstances found by the hearing referee were unsupported by the record, and the mitigating evidence showed that respondent's acts were aberrational and that respondent did not currently pose a threat to the public, the legal profession or the courts. The review department concluded that discipline consisting of a one-year stayed suspension and an actual suspension of sixty days was sufficient to preserve the integrity and maintain the high standards of the legal profession.

COUNSEL FOR PARTIES

For Office of Trials: William Davis

For Respondent: Charles H. Dick, Jr.

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HEADNOTES

[1 a-e] **1518 Conviction Matters—Nature of Conviction—Justice Offenses**
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Where respondent was convicted of a felony for harboring respondent's client while the client was a fugitive, even thought respondent was well-motivated, did not act for personal gain and committed no perjurious act, respondent's conviction was a serious matter, and involved acting with conscious disregard of an attorney's obligation to uphold the law. Thus, even though respondent's conduct was aberrational, respondent posed no current risk to the public, the legal profession or the courts, and respondent presented compelling mitigating evidence, a 60-day actual suspension, with one year of stayed suspension and one year of probation, was appropriate to preserve the integrity of the legal profession and enforce high professional standards.

[2 a, b] **191 Effect/Relationship of Other Proceedings**
1517 Conviction Matters—Nature of Conviction—Regulatory Laws
1527 Conviction Matters—Moral Turpitude—Not Found
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
Based on surrounding circumstances and on subsequent federal appellate decisions holding that conduct for which respondent was convicted is not a crime, referee properly determined that respondent's convictions for violating federal currency transaction reporting laws did not involve moral turpitude or other conduct warranting discipline.

[3] **141 Evidence—Relevance**
1699 Conviction Cases—Miscellaneous Issues
In criminal conviction matters, the State Bar Court is not limited to examining only the elements of the criminal offense, but is obligated to look at all facts and circumstances surrounding the offense to assess the respondent's fitness as an attorney.

[4] **106.20 Procedure—Pleadings—Notice of Charges**
192 Due Process/Procedural Rights
1699 Conviction Cases—Miscellaneous Issues
Where a certain set of facts was considered by the criminal court at the time of respondent's sentencing, and notice of such consideration was given to respondent at the time, there was sufficient notice to respondent prior to his disciplinary hearing of the relevance of such facts, and since respondent had an opportunity to present evidence on the issue at the disciplinary hearing, due process did not require remanding the case for submission of additional exculpatory evidence.

[5 a, b] **139 Procedure—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1521 Conviction Matters—Moral Turpitude—Per Se
Where Supreme Court directed State Bar Court only to hear evidence on appropriate level of discipline, hearing referee correctly ruled that Supreme Court had already established nature of respondent's criminal offense as one inherently involving moral turpitude, and Supreme Court's classification of offense of harboring a fugitive as one involving moral turpitude per se was final and binding on the State Bar Court.

[6 a, b] **139 Procedure—Miscellaneous**
192 Due Process/Procedural Rights
1521 Conviction Matters—Moral Turpitude—Per Se
Where record established that respondent had had opportunity to be heard by Supreme Court, prior to referral to State Bar Court, on question whether respondent's criminal offense involved moral turpitude per se, respondent was not denied due process by the Supreme Court's determination of that issue.

[7] **1528 Conviction Matters—Moral Turpitude—Definition**
The issue of whether an offense constitutes moral turpitude per se is a matter of law to be ultimately determined by the Supreme Court.

[8] **101 Procedure—Jurisdiction**
199 General Issues—Miscellaneous
The State Bar Court acts as the administrative arm of the Supreme Court on attorney disciplinary matters and acts pursuant to its mandate.

[9] **148 Evidence—Witnesses**
166 Independent Review of Record
Credibility findings by the finder of fact are to be accorded great weight by the review department and it should be reluctant to deviate from them. Nonetheless, the findings must be supported by the record. Where the review department found insufficient evidence to support challenged findings, it declined to adopt them.

[10 a, b] **148 Evidence—Witnesses**
162.11 Proof—State Bar's Burden—Clear and Convincing
162.90 Quantum of Proof—Miscellaneous
Rejection of a witness's testimony by the hearing judge does not in and of itself create affirmative evidence to the contrary. Where respondent's testimony on a factual issue was plausible and uncontradicted, it was appropriate to resolve all reasonable doubts in favor of respondent and reject a finding contrary to respondent's testimony as unsupported by clear and convincing evidence. Where respondent's version of events was plausible, even though controverted, it supported a reasonable inference of lack of misconduct, and where there was only circumstantial evidence to the contrary, misconduct was not established by clear and convincing evidence.

[11 a-c] **143 Evidence—Privileges**
191 Effect/Relationship of Other Proceedings
196 ABA Model Code/Rules
213.50 State Bar Act—Section 6068(e)
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1691 Conviction Cases—Record in Criminal Proceeding
The whereabouts of a fugitive client known to an attorney constituted privileged communications which the attorney cannot disclose. (Bus. & Prof. Code, § 6068 (e); ABA Model Rules, rule 1.6.) The attorney must advise the client to surrender and must not assist or facilitate the fugitive in avoiding capture or committing a crime. Thus, respondent's knowledge that his fugitive client was in California and his meetings with the client to discuss the progress of negotiations with the authorities regarding the outstanding criminal charges were client confidences which respondent was obligated to preserve. However, an attorney's ethical duty not to disclose client confidences does not extend to affirmative acts which further a client's unlawful conduct, and respondent's

guilty plea constituted conclusive proof that he committed all the acts necessary to commit the charged offense of harboring his fugitive client with the intent of preventing the client's discovery and arrest by federal authorities.

[12] **740.10 Mitigation—Good Character—Found**
765.10 Mitigation—Pro Bono Work—Found
Testimonials from clients regarding respondent's service on their behalf, in some instances on a pro bono basis, constituted mitigating evidence.

[13] **710.33 Mitigation—No Prior Record—Found but Discounted**
750.10 Mitigation—Rehabilitation—Found
Respondent's lack of a prior record was not a significant mitigating factor since he had only been in practice for eight years prior to his misconduct. However, where respondent had practiced without incident for more than twelve years since the misconduct occurred, he was entitled to have this taken into account, and the review department concluded based on respondent's record that respondent's criminal conduct was aberrational and unlikely to recur.

[14] **802.30 Standards—Purposes of Sanctions**
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Under the Standards for Attorney Sanctions for Professional Misconduct, the presumptively appropriate discipline for conviction of a crime involving moral turpitude is disbarment. However, where compelling mitigating circumstances predominate, a lesser sanction may be imposed, and the minimum of a two-year actual suspension suggested by the standards has not been applied by the Supreme Court. In such circumstances, the review department's duty is to determine the appropriate sanction in light of the purposes of attorney discipline: protection of the public, preservation of public confidence in the legal profession and maintenance of high professional standards.

[15] **1521 Conviction Matters—Moral Turpitude—Per Se**
1549 Conviction Matters—Interim Suspension—Miscellaneous
Setting aside the interim suspension of an attorney convicted of a crime involving moral turpitude is an uncommon action and occurs only when it is in the interests of justice to do so, with due regard to maintaining the integrity of and public confidence in the profession. Where respondent successfully petitioned the Supreme Court not to place him on interim suspension, he thereby made a sufficient showing that he did not pose a threat to the public, profession or the courts by his continued practice pending final resolution of the disciplinary proceedings, and rebutted his presumptive disqualification stemming from his conviction.

[16] **715.10 Mitigation—Good Faith—Found**
720.10 Mitigation—Lack of Harm—Found
1518 Conviction Matters—Nature of Conviction—Justice Offenses
1552.52 Conviction Matters—Standards—Moral Turpitude—Declined to Apply
Where respondent in criminal conviction matter had acted in what he believed to be the best interests of both his client and the criminal justice system, his good motives were not a defense to his breach of duty, but did constitute a strong factor in mitigation.

ADDITIONAL ANALYSIS

Mitigation

Found

735.10 Candor—Bar
745.10 Remorse/Restitution
791 Other

Discipline

1613.06 Stayed Suspension—1 Year
1615.02 Actual Suspension—2 Months
1617.06 Probation—1 Year

Probation Conditions

1022.50 Probation Monitor Not Appointed
1024 Ethics Exam/School

Other

1543 Conviction Matters—Interim Suspension—Vacated

OPINION

PEARLMAN, P.J.:

Respondent Philip A. DeMassa was admitted to the practice of law in California in 1971 and became a prominent criminal defense lawyer in San Diego. He has no prior record of discipline. This proceeding arose out of his 1985 conviction for one count of harboring a fugitive by allowing a client indicted on federal drug charges to spend the night in his home in February 1979, three days prior to surrendering to authorities, and for three counts of violating currency transaction reporting statutes. The Ninth Circuit Court of Appeals shortly thereafter declared the type of conduct underlying the currency transaction convictions not to constitute a crime.

Upon referral of the criminal convictions, the California Supreme Court instituted disciplinary proceedings but, on respondent's motion, vacated its initial order of interim suspension before it went into effect. Respondent conducted his law practice in exemplary fashion thereafter. The referee who conducted the hearing found "the most compelling mitigating circumstances clearly predominate" given "an extraordinary demonstration of good character of the Respondent attested to by a wide range of references in the legal and general communities . . . dedication to his clients . . . without equal . . . outstanding personality and great character without whom the profession would be at a profound loss." (Amended decision pp. 20-21.) Nonetheless, based in part on aggravating factors which we find unsupported by the record and in part on the perceived mandate of standard 3.2, Standards For Attorney Sanctions For Professional Misconduct (Trans. Rules Proc. of State Bar, div. V [hereinafter "standards" or "std."]), the referee recommended five years suspension stayed, conditioned on three years actual suspension. No case law is discussed in the referee's decision. Respondent thereafter sought review.

[1a] We find additional mitigating evidence of respondent's cooperation and, upon analysis of the case law, that a lengthy suspension is totally unnecessary because respondent's misconduct consisted of a single aberrational act and he poses no current risk to the public, the legal profession or the courts. Nonetheless, because the illegal act which he committed constituted a felony involving moral turpitude per se, to preserve the integrity of the legal profession and to enforce the high professional standards to which all attorneys must adhere, we deem it appropriate to recommend a short period of actual suspension. We therefore recommend that he be suspended from the practice of law for one year, that such suspension be stayed, that he be placed on one year's probation on conditions including sixty days actual suspension, and that he take and pass the California Professional Responsibility Examination within one year.

I. THE CRIMINAL CONVICTION

Respondent and other members of his office and attorneys who shared office space with him represented 26 defendants named in a federal indictment unsealed on February 14, 1978, charging the defendants with conducting an international drug smuggling enterprise known as the Coronado Company. One of the alleged "runners" for the Coronado Company, Robert Lahodny, had been a social acquaintance of respondent's and had also supervised renovation of a residence for the respondent in Santa Barbara prior to the issuance of the indictment.

The essential facts underlying respondent's conviction are undisputed. Following the indictment, respondent periodically was called by or met at hotels with the defendants who had not yet surrendered, including Lahodny, to update them on his negotiations with the federal authorities and to urge them to surrender to law enforcement authorities. Respondent persuaded Lahodny to meet him at respondent's residence outside of San Diego the last week in February 1979—the only place in the vicinity of San Diego Lahodny felt safe from apprehension. Lahodny spent parts of two days, one overnight, at respondent's home with respondent's wife and children, while respondent advised Lahodny of possible conflicts because of his representation of other codefendants and urged Lahodny to give himself up. Lahodny surrendered to federal authorities accompanied by his new attorney, Patrick Hennessey, an associate of respondent, on March 1, 1979.

On January 27, 1984, respondent was indicted by a federal grand jury sitting in the Southern District of California on a number of charges alleging that he

was a co-conspirator of the Coronado Company, that he violated currency reporting laws in depositing fees from clients and that he harbored Robert Lahodny, a fugitive. A superseding indictment was filed in October 1984. Respondent went to trial on the charges in the superseding indictment and, on November 23, 1985, the fifth week of his jury trial, respondent executed a negotiated plea agreement, withdrawing his prior plea of not guilty, pleading guilty to one count of violating 18 United States Code section 1071 (harboring a fugitive) and three counts of violating 31 United States Code sections 5313 and 5322 (currency transaction reporting). He agreed, among other terms, to waive any right to collaterally attack his plea. United States District Judge Earl B. Gilliam, on consideration of all of the factors including respondent's remorse and numerous letters attesting to his dedication and integrity, declined to order him to serve any time in prison. On December 30, 1985, respondent was sentenced on the currency transaction charges to pay a $100,000 fine over a five-year period at $20,000 per annum and on the charge of harboring a fugitive to serve a five-year prison term, which was suspended. He was ordered confined to a community treatment center (halfway house) for six months, and placed on supervised probation for five years. As part of his plea, respondent agreed not to represent clients in the federal court in the Southern District of California while the State Bar was conducting disciplinary proceedings against him.

II. PROCEDURAL HISTORY

Respondent's felony conviction was transmitted to the California Supreme Court on January 16, 1986. On March 12, 1986, the Supreme Court placed respondent on interim suspension, effective April 11, 1986, based on his "having been convicted of violating 18 United States Code section 1071, a crime involving moral turpitude." (Exh. 8.) Respondent filed a petition to set aside the order of interim suspension on March 24, 1986, asserting, among other things, that he had no prior disciplinary record, seven years had elapsed since his offense, and he posed no danger of future misconduct. His petition was accompanied by numerous exhibits including an excerpt from the transcript of his sentencing hearing and the character reference letters addressed to Judge Gilliam on his behalf. The State Bar did not file a timely response.

The interim suspension was set aside for good cause shown by order dated April 8, 1986, and the Supreme Court thereafter ordered briefs to be filed to show cause why final discipline should not be entered in the case. After submissions by both parties, the Supreme Court, by order filed May 23, 1986, referred the matter to the State Bar for a hearing, report and recommendation on the discipline to be imposed for respondent's violation of 18 United States Code section 1071, an offense involving moral turpitude, and for a determination of "whether the facts and circumstances surrounding the violation of 31 United States Code, sections 5313, 5322(b), and 31 Code of Federal Regulations, Part 103, sections 103.11 et seq. involved moral turpitude or other misconduct warranting discipline, and if so found, the aggregate discipline to be imposed." (Exh. 10.)

[2a] In rulings of the United States Court of Appeals for the Ninth Circuit issued shortly after respondent's conviction, the practice followed by respondent in depositing fees was determined not to be criminal conduct within the ambit of 31 United States Code sections 5313 and 5322, the currency transaction reporting statutes. (*United States* v. *Reinis* (9th Cir. 1986) 794 F.2d 506, 508; *United States* v. *Varbel* (9th Cir. 1986) 780 F.2d 758, 761-762.)

Pursuant to the Supreme Court's directive, a compensated referee conducted seven days of disciplinary hearings between August 3, 1987, and April 20, 1988. The record closed on October 24, 1988. While the referee found that the facts and circumstances of respondent's three felony convictions regarding the currency transaction reports neither involved moral turpitude nor constituted misconduct warranting discipline, the referee also found the presumptively appropriate discipline for respondent's remaining felony conviction for harboring a fugitive, a crime of moral turpitude per se, to be disbarment and so recommended based on the findings in aggravation set forth in his decision filed on February 9, 1989.

Respondent moved for reconsideration or hearing de novo under rule 562 of the Rules of Procedure

of the State Bar, seeking to admit additional evidence with respect to the aggravating factors found by the referee. The motion was granted by order issued on February 24, 1989, as to one issue regarding respondent's knowledge of Lahodny's alleged residency and resumption of supervision of work on the property owned by respondent. Three additional days of hearing were held. An amended decision was filed on October 3, 1989, in which the referee deleted one finding and determined that disbarment was not appropriate under standard 3.2, because of compelling mitigating evidence demonstrated at the hearing. The referee recommended that respondent be suspended for five years, stayed, serve a five-year probationary term and a three-year actual suspension, comply with rule 955 of the California Rules of Court and be required to pass a professional responsibility examination. Respondent filed a request for review of the amended decision.[1]

III. THE FACTS

The essential facts underlying respondent's conviction were conclusively established by his guilty plea. (Bus. & Prof. Code, § 6101.) The hearing below involved extensive testimony as to respondent's contacts with Lahodny prior to his indictment and the surrounding circumstances during the year Lahodny was a fugitive. Where there are significant modifications to the facts as found by the referee, they are identified and discussed below.

A. Harboring a Fugitive Charge

After a year with the federal public defender program in San Diego, respondent went into a private law practice, handling criminal defense cases primarily in federal court. He met Lahodny in 1973 in Monterey and maintained a sporadic social relationship with him. Lahodny was the son of a respectable middle class San Diego family; his father had been the city manager of the city of Coronado. Prior to 1978, Lahodny had referred a number of clients to respondent for legal advice and assistance.

1. Presence of Lahodny on the Ashley Road Property

In 1977, Lahodny was residing in the Santa Barbara area and, after investigating the investment prospects of a number of parcels of real estate in the Santa Barbara area, he interested respondent in acquiring a six and one-half acre residential property in Montecito for approximately $450,000. Lahodny's proposal was for respondent to purchase the property and finance the renovation and improvement of the buildings and grounds, while Lahodny resided there rent-free as caretaker and oversaw the renovations. When the property sold, Lahodny would be entitled to some share of profit realized. Respondent agreed and he and his professional corporation purchased the property in the early spring of 1977.

Lahodny moved onto the Ashley Road property soon after escrow closed and began contacting contractors. A bank account was opened and funded by respondent on which both Lahodny and respondent had check signing powers and out of which the mortgage and property improvements were paid. Some work was directly billed to respondent in San Diego as well.

During the time in which he supervised the renovation of the Ashley Road residence, Lahodny was secretly involved as a runner for the Coronado Company. One month each year he would assist in smuggling a large shipment of marijuana from Asia into the United States. In connection with the smuggling, Lahodny used numerous aliases provided by

1. After the amended decision was filed but before the period for petitioning for reconsideration had expired, respondent filed his original request for review. Within the period for reconsideration, the examiner filed a motion to reopen the record before the referee based on newly discovered evidence. The motion was granted by the referee on November 27, 1989. The proceedings in the review department were vacated and dismissed by order filed December 19, 1989. Thereafter, the parties filed a joint motion to withdraw the motion to reopen the record, including the exhibits attached to the motion to reopen the record, and to reinstate the amended decision. The motion was granted by the referee on August 27, 1990, the amended decision was reinstated as of August 27, 1990, and the instant request for review was filed by respondent on October 3, 1990.

the Coronado Company, in order to obscure his identity and confuse any law enforcement investigation. Meanwhile, he continued to use his own name with persons who knew him. Lahodny also provided false names and identification for his girlfriends and had them assume these identities when he felt it was necessary. The referee referred to Lahodny as living "something of a double life." (Amended decision p. 10.)

Respondent was aware of a 1977 grand jury investigation of members of the Coronado Company because he represented other targets of the grand jury, but testified that he did not know of Lahodny's involvement until the indictment was unsealed in February of 1978. (R.T., vol. V, pp. 71-74.) Lahodny was living at the time at the Ashley Road residence and had recently separated from a long-time girlfriend. In response to the break-up, Lahodny testified that he decided to take a vacation and wrote a letter to respondent (addressed to Mr. DeMasse [sic]) dated February 16, 1978, advising respondent that he was leaving on a vacation and turning over the care and renovation of the Ashley Road property to David and Nora Reddy. The letter was stamped "received" by respondent's office on February 20, 1978. Respondent met with Reddy, a long-time friend of Lahodny, within a week and entrusted him with overseeing the completion of the renovation project.

Lahodny testified that he was unaware that he had been indicted until after he departed the United States for Mexico and Tahiti. (R.T., vol. IV, pp. 119-120.) The referee found that Lahodny returned to the Santa Barbara area in May 1978, assuming the name "Bob Hill." His presence was established through the testimony of contractors and kitchen appliance suppliers who met Lahodny as Bob Hill while working on the kitchen renovation, corral fencing and landscaping of the Ashley Road property in the spring and summer of 1978. Although the work orders on these projects had been changed so that they were now in the name of "Reddy" or "Ready," the referee found that upon Lahodny's return, Lahodny, not Reddy, exercised the final word on approving or authorizing work, and gave large cash tips to contractors on site. Lahodny did not deny that he was on site, but testified that he did not let respondent know of his presence and advised the Reddys not to tell respondent he had been there.

Respondent admitted being in contact with Lahodny in connection with arranging terms of Lahodny's surrender, but denied any knowledge of Lahodny's presence or involvement in the work done on the Ashley Road property after May 1978. Originally, the referee found that Lahodny lived on the Ashley Road property. Upon rehearing, the referee concluded that there was insufficient evidence that Lahodny returned to live at the Ashley Road property or that respondent had authorized Lahodny to live there. (Amended decision p. 13.) Lahodny's girlfriend and other witnesses testified that Lahodny first lived with a friend and then shared with his girlfriend an apartment in the Santa Barbara polo grounds during that time period, and did not live at the Ashley Road property. In his original decision, the referee also disbelieved the testimony of Lahodny and respondent as to whether respondent was aware that Lahodny had returned to the Santa Barbara area in or about May 1978 and had resumed supervision of the Ashley Road renovation. The referee reached the same conclusion after reconsideration. Respondent challenges this finding in aggravation, which we discuss *post*.

The Ashley Road property was sold by respondent in November 1981 for approximately $1,300,000. Lahodny did not receive any portion of the proceeds from the sale.

2. The Ventura drunk driving incident

While he was a fugitive, on January 30, 1979, Lahodny was arrested and taken into custody in Ventura County for driving while under the influence of alcohol. Lahodny gave one of his Coronado Company aliases, "Gary John Classen," to the authorities on the scene and while in custody. He entered a plea of not guilty under the Classen alias, and his girlfriend, Susan Staub, posted cash bail of $300, under the alias "Karen Jackson." Both Lahodny and respondent testified that respondent did not know that Gary Classen was an alias for Robert Lahodny. Lahodny testified he was careful not to let respondent know because "it would have looked real stupid for somebody with a federal warrant out to be acting like that. And I just didn't want him to know

about it . . . ." (R.T., vol. IV, p. 84.) He told the respondent he had a friend from Idaho "Gary Classen," who had just been picked up on a drunk driving charge in Ventura and asked respondent if he knew a local attorney who could handle the case. Lahodny indicated to respondent that "Classen" was concerned whether his fingerprints might go to the FBI. (R.T., vol. V, p. 102.) Lahodny called respondent back later and was given the name of attorney Edward A. Whipple. Respondent and Whipple were not personally acquainted. Respondent spoke briefly to Whipple by telephone. Whipple sent a letter dated February 5, 1979 to respondent enclosing a waiver of constitutional rights and personal presence form for respondent to obtain "Classen's" signature. The letter detailed Whipple's best estimate of the outcome of the case and asked respondent for a phone number for "Classen" so Whipple could call and discuss the case with the client and thereafter sign the declaration of attorney in the case. (Exh. 11.) The completed waiver forms signed by "Classen" and $300 in cash were slipped under the door of Whipple's office after hours by Lahodny's girlfriend on February 12, 1979. (Amended decision p. 14.)

The drunk driving matter was heard on February 21, 1979, and Whipple, appearing on behalf of "Classen," entered a plea of no contest. "Classen" was found guilty, fined $350 and placed on two years probation. Whipple, having never met "Classen" and still unaware that Lahodny, a fugitive, was "Classen," wrote to respondent on February 21, 1979 (exh. 11), regarding the disposition of the case and enclosed the probation order with the conditions for "Classen" to sign. Whipple also stated that as soon as he had the answer to respondent's question regarding the disposition of "Classen's" fingerprints, he would call respondent. A note in Whipple's file indicated that respondent was advised that the prints would be forwarded to the state justice department in Sacramento and from there to the FBI. (Exh. 14.) Lahodny testified that he had his girlfriend or another woman pick up the forms at the respondent's office, that he then signed the probation order and slipped it under the door to Whipple's office after hours together with $50 to pay the balance of his fine. Whipple testified that he had no recollection of how the documents were returned to his office but it appeared they were hand-delivered to his secretary. (R.T., vol. IV, pp. 11-12; 33-37.)

Respondent testified that Lahodny spoke to him briefly about his friend's need for a lawyer and then he spoke to Whipple briefly at the time he referred the case. He recalled hearing of "Classen's" concern about whether the fingerprints would be sent to the FBI and that he relayed the concern to Whipple. (R.T., vol. V, p. 102.) During that period, he was busy preparing for a sentencing hearing for a different client until February 8th, and then was on a skiing trip in Colorado until February 17th. (R.T., vol. V, pp. 107-108.)

Respondent further testified that had he known Classen was an alias for Lahodny, he would not have referred the drunk driving case to a stranger, but would have sought a continuance of the case while he talked Lahodny into surrendering. (R.T., vol. V, pp. 109-112.) Whipple testified that had he learned Classen had not used his true name at the arraignment, a continuance could have been obtained in order to give him time to assess what his obligations were toward his client. (R.T., vol. IV, pp. 47-49.) An expert witness for respondent, attorney Ephraim Margolin, testified that in his opinion there would have been nothing improper in seeking a continuance for "Classen" while arranging his surrender to federal authorities. (R.T., vol. VI, p. 50.)

The referee found the testimony of both respondent and Lahodny that respondent was unaware of "Classen's" true identity inherently incredible. (Decision pp. 15-16.) Critical to the referee's assessment of the evidence was the inquiry from respondent concerning the disposition of the fingerprints and the elaborate logistics for communicating with "Classen." The referee noted that respondent's effort was expended on behalf of someone whom respondent had never spoken to, met, called or written. The referee concluded that respondent must have known that Lahodny and Classen were one and the same person. On review, respondent also challenges this finding, which we discuss *post*.

B. Currency Transaction Reports

As part of his plea, respondent admitted that on June 1, 1981, December 16, 1981, and May 3, 1982, respondent made cash deposits at the Bank of California in San Diego. In each instance, he had previously made cash deposits in amounts under $10,000

each and the sum of these cash deposits at that point in the calendar year totalled in excess of $100,000. On the dates in question, respondent made separate cash deposits which totalled in excess of $10,000, but were broken into sums of less than $10,000 each so as to avoid triggering the requirement under federal law that a currency transaction report be filed by the Bank of California concerning the deposits.

At the hearing, the referee found that respondent initially split his deposits at the request of bank officers at the Bank of California so the bank could avoid the requirement of filing a currency transaction report. Respondent continued his practice of splitting deposits even after bank officials had granted him an exemption from the filing requirement. As a rule, respondent received substantial advanced fees from clients in cash and it was the practice of criminal defense attorneys at that time to make cash deposits in a manner as to avoid triggering the cash transaction reporting requirement.

[2b] The referee concluded on this evidence that the currency convictions did not constitute crimes involving moral turpitude, nor offenses otherwise warranting discipline. He also noted that the conduct in question is no longer considered a crime. (See *ante*, at p. 743.) The State Bar does not dispute that conclusion and, upon our review, we adopt the referee's analysis and recommendation with respect to the currency convictions. With respect to the conviction for harboring a felon, our discussion follows.

IV. DISCUSSION

A. Due Process Challenges

Respondent alleges two violations of his right to due process and they are addressed in turn.

1. Evidence concerning the Ventura drunk driving incident

Respondent asserts he was denied due process in that he had no notice that the evidence regarding the Ventura incident would be considered as misconduct or as an aggravating factor. He contends that it was advanced at the hearing solely for the purpose of illustrating respondent's contacts with Lahodny during the time Lahodny was a fugitive. The referee found respondent had assisted Lahodny in using his alias to avoid alerting law enforcement and court officials of his true identity and considered that evidence as a factor in aggravation in the original hearing decision. Respondent filed his petition for reconsideration thereafter, requesting that the incident either be disregarded for purposes of determining discipline, or he should be permitted to introduce additional evidence on the issue in an effort to show his lack of knowledge of Lahodny's use of an alias. The referee denied his request as to that issue,[2] finding that the Ventura incident was related to the circumstances of respondent's criminal conviction, there was no motion at the time the evidence was offered to limit its use, and the evidence had been admitted at the hearing without objection.

[3] As the examiner points out, in criminal conviction matters, the State Bar Court is not limited to examining only the elements of the offense in question, but is obligated to look at all facts and circumstances surrounding the offense to assess the respondent's fitness as an attorney. (*In re Kristovich* (1976) 18 Cal.3d 468, 472.) Our Supreme Court explained in *In Re Arnoff* (1978) 22 Cal.3d 740, 745, "We have uniformly considered in reference proceedings all facts and circumstances surrounding the commission of a crime by an attorney. [Citation.]" **[4]** The Ventura incident was considered by the federal judge at sentencing, and respondent was so advised both at the plea hearing and sentencing. (Exh. 4, pp. 3502-3503; exh. 5, pp. 35-36.) Accordingly, we conclude that there was sufficient notice to respondent prior to the hearing of the relevance of the Ventura incident to his criminal conviction. Since respondent had notice and an opportunity to present evidence before the hearing referee on the Ventura incident, we deny respondent's motion to remand this case for consideration of additional exculpatory evidence on this issue. However we also conclude, *post*, that the existing record did not demonstrate

2. The referee did grant respondent leave to present additional evidence on the Ashley Road property because respondent did not have access to documents relating to the property until his files were released to him by the U.S. District Court in February 1989.

clear and convincing evidence of an aggravating factor resulting from the Ventura drunk driving incident.

2. Moral turpitude determination

[5a] Respondent raises on review the issue of whether his conviction for harboring a fugitive is a crime inherently involving moral turpitude. The referee correctly ruled that the California Supreme Court had already found respondent's conviction for 18 United States Code section 1071 (harboring a fugitive) to be a crime of moral turpitude per se. (Amended decision p. 18.) **[6a]** Respondent argues that the Supreme Court's referral order does not support the referee's conclusion. Respondent characterizes the quoted language from the order as ambiguous and further asserts that if the issue was already determined in this manner, he has been denied due process of law. We agree with the examiner that there is no ambiguity in the Supreme Court order or any hint of denial of due process.

[7] The issue of whether an offense constitutes moral turpitude per se is a matter of law to be ultimately determined by the Supreme Court. (*In re Strick* (1983) 34 Cal.3d 891, 901.) **[6b]** The record is replete with respondent's opportunities to be heard by the Supreme Court on this issue before the matter was referred to the State Bar.[3] **[8]** We act as the administrative arm of the Supreme Court on attorney disciplinary matters and act pursuant to its mandate. (*Emslie* v. *State Bar* (1974) 11 Cal.3d 210, 224.) On the currency transaction offenses, the Supreme Court asked the State Bar Court to hold a hearing, and make a report and recommendation as to whether the crimes constituted offenses involving moral turpitude or other conduct warranting discipline and, if appropriate, a discipline recommendation. **[5b]** In contrast, on the conviction for harboring a fugitive, the directive from the Supreme Court was to hear evidence relative to the appropriate level of discipline because the Supreme Court had already established the nature of the offense as one inherently involving moral turpitude. That classification of the offense of harboring a fugitive was final and binding upon the referee below and was reinforced by the Supreme Court's subsequent opinion in *In re Young* (1989) 49 Cal.3d 257 similarly categorizing the same crime.

B. Challenges to Factual Findings

Respondent attacks the referee's findings of credibility on both the issue of his knowledge of Lahodny's resumed supervision of the Ashley Road renovations and the Ventura drunk driving incident, specifically that respondent and Lahodny were not believable witnesses. **[9]** Credibility findings by the finder of fact are to be accorded great weight by us and we should be reluctant to deviate from them. (Rule 453, Trans. Rules Proc. of State Bar; *Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1055-1056.) Nonetheless, the findings must be supported by the record. On our independent review of the record, we find insufficient evidence to support the challenged findings and we decline to adopt them.

A number of witnesses testified as to respondent's extreme devotion to his law practice to the exclusion of his personal interests and investments in general and his neglect of the supervision of the Ashley Road renovation in particular, a project taking place 200 miles from his home. (R.T. on rehearing (May 30, 1989) pp. 183-185; (June 29, 1989) pp. 5-11; 16; 31-32; 51-53.) Indeed, it is undisputed that he allowed bills from the renovation to pile up unpaid for months

3. When the conviction was referred to the Supreme Court, respondent filed extensive papers in response to the transmittal, contending that the characterization of the offense as one involving moral turpitude as a matter of law in the transmittal papers was incorrect. After the interim suspension order was issued, respondent petitioned the Court to have the suspension set aside. His brief led with arguments that the conviction did not involve moral turpitude inherently or under the facts and circumstances in the case. When the Court set aside the interim order effective April 8, 1986, it ordered respondent to show cause why final discipline should not be imposed under California Rules of Court, rule 951(b). The rule then extant provided that the attorney's return could include "a request for termination of suspension and dismissal of the proceeding upon the ground that the crime and the circumstances of its commission did not involve moral turpitude . . . ." The respondent again argued the moral turpitude issue in his response to the Supreme Court. In its referral order issued thereafter, the Supreme Court rejected his arguments and determined as a matter of law the offense to be one involving moral turpitude.

during this period of time. (R.T. on rehearing (June 29, 1989) pp. 45-46; R.T., vol. III, pp. 74-75.) None of the paperwork transmitted to respondent in San Diego indicated that Lahodny was involved on the project after Reddy was placed in charge. (R.T. on rehearing (June 29, 1989) pp. 44-45; exh. P.) Respondent had instructed Lahodny to stay away from the Ashley Road property. (R.T. on rehearing (June 19, 1989) pp. 22-23; R.T., vol. IV, p. 75.) No witnesses testified that respondent had any knowledge that Lahodny was visiting and Lahodny asked the Reddys not to disclose his visits to respondent. (R.T., vol. IV, p. 124.)

The referee concluded that, contrary to respondent's testimony, respondent knew that Lahodny had come back to work on the renovation because he was "cognizant of the progress on the property." (Amended decision p. 12.) **[10a]** The referee may not have found respondent's testimony credible on this point, but "rejection of testimony 'does not create affirmative evidence to the contrary of that which is discarded.'" (*Edmondson* v. *State Bar* (1981) 29 Cal.3d 339, 343, quoting *Lubin* v. *Lubin* (1956) 144 Cal.App.2d 781, 795.) Indeed, respondent's explanation of his preoccupation with his law practice and lack of awareness of Lahodny's participation on the project in Santa Barbara was plausible and uncontradicted. In such circumstances it is appropriate to resolve reasonable doubts in favor of the respondent and reject a contrary finding as unsupported by clear and convincing evidence. (*Davidson* v. *State Bar* (1976) 17 Cal.3d 570, 573-574.) Therefore, we do not find clear and convincing evidence that respondent was aware of Lahodny's work on the Ashley Road renovation after May 1978.

We reach a similar conclusion as to the referee's findings concerning the Ventura drunk driving incident. Whipple relied entirely on his sketchy notes and the documents in his file for the substance of his testimony. He had no independent recollection of any conversations with respondent or "Classen." There is nothing in Whipple's testimony and file to support the conclusion that respondent was necessarily aware that "Classen" was an alias of Lahodny. The referee found that Whipple did not know he was dealing with a fugitive despite never having met his client; despite the "highly unusual handling of the paperwork"; and despite the "unusual inquiry" as to whether or not the FBI would receive Classen's fingerprints. The testimony of respondent that he was likewise kept ignorant of Classen's true identity is not inherently incredible.

The record discloses that respondent was busy with another case when he received a brief phone call from Lahodny seeking a referral for a friend. There is no indication that respondent gave the referral a great deal of attention, or that he knew that Lahodny was lying to him. Respondent testified that had he known that Lahodny himself needed a defense lawyer, he would have handled the matter himself, and sought a continuance in Ventura to allow Lahodny time to surrender in San Diego and still claim the disposition of the drug charges respondent had negotiated with the U.S. Attorney. (R.T., vol. V, pp. 109-110.) The course he testified he would have taken had he known the truth appears more consistent with his generally zealous concern for his clients and his repeated prior counsel to Lahodny to surrender. The action he did take—referring "Classen" to a stranger—appears more consistent with ignorance of "Classen's" true identity.

[10b] Where the respondent's version is plausible in the context of the entire record, even when controverted, it supports a reasonable inference of lack of misconduct. (*Davidson* v. *State Bar*, *supra*, 17 Cal.3d at p. 574.) Here, there was no direct testimony establishing, as found by the referee, that respondent "knowingly aided Mr. Lahodny's use of an alias in the disposition of the Ventura County misdemeanor complaint against 'Gary John Classen' . . . ." (Amended decision p. 19.) There was only circumstantial evidence suggesting that respondent could have known and uncontradicted testimony of respondent and Lahodny that he did not know. Even if respondent's testimony were not worthy of belief, "'it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.'" (*Edmondson* v. *State Bar*, *supra*, 29 Cal.3d at p. 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265.) We therefore cannot conclude on this record that clear and convincing evidence established that respondent knowingly aided Lahodny in the use of an alias before the Ventura court.

C. Evidence in Mitigation and Aggravation

The extensive mitigating evidence considered by the referee included respondent's lack of a prior record of discipline, character testimony from persons knowledgeable of the criminal conviction proceedings including a judge of the California court of appeal, a federal magistrate, numerous fellow practitioners in San Diego and prominent colleagues throughout the state, and statements by respondent as to his remorse and contrition. As noted earlier, the referee concluded that "[t]here has been an extraordinary demonstration of good character of the [r]espondent attested to by a wide range of references in the legal and general communities who are aware of a substantial extent of the [r]espondent's misconduct, all of whom strongly believe that the [r]espondent is a brilliant lawyer, whose dedication to his clients is without equal, who possesses an outstanding personality and great character without whom the profession would be at profound loss." (Amended decision p. 20.) This community esteem is a strong mitigating factor. (Cf. *Sternlieb* v. *State Bar* (1990) 52 Cal.3d 317, 331; *Schneider* v. *State Bar* (1987) 43 Cal.3d 784, 801.)

The referee also took into account respondent's view of his ethical obligations toward his client as a factor in mitigation and respondent's good faith in persuading Lahodny eventually to surrender. Respondent and other witnesses testified to the atmosphere of distrust and hostility between the Department of Justice and the criminal defense bar and, particularly, the U.S. Attorney's office and the defense bar in San Diego, starting in the 1970's. (See, e.g., R.T., vol. I, pp. 75-77, 80-83; exh. B-1, pp. 14, 19-22.) It was not uncommon for attorneys to be called to appear before the federal grand jury in San Diego. (*Id.* at pp. 75-76.) Respondent was subpoenaed to testify before grand juries in Los Angeles and San Diego at least four times and other subpoenas were served and later withdrawn. (*Id.* at pp. 58-60; 73-74.)[4] His law office and home were searched over three days in connection with the criminal offenses underlying this proceeding. The search was later determined to be illegal. (*Id.* at p. 79.) His office records and personal files were seized by federal agents and portions remain in federal custody to date. (*Id.* at pp. 77-79; see *ante* fn. 2.) Respondent's response at the time was vigorously to resist all government efforts to make him a willing or unwilling witness against his clients in order to protect their confidences. (*Id.* at pp. 59-60.)

[11a] On review, respondent argues that all his actions concerning Lahodny were consistent with his obligation under Business and Professions Code section 6068 (e)[5] and the American Bar Association Model Rules of Professional Conduct, rule 1.6,[6] to keep the confidences of his client inviolate, even to his own peril. The attorney-client privilege protects from disclosure information confided by the client to the attorney in the course of their relationship.

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4. In 1990, the American Bar Association's House of Delegates adopted a new paragraph in its Model Rules of Professional Conduct to forbid the subpoenaing of an attorney to present evidence concerning a past or present client except by prior judicial approval, after opportunity for an adversarial hearing, and a showing that the prosecutor reasonably believes the information is not privileged, is essential to the case and cannot be obtained by an alternative means. (ABA Model Rules Prof. Conduct, rule 3.8(f); Lawyers' Manual of Prof. Responsibility (ABA/Bur.Nat.Affairs) 6 Current Reports, No. 2 (Feb. 28, 1990), pp. 25-26.)

5. Business and Professions Code section 6068 (e) sets forth the duty of an attorney in California "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client."

6. Rule 1.6 *Confidentiality of Information* reads as follows:

"(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

"(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: [¶] (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or [¶] (2) to establish a claim or defense on behalf of the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

[11b] The ethics opinions of the various states cited by respondent support his contention that the whereabouts of a fugitive client known to an attorney constitute privileged communications which cannot be disclosed by the attorney. Those opinions also recognize the attorney's obligation to advise the fugitive client to surrender to authorities and prohibit acts by the attorney to assist or facilitate the fugitive in avoiding capture or committing a crime.

[11c] We agree with respondent that his knowledge that Lahodny was in California and his meetings to discuss the progress of negotiations with the federal authorities on the outstanding criminal charges are client confidences which he was obligated to preserve. However, in his guilty plea, respondent affirmed that he harbored his client with the intent of preventing his client's discovery and arrest by federal authorities. (Exh. 4, pp. 3498, 3501-3502.) "A criminal conviction, including a plea of guilty, is conclusive proof that the attorney committed all the acts necessary to constitute the offense." (*Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 110; Bus. & Prof. Code, § 6101 (a).) Under the facts established by the conviction, respondent took affirmative acts—albeit extremely limited in nature—which served to hide and shelter his client Lahodny who remained at large for an additional three days thereafter. The California Supreme Court has specifically held that an attorney's ethical duty not to disclose his client's confidences does not extend to affirmative acts which further a client's unlawful conduct. (*In re Young*, *supra*, 49 Cal.3d at p. 265.)

Young had been convicted of one count of being an accessory to a felony (Pen. Code, § 32), by assisting a client with the intent of avoiding arrest and with knowledge that the client had been charged with committing a felony.[7] Young provided financial assistance to the client who had fled to Hawaii after being charged with robbery,[8] although Young consistently counseled the client to surrender. Nevertheless, when the client was arrested after his return to California on a petty theft offense and gave a false name to authorities, Young arranged for bail under the client's assumed name. He later reserved a motel room for the client near the court for his arraignment on the theft charge, where the client was to surrender on the robbery charges as well. Young and his client were arrested when they arrived at the motel. The Supreme Court found Young's conviction constituted a crime involving moral turpitude per se, noting that in assisting the client in this manner an attorney "necessarily acts with conscious disregard of his obligation to uphold the law." (*In re Young*, *supra*, 49 Cal.3d at p. 264.) Of greatest concern to the Supreme Court was the fraud on the court perpetrated by Young in arranging bail for his client under a false name. (*Id.* at p. 265.)

No dishonesty toward the court was established here or any other factor in aggravation of the essential facts established by the conviction, but compelling mitigating evidence was properly found by the referee.

[12] Before us, the parties also stipulated to the admission of numerous additional declarations, including several from clients in various civil matters presenting impressive testimonials regarding respondent's service on their behalf.[9] In a number of instances, respondent represented these clients on a

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7. Respondent argues that the *Young* case is distinguishable from this matter because, as noted in a footnote in the case, Young did not represent the fugitive client on the underlying criminal charge of robbery. (*In re Young*, *supra*, 49 Cal.3d at p. 261, fn. 3.) However, respondent likewise did not represent Lahodny once he surrendered. As here, it is evident that there was an attorney-client relationship established between Young and the fugitive client (see *Beery* v. *State Bar* (1987) 43 Cal.3d 802, 811-812), and Young invoked the duties and protections that flowed therefrom, including the duty to protect client confidences. (*In re Young*, *supra*, 49 Cal.3d at p. 265.)

8. The robbery charge later led to a felony-murder charge when the victim died, although there was no evidence Young knew of the victim's death at the time of his actions. (*In re Young*, *supra*, 49 Cal.3d at p. 266.)

9. One case resulted in a published opinion interpreting rule 985(i) of the California Rules of Court to allow waiver of transcript costs for an indigent quadriplegic client seeking to proceed in forma pauperis. (*Mehdi* v. *Superior Court* (1989) 213 Cal.App.3d 1198.) In another case respondent successfully challenged the arrest of his client on seven-year-old murder charges in a writ proceeding before the court of appeal resulting in remand of the case and its subsequent dismissal by the trial court for prejudicial delay.

pro bono basis. In addition, although not accepted by the referee as mitigating evidence, the examiner acknowledged respondent's candor and cooperation at the hearings below. (R.T., vol. 7, pp. 142, 144.) It is manifest from our review of the record that respondent fully cooperated with the State Bar in this proceeding and that should be recognized as a mitigating circumstance as well. (*In re Aquino* (1989) 49 Cal.3d 1122, 1131.)

[13] Respondent's lack of a prior discipline record is not a significant factor in and of itself given that he had been in practice only eight years at the time of his misconduct. (*In re Naney* (1990) 51 Cal.3d 186, 196; *In re Demergian* (1989) 48 Cal.3d 284, 294.) Nevertheless, respondent is entitled to have taken into account his subsequent practice without incident for more than 12 years since his criminal conduct. (*Amante* v. *State Bar* (1990) 50 Cal.3d 247, 256.) His long otherwise unblemished career also allows us to make the finding his conduct was aberrational and unlikely to recur. (Cf. *Friedman* v. *State Bar* (1990) 50 Cal.3d 235, 245.)

The examiner concedes that respondent never harmed his client because his crime resulted from excessive zeal in acting on his client's behalf, not from acts in derogation of his client's interests. (R.T., vol. 7, pp. 141-142.) Rather, respondent's crime, like Young's, was in derogation of his duties as a citizen and an attorney not to violate the law while seeking to act on behalf of his client.

D. Recommended Discipline

[14] Under the Standards for Attorney Sanctions for Professional Misconduct, the presumptively appropriate discipline for a conviction of an attorney of a crime which involves moral turpitude is disbarment. (Std. 3.2; *In re Crooks* (1990) 51 Cal.3d 1090, 1101; see also *In re Berman* (1989) 48 Cal.3d 517, 523.) Nonetheless, as the referee below found, standard 3.2 provides that a lesser sanction may be imposed where, as here, compelling mitigating circumstances predominate. (See also *In re Leardo* (1991) 53 Cal.3d 1, 10.) The referee failed to note, however, that where compelling mitigation exists, the Supreme Court has rejected application of the two-year minimum actual suspension suggested by standard 3.2. (*In re Young*, *supra*, 49 Cal.3d at pp. 268-270.) Our duty remains to determine the appropriate sanction in light of the purposes of attorney discipline: protection of the public, preservation of public confidence in the legal profession and maintenance of high professional standards. (*Harford* v. *State Bar* (1990) 52 Cal.3d 93, 100.)

We turn first to *In re Young*, *supra*, 49 Cal.3d 257, for guidance on analyzing the issue of the appropriate level of discipline. The approach of the Court in *In re Young* suggests that the circumstances here warrant significantly less discipline. Both attorneys were convicted of harboring fugitives—felonies inherently involving moral turpitude—and thus were presumed to be unsuitable legal practitioners. (*In re Higbie* (1972) 6 Cal.3d 562, 573.) As a result, both were ordered on interim suspension. Both petitioned the Supreme Court to set aside the suspension order to permit continuation of their legal practice during the pendency of the disciplinary proceedings. Young's petition was denied. Respondent's petition was granted. [15] While we cannot speculate as to which, among the myriad facts presented by respondent, proved ultimately persuasive to the Supreme Court on the petition to set aside respondent's interim suspension, such action is relatively uncommon and occurs only "when it appears to be in the interest of justice to do so, with due regard being given to maintaining the integrity of and confidence in the profession." (Bus. & Prof. Code, § 6102 (a).) Thus, unlike Young, at the outset, respondent made a sufficient showing to the Court that he did not pose a threat to the public, profession and the courts by his continued practice during the pendency of these proceedings, rebutting his presumptive disqualification stemming from his conviction of a crime inherently involving moral turpitude.

[1b] The full record developed at the hearing and by stipulated additional evidence on review similarly discloses no current risk to the public. However, we must consider the integrity of the State Bar and the public's confidence in the legal profession. Conviction of a felony is a serious matter. As indicated above, the Court found in *In re Young* that even when a well-motivated attorney harbors a fugitive while seeking to talk him into surrendering, he or she "necessarily acts with conscious disregard of his

obligation to uphold the law." (*In re Young*, *supra*, 49 Cal.3d at p. 264.) We must conclude that the same applies to the federal conviction in this case.

After finding aggravating factors of fraud on the bail bondsman surrounding the conviction for harboring or aiding a principal in a felony (Pen. Code, § 32), the Court in *In re Young*, *supra*, 49 Cal.3d 257 imposed a five-year suspension, stayed, and a four-year actual suspension, with credit for the three years Young had spent on interim suspension. Based on the Court's comment as to the arbitrariness of the length of Young's interim suspension, it is unlikely that *In re Young* would have resulted in a total period of disciplinary suspension of four years, absent the lengthy interim suspeusion. (*In re Young*, *supra*, 49 Cal.3d 257, 267, fn. 11.) Indeed, the Court pointed out that only one year of the ordered suspension was prospective. (*Id.* at p. 270, fn. 14.) If Young's misconduct were limited to the attempt to put his client up overnight at a motel prior to surrendering and not aggravated by the fraud in securing his client's bail, the Supreme Court would presumably have not felt it necessary to order one year of prospective suspension. This is because the Supreme Court, in modifying the degree of discipline in *In re Young*, cited as illustrative cases where the attorneys committed acts constituting crimes involving moral turpitude in which the actual suspension ordered ranged from no actual suspension to one year of suspension depending on the balance of mitigating and aggravating factors. (*Id.* at p. 270; see, e.g., *Chadwick* v. *State Bar*, *supra*, 49 Cal.3d at p. 112 [attorney convicted of insider trading and counseling another to lie to Securities and Exchange Commission; five years probation and one year actual suspension]; *Bach* v. *State Bar* (1987) 43 Cal.3d 848, 856 [attorney deliberately sought to mislead judge; three years probation and sixty days actual suspension]; *In re Chira* (1986) 42 Cal.3d 904, 909 [attorney convicted of conspiring to impede the IRS by backdating lease of personal vehicle as part of tax shelter; one year stayed suspension and three years probation, no actual or interim suspension]; *Montag* v. *State Bar* (1982) 32 Cal.3d 721 [false testimony before the grand jury and other misconduct resulting in six months actual suspension].)

In several cases where original proceedings were brought resulting in a finding of a single instance of giving knowingly false testimony or making a knowingly false statement, the Court, upon consideration of substantial mitigating evidence, limited discipline to a reproval. (*Mushrush* v. *State Bar* (1976) 17 Cal.3d 487 [rejecting a one-year recommended period of actual suspension and ordering public reproval for one instance of false statements in obtaining a court order confirming a bankruptcy sale]; *Di Sabatino* v. *State Bar* (1980) 27 Cal.3d 159 [three justices dissenting in favor of no discipline]; *Sullins* v. *State Bar* (1975) 15 Cal.3d 609 [attorney publicly reproved for nondisclosure of material information, no prior record of discipline in his 45 years as an attorney]; *Mosesian* v. *State Bar* (1972) 8 Cal.3d 60 [local committee's recommendation of three months suspension reduced to reprimand].)

The mitigating circumstances most comparable to the instant case were those found in *In re Chira*, *supra*, 42 Cal.3d 904. The United States District Court sentenced Chira to one year of probation. Chira's acts were in connection with his personal affairs and had a devastating effect on his personal and professional life. The Supreme Court noted that Chira had otherwise spent a total of 24 years in law practice without incident and rejected any actual suspeusion as overly punitive. (*Id.* at p. 909.) Thereafter, in *Schneider* v. *State Bar*, *supra*, 43 Cal.3d 784 the Supreme Court cited *In re Chira* in rejecting the volunteer review department's recommendation of two years actual suspension for two instances of misconduct in favor of three years stayed suspension, three years probation and thirty days actual suspension. It found the review department recommendation grossly excessive in light of extensive mitigating evidence similar to that offered here. The Court noted that "the record shows that petitioner's transgressions were confined to a relatively short period. His conduct before and since has been beyond reproach . . . . Petitioner has been candid, cooperative and contrite." (*Id.* at pp. 800-801.)

In re Kristovich, *supra*, 18 Cal.3d 468, is also instructive because it involved a criminal conviction constituting moral turpitude per se. There, an attorney acting as a public administrator of estates probated in Los Angeles County, provided false names in three sales from estates administered by his agency in order to avoid a prohibition against purchases from estates by employees or agents of the agency. None of the sales was actually prohibited by law and

all were made for market value. Kristovich was convicted of perjury for submitting the false names to the probate court for approval of the sales, sentenced to five years probation (later reduced to two years) and ordered to pay a $2,000 fine. Upon his conviction, he was placed on interim suspension, which was vacated a month later upon good cause shown. His mitigating evidence at his disciplinary hearing included a long unblemished record, the lack of any personal gain from his misconduct, and many character witnesses to his distinguished career before and since the misconduct. The Supreme Court imposed three years stayed suspension, three years probation, and three months actual suspension. Like Chira, Kristovich obtained no personal gain and did not harm clients or other individuals. **[1c]** In this case, while the misconduct was related to respondent's law practice, likewise we find no personal gain to respondent from his misconduct or harm to his client. Moreover, unlike Kristovich or Chira, respondent committed no affirmative perjurious act in committing his crime. Indeed, he was affirmatively obligated by his duty to his client to conceal knowledge of Lahodny's whereabouts so long as he did not actively engage in harboring Lahodny. His problem was in crossing the line from zealous protector of client confidences to providing Lahodny with lodging while a fugitive.

We also note the devastating impact that respondent's criminal conviction and the surrounding publicity had on him and his family, the nature of his law practice and ability to earn income therefrom. (Cf. *In re Chira*, *supra*, 42 Cal.3d at p. 907; *Schneider* v. *State Bar*, *supra*, 43 Cal.3d at p. 799.)

[1d] Respondent's lengthy period of exemplary behavior since his conviction indicates that the recommended three-year actual suspension is clearly unnecessary in this case. While respondent transgressed his ethical duties, he did so, like Schneider, Chira, Mushrush and Kristovich, for a very short period. **[16]** Unlike the lawyers in the cited cases, it is evident respondent believed he was at all times doing his best to serve the ultimate interests of both his client and the criminal justice system. (*Ames* v. *State Bar* (1973) 8 Cal.3d 910, 921.) While good motives are not a defense to his breach of duty, they constitute a strong mitigating factor. (*In re Young*, *supra*, 49 Cal.3d at pp. 268-269.) **[1e]** Moreover, given the opportunity to practice law during the pendency of these proceedings, respondent has demonstrated that he can and will in all likelihood continue to adhere consistently to the high standards of the legal profession. Respondent's criminal conduct can now be viewed as aberrational. We conclude on the facts in this case that, upon due consideration of the nature of the crime, the circumstances of its commission and the compelling mitigation, one year of stayed suspension conditioned on one year of probation and sixty days of actual suspension, coupled with a requirement to take a Professional Responsibility Examination is appropriate to accomplish the goals of attorney discipline.

FORMAL RECOMMENDATION

For the reasons stated above, we recommend that respondent be suspended from the practice of law for one year, that execution of such order be stayed, and that respondent be placed on probation for one year on the following conditions:

1. That he shall be actually suspended for the first sixty days of the period of his probation;

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10, and October 10 of each calendar year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

(a) in his first report, that he has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

4. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professional Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1;

5. That, except to the extent prohibited by the attorney client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court or her designee at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge or designee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge or designee relating to whether respondent is complying or has complied with these terms of probation;

6. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of one year shall be satisfied and the suspension shall be terminated.

Finally, we recommend that respondent be required to take and pass the California Professional Responsibility Examination given by the State Bar within one year from the effective date of the Supreme Court's order herein.

We concur:

NORIAN, J.
STOVITZ, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KENNETH LAWRENCE CARR

A Member of the State Bar

[No. 87-C-17557]

Filed December 12, 1991

SUMMARY

A hearing panel of the former, volunteer State Bar Court recommended that no discipline be imposed against an attorney as a result of his conviction for driving under the influence of alcohol and/or drugs. The recommendation was based on a stipulation of the parties that the facts and circumstances surrounding the conviction did not involve moral turpitude and the hearing panel's conclusion, after considering the evidence presented at trial, that the State Bar failed to prove that the facts and circumstances involved other misconduct warranting discipline. (Donn Dimichele, Sally Rader, Hearing Referees.)

The State Bar examiner sought review, contending that the Supreme Court opinion in the attorney's prior discipline case, which resulted from two prior criminal convictions for the same offense, established that a conviction for driving under the influence on its face involves other misconduct warranting discipline. The review department rejected the examiner's contention, holding that culpability for professional misconduct is established, if at all, by an examination of the facts and circumstances surrounding the attorney's present conviction. Further, the review department concluded that the facts and circumstances surrounding the present conviction, which demonstrated that the attorney drove his car after taking legal medications which he did not know, nor reasonably should have known, would impair his driving ability, and after unexpectedly leaving his girlfriend's residence, did not involve moral turpitude or other misconduct warranting discipline. Accordingly, the department adopted the hearing panel's decision and dismissed the proceeding.

COUNSEL FOR PARTIES

For Office of Trials: William F. Stralka

For Respondent: Kenneth L. Carr, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1699 Conviction Cases—Miscellaneous Issues
A conviction for driving under the influence is not professional misconduct on its face; whether such a conviction involves misconduct warranting discipline depends on consideration of all the facts and circumstances.

[2] **139 Procedure—Miscellaneous**
191 Effect/Relationship of Other Proceedings
1699 Conviction Cases—Miscellaneous Issues
Where the Supreme Court's order referring a conviction matter to the State Bar required the State Bar Court to determine whether the conviction involved misconduct warranting discipline, the order demonstrated that the attorney's conviction alone did not establish that the attorney was culpable of professional misconduct.

[3] **130 Procedure—Procedure on Review**
135 Procedure—Rules of Procedure
166 Independent Review of Record
The review department's inquiry into a matter does not end when it determines that the arguments of the party seeking review are unpersuasive. In all cases brought before it, the review department must independently review the record. In so doing, the review department accords great weight to findings of fact made by the hearing department which resolve testimonial issues. However, the review department has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (Rule 453, Trans. Rules Proc. of State Bar.)

[4 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1527 Conviction Matters—Moral Turpitude—Not Found
Respondent's conviction for driving under the influence of alcohol and/or drugs did not involve moral turpitude, where the facts and circumstances surrounding the conviction demonstrated that respondent ingested legal medications that he did not know, nor reasonably should have known, would impair his driving ability, and thereafter unexpectedly drove his car.

[5 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
Although the circumstances of an attorney's ingestion of medications may not be a defense to the criminal charge of driving under the influence, they are relevant to whether professional discipline is necessary for the protection of the public, courts and legal profession. Where those circumstances demonstrated that the attorney ingested legal medications that he did not know, nor reasonably should have known, would impair his driving ability and thereafter unexpectedly drove his car, they did not indicate that the attorney's criminal violation demeaned the integrity of the legal profession or constituted a breach of the attorney's responsibility to society, other than any criminal violation would.

[6 a, b] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
1691 Conviction Cases—Record in Criminal Proceeding
An attorney's conviction is conclusive proof, for disciplinary purposes, that the attorney committed the crime for which the attorney was convicted. However, California's driving under the influence laws do not prohibit drinking or ingestion of drugs and driving. Rather, they prohibit driving under the influence of alcohol or drugs and/or driving with a specified blood alcohol content. Thus, the mere fact that an attorney ingested legal medications and then drove a vehicle did not indicate that the attorney's conduct demeaned the integrity of the profession or constituted a breach of the attorney's responsibility to society.

[7 a-c] **1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found**
Professional discipline following an attorney's criminal conviction has been held to be warranted where the circumstances surrounding the attorney's criminal conduct, though not involving moral turpitude, closely paralleled the duties of a practicing attorney. Where an attorney's activities leading to the conviction were of a personal nature and not the kind of activities that an attorney would likely confront in the ordinary course of the attorney's duties, and the attorney's testimony did not give rise to doubt that the attorney's advice to clients in similar circumstances would be sound, no misconduct warranting discipline was involved in the conviction.

[8] **191 Effect/Relationship of Other Proceedings**
204.90 Culpability—General Suhstantive Issues
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
A nexus between an attorney's criminal misconduct and the practice of law might have been established if the State Bar had proven that the attorney's present criminal conduct had violated the terms of the attorney's previously imposed criminal probation.

[9] **204.90 Culpability—General Substantive Issues**
1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
A nexus between an attorney's criminal misconduct and the practice of law may be established where the circumstances surrounding the attorney's conviction indicate that the attorney has problems with alcohol abuse. However, an attorney's ingestion of normal doses of legal medications for appropriate symptoms did not demonstrate a substance abuse problem.

ADDITIONAL ANALYSIS

[None.]

OPINION

NORIAN, J.:

We review the recommendation of a hearing panel of the former volunteer State Bar Court that no discipline be imposed against respondent, Kenneth Lawrence Carr, as a result of his 1987 conviction for driving under the influence of alcohol and/or drugs. The recommendation is based on a stipulation of the parties that the facts and circumstances surrounding the conviction did not involve moral turpitude and the hearing panel's conclusion, after considering the evidence presented at trial, that the State Bar failed to prove that the facts and circumstances involved other misconduct warranting discipline. The State Bar examiner sought our review contending that respondent's prior discipline, which resulted from two prior criminal convictions for the same offense, establishes that the present conviction per se involves other misconduct warranting discipline.

After our independent review of the record, we have determined that the examiner's assertions are not persuasive because the Supreme Court's order referring this matter to the State Bar demonstrates that culpability for professional misconduct is established, if at all, by an examination of the facts and circumstances surrounding the present conviction. Further, we conclude that the facts and circumstances surrounding the present conviction, which show that respondent drove his car after taking lawful medications which he did not know would impair his driving ability, and after unexpectedly leaving his girlfriend's residence, do not involve moral turpitude or other misconduct warranting discipline. Accordingly, we find that the hearing panel's decision is supported by the record and applicable law and we adopt the decision, with the minor modifications discussed below, as our own.

BACKGROUND

Respondent was admitted to the practice of law in California in 1976. On February 26, 1985, a four-count misdemeanor criminal complaint was filed against him, alleging that on February 15, 1985, respondent violated: Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol and drugs), with allegations of two prior convictions for the same offense (a third prior conviction was added to the complaint by amendment); Vehicle Code section 14601.2, subdivision (a) (driving a vehicle with knowledge that driving privilege suspended or revoked for driving under the influence of alcohol or drugs); Vehicle Code section 12500, subdivision (a) (driving a vehicle without holding a driver's license); and Health and Safety Code section 11357, subdivision (a) (possession of hashish). (Exh. 1.) He pleaded no contest in September 1987 to the driving under the influence charge (Veh. Code, § 23152, subd. (a)), and admitted three prior convictions in May 1982, December 1983, and January 1984 for the same offense. (Exh. 1.) The remaining charges were dismissed. (*Ibid.*) Respondent was sentenced to 180 days in jail, with 60 days served in custody and the remaining 120 days in a release program. (*Ibid.*)

The Supreme Court referred the matter to the State Bar for a hearing, report and recommendation as to the discipline to be imposed in the event the State Bar Court concluded respondent's conviction involved moral turpitude or other misconduct warranting discipline. (See Bus. & Prof. Code, § 6102 (e).) Trial in the State Bar Court occurred before a hearing panel of former, volunteer referees.[1] The parties stipulated at trial that respondent's conviction did not involve moral turpitude. (R.T. p. 78.[2]) The hearing panel's decision recommended that no discipline be imposed based on the conclusion that

1. The hearing panel was to consist of three referees. (Former rule 558, Rules Proc. of State Bar.) However, one became ill prior to trial and was not able to attend. Respondent's objection to proceeding without three referees was properly overruled by the panel. (*In re Morales* (1983) 35 Cal.3d 1, 7.)

2. The record contains reporter's transcripts for proceedings held on June 14, 1989, and August 31, 1989. The case was originally set for trial before a single referee on the June 14 date. At that time, respondent appeared and moved for appointment of counsel to represent him at State Bar expense, and for appointment of a three-person hearing panel pursuant to rule 558 of the former Rules of Procedure of the State Bar. The referee properly denied the motion for appointment of counsel (*Yokozeki* v. *State Bar* (1974) 11 Cal.3d 436, 447-448), and granted the request for a three-person panel. (R.T., June 14, 1989, pp. 19-20, 35-40, respectively.) As a result, the matter was continued to the August 31 date. All further references to the reporter's transcript are to the transcript of the proceedings on August 31, 1989.

the State Bar had failed to prove by clear and convincing evidence that the facts and circumstances surrounding respondent's conviction involved other misconduct warranting discipline.

FACTS

The criminal charge against respondent arose from events that occurred on February 15, 1985. (Exh. 1.) Respondent was found asleep in his car by police officers at an intersection in Los Angeles at about 2:15 a.m., with the car engine off. (R.T. pp. 7-10.) He was arrested and taken to the police station. (R.T. pp. 11-12.)

In the hours before his arrest, respondent had been at his girlfriend's residence and had planned to sleep there. (R.T. pp. 52-53.) Some three months prior to his arrest, respondent had been prescribed Valium for pain he suffered as a result of a toboggan accident. (R.T. pp. 46-47.) He did not take the entire prescription at that time and consequently had some left on the night of his arrest. (*Ibid.*) About three hours prior to his arrest, respondent took one 10-milligram pill of Valium because he was upset. (R.T. pp. 52, 59, 73-74.) Respondent knew that Valium was prescribed for "emotional upset." (R.T. p. 82.) Approximately one hour prior to his arrest, he took two to four Excedrin P.M. for a headache. (R.T. pp. 12, 52.) At some point in time after he had taken both medications, respondent's girlfriend asked him to leave, which he did. (R.T. p. 53.)

Respondent left his girlfriend's to drive to his home, which was approximately four miles away, and had traveled about two miles at the time of his arrest. (*Ibid.*) He attributes falling asleep to the combined effect of the Valium and Excedrin. (R.T. p. 75.) Respondent surmised that another motorist must have turned off his vehicle's engine. (R.T. pp. 54-55.) Respondent had not previously known Valium to have any overt effect on him, but he had never taken it in combination with Excedrin P.M., nor did he know that the Excedrin P.M. could cause drowsiness. (R.T. p. 71.) Respondent did not recall whether the Valium bottle had a warning that the drug might cause drowsiness, or that it should not be taken with any other drug. (*Ibid.*) Had respondent known earlier in the evening that he would drive later, he would not have "taken anything that [he] would have thought would have affected [his] ability to drive." (R.T. p. 47.)

Respondent did not have a valid California driver's license at the time of his arrest, but did have a Nevada driver's license which had expired. (R.T. p. 13.) He did not know at the time of his arrest that the Nevada license had expired because he had not received the expiration notice in the mail. (R.T. p. 15.)

DISCUSSION

[1a] The State Bar examiner requested our review arguing that respondent's prior discipline (*In re Carr* (1988) 46 Cal.3d 1089 [respondent's previous conviction for driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)), with the admission of two prior convictions for the same offense, was other misconduct warranting discipline]), establishes that his present conviction is per se other misconduct warranting discipline. According to the examiner, *In re Carr* stands as notice to all attorneys that a conviction for driving under the influence is professional misconduct on its face. In reply, respondent asserts that the hearing panel's decision is supported by the record and should stand. We conclude that the examiner's arguments are not persuasive.

In re Carr involved respondent's no contest pleas in 1983 and 1984 to separate counts of driving under the influence of alcohol. (*In re Carr, supra*, 46 Cal.3d at p. 1090.) The State Bar Court recommended Carr's suspension from the practice of law after concluding that the facts and circumstances surrounding the convictions did not involve moral turpitude, but did involve other misconduct warranting discipline. (*Ibid.*) The Supreme Court, without a factual discussion, adopted the State Bar Court's recommendation. (*Id.* at p. 1091.) The examiner asserts that by not pursuing a factual discussion, the Court intended, by omission, to warn attorneys that driving under the influence is per se misconduct.

[1b] We find the examiner's analysis of *In re Carr* contradicted by the express conclusion reached by the Court: "This court, *after reviewing the entire record and considering all the facts and circum-*

stances, has concluded that Carr's conduct did not involve moral turpitude, but did involve other misconduct warranting discipline." (*In re Carr*, *supra*, 46 Cal.3d at p. 1091, emphasis added.) The Court clearly considered the facts and circumstances surrounding the convictions in reaching its conclusion.

[2] The Supreme Court's order referring the present matter to the State Bar also demonstrates that the conviction alone does not establish that respondent is culpable of professional misconduct. The Court referred this case to the State Bar for a hearing, report, and recommendation as to the discipline to be imposed in the event the State Bar Court determined that the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline. The Court would not have referred this matter to the State Bar for a determination of whether misconduct occurred if respondent's prior conviction per se established misconduct.

In addition, the Supreme Court has indicated that the record of the conviction alone does not establish professional misconduct. "Our order referring the matter to the State Bar demonstrates that the fact of conviction alone does not evidence moral turpitude." (*In re Strick* (1983) 34 Cal.3d 891, 904.) The Court held in *Strick* that charges of unprofessional conduct were not sustained by clear and convincing proof where the only evidence presented regarding the facts and circumstances surrounding a conviction consisted of copies of the criminal judgment and a transcript of the hearing on entry of the plea and sentencing. (*Id.* at p. 905.) For the above reasons, we conclude that the examiner's assertions are not persuasive.

[3] Our inquiry, however, does not end with our determination that the examiner's arguments on review are unpersuasive. Rule 453 of the Transitional Rules of Procedure of the State Bar provides that in all cases brought before it, this review department, like the Supreme Court, must independently review the record. (See *Sands* v. *State Bar* (1989) 49 Cal.3d 919, 928.) We accord great weight to findings of fact made by the hearing department which resolve testimonial issues. (*In re Bloom* (1987) 44 Cal.3d 128, 134; rule 453(a), Trans. Rules Proc. of State Bar.) However, the review department has the authority to make findings, conclusions and recommendations that differ from those made by the hearing department. (Rule 453(a), Trans. Rules Proc. of State Bar.) Moreover, the issues raised or addressed by the parties on review do not limit the scope of the issues to be resolved by the review department. (*Ibid.*)

Preliminarily, we note that neither party contends that the hearing panel's findings of facts are not supported by the record. Our review of the record indicates that with two minor exceptions, the findings are well supported and we adopt them as our own. The exceptions are, first, the panel found that respondent had a fight with his girlfriend, became upset and left. (Decision pp. 3, 4.) We find no evidence that respondent had a fight with his girlfriend. Respondent testified that his girlfriend asked him to leave, which he vaguely attributed to the girlfriend having someone come over to give her a ride to work the next day. (R.T. p. 53.) Second, the hearing panel attributed respondent's ingestion of the Valium to his being upset because of the fight with the girlfriend. (Decision p. 3.) Respondent testified that he was mentally upset, without attributing that condition to any particular event. (R.T. p. 73.) These discrepancies in the findings are minor and do not affect the essential findings that respondent ingested medications that he did not expect to impair his driving ability and drove his vehicle after unexpectedly leaving his girlfriend's residence.

[4a] As indicated, the parties stipulated that the facts and circumstances surrounding the crime did not involve moral turpitude. After our independent review of the record, we find no basis for departing from this stipulated legal conclusion.

The examiner was content to rely on the record of the present conviction and *In re Carr*, *supra*, 46 Cal.3d 1089, to establish that the present conviction involved other misconduct warranting discipline. He did not call any witnesses other than respondent and, except for the record of the conviction, did not present any other admissible evidence of the facts and circumstances surrounding the conviction. In addition, the record of the present conviction is sparse in terms of the surrounding facts and circumstances of the crime. The referee concluded, after

hearing the evidence, that the facts and circumstances did not amount to other misconduct warranting discipline. In reaching that conclusion, the referee applied the legal principles regarding the application of the "other misconduct warranting discipline" standard articulated by the Supreme Court in *In re Rohan* (1978) 21 Cal.3d 195.

Rohan had been convicted of wilfully failing to file his federal income tax return. (*Id.* at p. 198.) The State Bar found Rohan's conviction did not involve moral turpitude, but did involve other misconduct warranting discipline. (*Ibid.*) In a decision consisting of three separate opinions, the Supreme Court unanimously agreed that discipline was warranted. The lead opinion concluded that an attorney's violation of the law which did not involve moral turpitude was subject to State Bar discipline if the violation "demeans the integrity of the legal profession and constitutes a breach of the attorney's responsibility to society." (*In re Rohan*, *supra*, 21 Cal.3d at p. 204 (lead opn. of Clark, J. and Richardson, J.).) A concurring opinion concluded that discipline was warranted because the circumstances surrounding the conviction reflected on Rohan's fitness to practice law: "In sum, the relationship of the offense to the practice of law, not its seriousness, is the crucial element justifying the imposition of discipline." (*Id.* at p. 205 (conc. opn. of Tobriner, Acting C.J. and Mosk, J.).) A second concurring opinion concluded that discipline was warranted, but disagreed with the lead opinion's formulation of the bases for imposing the discipline. (*Id.* at pp. 206-207 (conc. opn. of Sullivan, J. and Wright, J.).)

The referee in the present matter found that the evidence presented indicated that respondent did not expect the Valium and Excedrin he had ingested to impair his driving ability and that respondent drove his car only after unexpectedly leaving his girlfriend's residence. (Decision p. 9.) Applying *In re Rohan*, *supra*, 21 Cal.3d 195, the referee concluded the respondent's conduct did not demean the integrity of the legal profession and did not amount to a breach of respondent's responsibility to society, except to the extent that any violation of the law would do. (Decision p. 9.) The referee also concluded that there was no relationship between the conviction and the practice of law, again except to the extent any violation of the law would have. (*Ibid.*)

[5a] We agree with the referee's analysis. There is no evidence in the record that indicates respondent was aware one Valium would have an adverse effect on his driving ability, nor is there any evidence to suggest he was aware that Excedrin P.M. would have such an effect. Indeed, respondent had taken Valium before the night of his arrest and had not known the drug to have any overt effect on him. In addition, there is no evidence to suggest that respondent was aware that the medications, taken together, would impair his driving ability. There is also no evidence that either the Valium or Excedrin P.M. containers had any kind of warning regarding the effects the medications would have on a person or his/her driving ability. In addition, at the time he took the medications, respondent had every intention of spending the night at his girlfriend's residence. In short, respondent drove his car after ingesting medications that he did not know would impair his driving ability and after unexpectedly leaving his girlfriend's residence.

[6a] We recognize that respondent's conviction is conclusive proof that he committed the crime for which he was convicted. (*In re Crooks* (1990) 51 Cal.3d 1090, 1097; Bus. & Prof. Code, § 6101, subd. (a).) However, our driving under the influence laws do not prohibit drinking (or in this case, ingestion of drugs) and driving. (See Veh. Code, § 23152.) Rather, they prohibit driving *under the influence* of alcohol or drugs (Veh. Code, § 23152, subd. (a)) and/or driving with a specified blood alcohol content (Veh. Code, § 23152, subd. (b)). A person is "under the influence" when, as a result of drinking or using a drug, his/her physical or mental abilities are impaired to such a degree that he/she no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence, under same or similar circumstances. (CALJIC No. 16.831; *People* v. *Schoonover* (1970) 5 Cal.App.3d 101, 105-107.) It is not unlawful under these laws to drink and/or use drugs and drive as long as driving ability is not impaired. Thus, the mere fact that respondent ingested the medications and drove his vehicle does not indicate that his conduct demeans the integrity of the profession or constitutes a breach of his responsibility to society.

[5b] Respondent's conviction is conclusive evidence that his driving ability was impaired. However,

the record indicates that he did not have any prior warning that the medications he ingested would have that effect. Although the circumstances of respondent's ingestion of the medications is not a defense to the criminal charge of driving under the influence, they are relevant to whether professional discipline is necessary for the protection of the public, courts and legal profession. The facts and circumstances surrounding respondent's ingestion of the medications and thereafter driving his car indicate to us that this criminal violation does not demean the integrity of the legal profession nor constitute a breach of his responsibility to society, other than any criminal violation would.

[7a] As noted above, one of the concurring opinions in *In re Rohan* found that discipline was warranted in that case because: "The maintenance of clear and accurate financial records and the preparation and filing of timely tax returns closely parallel the duties of a practicing attorney. Petitioner's carelessness in these matters suggests that, for the protection of clients, his practice should be subject to probationary supervision by the State Bar." (*In re Rohan, supra*, 21 Cal.3d at p. 206 (conc. opn. of Tobriner, Acting C.J. and Mosk, J.).) In other cases the Supreme Court has also found that discipline was warranted where the circumstance surrounding the attorney's criminal conduct, though not involving moral turpitude, closely paralleled the duties of a practicing attorney. For example, in *In re Morales, supra*, 35 Cal.3d 1, the attorney had been convicted of 27 misdemeanor offenses involving the failure to withhold or pay certain payroll taxes and unemployment insurance contributions for his employees. (*Id.* at pp. 3-4.) The Court stated: "It is reasonably foreseeable that petitioner's legal advice could be solicited by clients in similar circumstances, and we have grave doubts whether the advice he would offer would be sound in view of petitioner's apparent failure even now to recognize that what he did was not justified simply because no 'excess funds' existed with which to pay the state." (*Id.* at p. 6.)

[7b] In the present case, we do not find the circumstances surrounding respondent's conviction to closely parallel his duties as an attorney. Respondent's activities on the night of his arrest were of a personal nature and not the kind of activities that an attorney would likely confront in the ordinary course of the attorney's duties. In addition, respondent testified that he would not have taken the medications if he had known earlier in the evening that he would drive later. Respondent's perception of his conduct distinguishes this case from *In re Morales, supra*, 35 Cal.3d 1, and does not indicate that we should have grave doubts that his advice to clients in similar circumstances would be sound.

After the referee's decision in this matter, the Supreme Court decided *In re Kelley* (1990) 52 Cal.3d 487. Kelley had been convicted of driving under the influence of alcohol (Veh. Code, § 23152, subd. (b)), with a prior conviction for the same offense, and of violating the terms of her probation imposed as a result of the first conviction (Pen. Code, § 1203.2). (*Id.* at p. 491.) The prior conviction occurred some 31 months before the second conviction. (*Id.* at pp. 492-493.) The State Bar concluded Kelley's conduct did not involve moral turpitude, but did involve other misconduct warranting discipline, and recommended that discipline be imposed. (*Ibid.*) The Supreme Court adopted the State Bar's disciplinary recommendation with the exception of a probation term related to abstinence from the use of intoxicants. (*Id.* at p. 490.) The Court, citing *In re Rohan, supra*, 21 Cal.3d 195, noted that it had disagreed about the application of the "other misconduct warranting discipline" standard but that disagreement focused on whether the application of the "other misconduct warranting discipline" standard required a nexus between the attorney's misconduct and the practice of law. (*In re Kelley, supra*, 52 Cal.3d at p. 495.) The Court concluded that resolution of that issue was unnecessary because a nexus had been established in *Kelley* in two ways. (*Ibid.*)

[8] First, the Supreme Court concluded that Kelley violated a court order when she violated the conditions of her probation which had been imposed as a result of Kelley's previous driving under the influence conviction. (*Ibid.*) The sparse record in the present matter does not contain any indication that respondent violated any previously imposed criminal probation order. The Supreme Court noted in *In re Carr, supra*, 46 Cal.3d 1089, that as a result of respondent's driving under the influence convictions in 1983 and 1984, the criminal court imposed sen-

tences that included three years probation. (*In re Carr, supra*, 46 Cal.3d at p. 1090.) However, we do not know, on the present record, whether that probation remained in effect at the time of respondent's arrest in February 1985, and if so, the terms and conditions of the probation, and therefore we have no way of knowing whether respondent violated his probation by driving under the influence in the present case.

[9] The second way a nexus had been established in *Kelley* was the Court's conclusion that Kelley's two driving under the influence convictions within a 31-month period indicated problems with alcohol abuse. (*In re Kelley, supra*, 52 Cal.3d at p. 495.) "Her repeated criminal conduct, and the circumstances surrounding it, are indications of alcohol abuse that is adversely affecting petitioner's private life. We cannot and should not sit back and wait until petitioner's alcohol abuse problem begins to affect her practice of law." (*Ibid.*) Although the present conviction is respondent's fourth driving under the influence offense within a relatively short period of time, we cannot conclude on this record that the present conviction indicates a substance abuse problem. Respondent's ingestion of Excedrin P.M. for a headache and one prescription Valium because he was upset do not demonstrate, in our view, a substance abuse problem.

[4b] In conclusion, we do not view the record as clearly and convincingly establishing that the facts and circumstances surrounding respondent's conviction involve either moral turpitude or other misconduct warranting discipline. [6b] We do not find that respondent's operation of his car after ingesting medications that he did not know would impair his driving ability and after unexpectedly leaving his girlfriend's residence to demean the integrity of the legal profession or constitute a breach of respondent's responsibility to society. [7c] We also do not find a nexus between respondent's conduct and the practice of law because the conduct does not closely parallel the duties of a practicing attorney and taking Excedrin P.M. and one Valium does not indicate that respondent has a substance abuse problem.

DISPOSITION

After our independent review of the record, we adopt the hearing panel's conclusion that the State Bar failed to prove by clear and convincing evidence that the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline. Accordingly, we hereby dismiss this proceeding.

We concur:

PEARLMAN, P. J.
STOVITZ, J.